THE STRUCTURE AND USE OF LETTERS OF INTENT AS PRENEGOTIATION CONTRACTS FOR PROSPECTIVE REAL ESTATE TRANSACTIONS

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Editors' Synopsis: This Article distinguishes the elements, antecedents, and structured integration of letters of intent. The Article examines the structure of the letter of intent, traces the historical roots of contract law to focus on concepts used to interpret contractual effect, focuses on negotiations, performance, and remedies associated with letters of intent, and finally analyzes common provisions of letters of intent. Overall, the Article aims to improve the usefulness of letters of intent.

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I. INTRODUCTION: THE RULES OF ENGAGEMENT

A letter of intent, like the soft edge of persuasion, can perform an important function in the life cycle of a transactional relationship. But, like persuasion, the letter serves its function best when its limits are properly understood and the reliance on its effect comports with its power.

A letter of intent is useful for setting the binding ground rules of a negotiation. That is probably its primary utility. A secondary use of a letter of intent is to raise issues or allude to special circumstances in a vague, nonbinding fashion to provide some context to the interest of the parties. By being both encouraging and reserved, a letter can seem equivocal and enigmatic. This natural state makes a letter of intent problematic because it lives under several guises in the fringe between the plainly ingenuous and the sophisticatedly disingenuous, the scrupulous and the unscrupulous, the reliable and the unreliable, like the realm that Don Giovanni exploited to his disgrace and perdition.[1] Because of the feeling of vacillation and uncertainty, to some practitioners a letter of intent always reeks from the distinct vapor of the infernal, and will always be a concoction of no good.[2] The fear and reluctance of these practitioners is validated if the parties fail to consummate the prospective transaction and their acrimony, fury and vengeance are unloosed.[3] Nowadays, though the

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[1] "Such is the end of who does wrong.
Of evildoers the death
To their lives is always as deserved."
WOLFGANG A. MOZART, DON GIOVANNI sc.XXII (1787).

[2] New York attorney Stephen R. Volk stated that "a letter of intent is an invention of the devil and should be avoided at all costs." Andrew R. Klein, Comments, *Devil's Advocate: Salvaging the Letter of Intent*, 37 EMORY L.J. 139, 139 (1988) (citations omitted).

[3] Many historians trace the recrudescence of Florentine civil war between Guelphs and

feelings surrounding a letter may be as violent and the attitude as belligerent, the lust for blood has been sublimated from physical and sanguinary duels to more civilized but no less malignant and punishing litigation under the cold eye of the court.[4]

The possible ruinous effects of letters of intent should be to no one's surprise. Even when composed under a more temperate humor, a letter of intent can promote confusion because it is necessarily incomplete as to the anticipated transaction. This incompleteness implicitly fosters ambiguity. Those who condemn letters of intent for their unpredictability fear the exploitation of that ambiguity as the ulterior strategy of the adverse party. They automatically equate ambiguity with duplicity. But ambiguity performs a service,[5] as long as it does not transgress the bounds of good commercial practice. It is not unusual to present nonbinding terms ambiguously with the expectation that the ambiguity will be resolved when the terms become binding. Sometimes binding terms are ambiguous, which adds the risk that a third-party finder of fact will be needed to construe the proper meaning or impose a new one. Ambiguity is misused when it is used to cloak misrepresentations or omissions that are known to be misleading or should reasonably be expected to mislead a party as to a fundamental assumption of the transaction. Standing alone, ambiguity is not wrong and should not be considered immoral or deceitful. Using ambiguity as a seemingly meek solution to avoiding direct confrontation and deadlock, while identifying the terms of the prospective transaction, has always been a practical and time honored approach to otherwise intractable problems of compromise. This approach has been deployed in contract negotiation, in legislative negotiation,[6] and in the negotiation of

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Ghibellines to Mosca de' Lamberti, who "renewed the Ghibelline feud with the Guelphs in 1215 by inciting the Amidei family to murder the Guelph Buondelmonte dei Buondelmonti for breaking his engagement to one of their daughters." DANTE'S INFERNO: TRANSLATIONS BY TWENTY CONTEMPORARY POETS 194 n.96-100 (Daniel Halpern ed. 1993). The breakup triggered a series of horrifying and devastating battles, banishments, and forfeitures that were not brought under control until 1420 with the ascendancy of the Medicis.

[4] It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that the Roman law started from the blood feud, and all the authorities agree that the German law begun [sic] in that way. The feud led to the composition, at first optional, then compulsory, by which the feud was bought off. . . . The killings and houseburnings of an earlier day became the appeals of mayhem and arson. The appeals *de pace et plagis* and of mayhem became, or rather were in substance, the action of trespass which is still familiar to lawyers.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 2-3 (1881).

[5] *See* E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 940 (1966-67). Those who respect the wisdom of Heracleitus would not be daunted but cheered by the recognition that relationships are enlivened by stress, as he says, "Existence . . . depends upon Strife—the tension of opposites and therefore it can truly be said that 'strife is necessary to existence.'" KATHLEEN FREEMAN, THE PRESOCRATIC PHILOSOPHER 114 (1966). *See also infra* Part IV.A.2. for a discussion of good faith.

[6] A statutory concept, however, is supposed to suggest what the

the United States Constitution.[7] As in those more conspicuous instances, it also can be a practical and honorable tool in letter of intent negotiations.

Commonly, when the parties sign a letter of intent, neither party is totally sure what it wants as the ultimate result. Later, when one of the parties wants the other to be bound, the undertaking then founders on the judicial interpretation of the single question: What did the parties intend, really?[8]

The fundamental source of the contention and anxiety over the intent of the letter is that a letter of intent usually attempts to accomplish two

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> legislature had in mind; the items to be included under it should be of the same order. We mean to accomplish what the legislature intended. . . . The difficulty is that what the legislature intended is ambiguous. In a significant sense there is only a general intent which preserves as much ambiguity in the concept used as though it had been created by case law.
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> This is not the result of inadequate draftsmanship, as is so frequently urged. Matters are not decided until they have to be. For a legislature perhaps the pressures are such that a bill has to be passed dealing with a certain subject. But the precise effect of the bill is not something upon which the members have to reach agreement.

EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 21 (1949).

[7] > All the evidence points to the conclusion that in composing the Necessary and Proper Clause, the Committee of Detail crafted a compromise, a masterpiece of enigmatic formulation, so artfully phrased that after the convention each side could argue its version of the clause: either, as Virginia and the South would have it, that Congress could merely approve measures incidental to the execution of the enumerated powers or, as those in the North would say, that Congress could enact laws in the general interest of the country. There were, in fact, no victors in the dispute over the extent of congressional power; the dispute was merely deferred.

JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATE OVER ORIGINAL INTENT 4 (1999).

[8] "In seeking to determine whether such a preliminary commitment should be considered binding, a court's task is, once again, to determine the intentions of the parties at the time of their entry into the understanding, as well as their manifestations to one another by which the understanding was reached." Teachers Ins. and Annuity Ass'n v. Tribune Co., 670 F. Supp. 491, 499 (S.D.N.Y. 1987). The meaning and issues surrounding intent twinkle in and out of focus like the stars that charm the observer with the intimation of new worlds of knowledge to discover, but are so inaccessible that they provide neither warmth nor illumination. The central issue of intent is a deep concern in contemporary contract analysis, and its application and interpretation in different and sometimes inconsistent ways will be revisited in this Article. For example, the Random House Dictionary of the English Language (1966) gives the definition of intent, as it relates to the law, as: "The state of a person's mind which directs his actions toward a specific action." Though this definition is seemingly sensible, appropriate, and sound, we will find in the course of the examination this Article conducts that the definition, while appealingly simple, is simply wrong when applied in the context of the law of contracts and of contractual effect. (*See infra* Parts III.A. and IV.A.1.). Of course the battle over who can best interpret what words mean, the speaker or the listener, is the same battle for supremacy between authorial intent and percipient interpretation that is the crux of all human expression and communication.

purposes and the purposes assume contradictory positions. This is why people complain that letters of intent are ambiguous or even duplicitous. The prime cause of problems with a letter of intent is that the parties fail to accept the practical situation that some provisions must be static, concrete, and contractually binding and that other provisions must be fluid, organic, perhaps vague and nonbinding. In distinguishing the two types of provisions, the touchstone is that only some provisions are agreed upon as enforceable obligations as a condition of negotiations. These are the preconditions to contractual negotiations for a transaction and comprise a prenegotiation contract. This contract is a prepurchase-and-sale negotiation contract and should be valid, binding, legal, and enforceable. The other provisions, the hypothetical terms of the possible business transaction, are potential contract terms which, if agreed upon, would create a purchase-and-sale contract. However, these hypothetical terms of the potential transaction should not be valid, binding, legal, or enforceable until intended to be as reflected by the fact that the circumstances match the conditions of enforceability. The distinction can be signified with more decisiveness: the drafter can prepare one writing, in the form of a binding letter agreement, to establish the conditions to negotiation, and prepare a separate writing, in the form of a nonbinding term sheet, to outline the provisional offers and approaches towards the business terms.

The significance of the clash of purposes can be found in the name of the document itself. Sometimes the writing is entitled "Letter of Intent," but at least half the parties in a dispute swear there was no intent. Sometimes the writing is called a "Nonbinding Agreement" which, if it is not directly an oxymoronic phrase, then its facial ambiguity makes it a cousin of one.[9] The presumption underlying all legal agreements is that they are binding.[10] The text of the letter also sometimes will reinforce the

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[9] The gradation of the level of ambiguity depends upon the drafter's explication of what is meant by "letter of intent" within the text. At one level, "letter of intent" means both itself and its opposite: it is a letter proposing what the parties intend, and that the parties intend nothing. This is a classic contradiction, a contranymic clause (the way a word such as "cleave" or "sanction" has two meanings that are opposites). As such, the phrase falls within the seventh, last, and most extreme circle of ambiguity. *See* WILLIAM EMPSON, SEVEN TYPES OF AMBIGUITY 192-233 (New Directions 1947). "[T]he most [ambiguity] that can be conceived, occurs when the two meanings of a word, the two values of the ambiguity, are the two opposite meanings defined by the context, so that the total effect is to show a fundamental division in the writer's mind." *Id.* at 192.

[10] Authorities have distinguished the legal effect of an agreement compared to a contract. For example, RESTATEMENT (SECOND) OF CONTRACTS § 5 (1981) states:

> § 5. Terms of Promise, Agreement, or Contract
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> (1) A term of a promise or agreement is that portion of the intention or assent manifested which relates to a particular matter.
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> (2) A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations.

Similarly, one authority parses the meaning of "agreement" (the manifestation of mutual assent) and distinguishes it from "contract" (a promise creating a legal duty or legal

contradictions by dilating upon self-negating language, such as the following: "This letter of intent is not a contract, and neither of us intends that the preliminary understandings contained herein represent our final agreement as to the transaction we are discussing."[11] On a superficial level, this language would seem to be true,[12] but on second thought, on a more logical level, it cannot be true because the parties do intend to confer finality on at least the one provision of the agreement that is supposed to establish irrefutably that the other provisions of the agreement are preliminary. The parties are investing contractual effect into the *one* provision of the document that distinguishes that the *other* provisions of the document cannot have contractual effect. For a drafter committed to clarity, accuracy, and meaningfulness, these casual mischaracterizations are misleading, illogical, and problematic.

Many articles have analyzed the drafting dangers inherent in a letter of intent and the cases that have resulted in conflicting outcomes.[13] This

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redress), "bargain" (an agreement to exchange promises), and "promise" (the undertaking to cause something to happen or not happen). *See* 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 1.1-1.4 (4th ed. 1990). Williston stakes out an extreme position by concluding that "because the term agreement does not imply whether legal consequences exist, it is possible and, indeed likely, that some contracts may be formed without agreement." *See* 1 *id.* § 1.3, at 15. This commentary most likely is making a tacit reference to "formal contracts." *See infra* notes 44 and 67. Another authority tries to distance itself from the tiresomely old-fashioned idea that contracts are based on promises: "[t]he two definitions discussed in this paragraph point away from older ones which attempted to define contract in purely promissory terms and, therefore, give us a more realistic view of what contract is." 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.3 at 10 (Joseph M. Perillo ed., rev. ed. 1993). But later, the commentary reluctantly submits to the power of tradition by confessing, "The term 'promise' must continually be used in any statement of the law of contracts." 1 *id.* § 1.3 at 35.

[11] RALPH B. LAKE & UGO DRAETTA, LETTERS OF INTENT AND OTHER PRECONTRACTUAL DOCUMENTS: COMPARATIVE ANALYSIS AND FORMS 291 app. B-3 (2nd ed. 1994). Of course this seems to pay respect to the generally cited definition of contract in the Restatement (Second) of Contracts: "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). Though often cited, this definition has not avoided criticism. "This definition is not particularly useful, and may be positively misleading." 1 CORBIN, *supra* note 10, § 1.3, at 8. Even when others have been more complimentary, their faint praise issues with an almost audible sigh of reservation. "Although this particular definition of contract is useful, it is not entirely satisfactory . . . ." 1 WILLISTON, *supra* note 10, § 1.1 at 4.

[12] Williston has blithely accepted this intrinsically fuzzy approach: "Thus, for example, an instrument which expressly states that it is a gentleman's agreement or otherwise not a binding commitment will generally not be treated as creating contractual duties, although it is nevertheless an agreement." 1 WILLISTON, *supra* note 10, § 1.3, at 14. Corbin gets closer to the truth when he blandly concludes "that a letter of intent is not a useless document, but it is not, in principal, a contract, except perhaps a contract to continue bargaining in good faith." 1 CORBIN, *supra* note 10, § 1.16, at 46. The undertaking of this Article, of course, is to question these conclusions and examine the circumstances in which they may be true or false.

[13] *See generally* LAKE & DRAETTA, *supra* note 11; David Broadwin, *How to Draft Letters of Intent for Business Acquisitions (with Form)*, PRAC. LAW., Mar. 1991, at 13;

Article will add to the pile. This Article is organized into four substantive parts. First, it examines the structure of the letter of intent by attempting to distinguish the classes of letters of intent based on the relationship between contractual elements in the letter, on the one hand, and the prepurchase-and-sale hypothetical business terms, on the other hand. The second part of this Article, in the classic modernist style appropriate to transition, abruptly breaks off the direct examination of the classification of letters of intent and takes a rough pass over the historical roots and branches of American contract law to focus on some of the clear and obscure concepts used to interpret contractual effect. In the third part, the Article resumes the investigation of letter of intent structure with respect to negotiation, performance, and remedies. In the fourth part, the Article discusses and analyzes common provisions appropriate for letters of intent. The Article is written to better distinguish the elements, antecedents, and structured integration of letters of intent, in the hope that it will improve their usefulness. The Article provides an analysis that may be controversial, under the principle that the controversial can be provocative, the provocative stimulating, and the stimulating enjoyable.

II. CHOOSING THE PURPOSE

No matter which purpose the parties settle upon, if the parties can agree upon it, they avoid the squabble that storms up when hindsight is used to reconstruct what foresight failed to recognize. In the absence of a manifested resolution of the purpose, the courts will step in to find the meaning that will bind the parties, whether by interpreting what is or construing what ought to be.[14]

At one end of the landscape, some parties presume the writing to be

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Michael P. Carbone, *Negotiating a Letter of Intent for an Anchor Store Lease*, PRAC. REAL EST. LAW. May 1995, at 85; Christopher J. Devlin, *How Binding are Letters of Intent?*, ME. B.J., Sept. 1995, at 298; E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); Jesse B. Heath, Jr., *Letters of Intent: Are They Binding?*, 24 COLO. LAW. 2367 (1995); Thomas C. Homburger and James R. Schueller, *Letters of Intent - A Trap for the Unwary*, 37 REAL PROP. PROB. & TR. J. 511 (2002); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969); Harris Ominsky, *Counseling the Client on Gentleman's Agreements*, PRAC. LAW., Dec. 1990, at 25; Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70 (1993); Kenneth L. Samuelson et al., *Drafting Letters of Intent for Leases (with Forms)*, PRAC. REAL EST. LAW., Sept. 1997, at 57; William G. Schopf et al., *When a Letter of Intent Goes Wrong*, BUS. L. TODAY, Jan./Feb. 1996, at 31; Harvey L. Tempkin, *When Does the "Fat Lady" Sing?: An Analysis of "Agreements in Principle" in Corporate Acquisitions*, 55 FORDHAM L. REV. 125 (1986); Klein, *supra* note 2; Jayna Jacobsen Partain, Note, *The $10.53 Billion Question—When are the Parties Bound? Pennzoil and the Use of Agreements in Principle in Mergers and Acquisitions*, 40 VAND. L. REV. 1367 (1987).

[14] "Statutes do not cease to be law because the power to fix their meaning in case of doubt or ambiguity has been confided to the courts. One might as well say for like reasons that contracts have no reality as expressions of a contracting will." BENJAMIN CARDOZO, THE NATURE OF JUDICIAL PROCESS 127 (1921).

nothing more than a childlike engagement with neither accountability nor commitment but with the attendant consequences that might otherwise seem selfish, indifferent, or impudent.[15] This initial attitude, the disinclination to submit to preliminary goals, is clearly far removed from the final goal of the parties, which is to reach a formal contract on their rights and obligations for the sale of the property, consummated by settlement. At the other end of the landscape, parties get ahead of themselves, trying to compress the interrogatory "Can we negotiate?" into the imperative "We must close!," in an effort to force the larger mass of a fully drawn transaction into the smaller pouch of a tentative outline. Between those extremes are numerous grades of obligation and liability on which the parties can find a common ground. Correspondingly, misadventures on the road to drafting a letter of intent can create impediments, diversions, and inaccessibility to enforceability. Case law invites the conclusion that the better purpose of the letter of intent, and the better goal for parties who prefer to avoid litigation, is for the letter of intent to establish the ground rules for undertaking a negotiation, regardless of whether the negotiation is a success or failure.

To proceed in a scientific method, the case law can be gathered together methodically and systematically separated into four classes, based on how the court characterizes the purpose of the letter, either as: (1) a mere gesture showing interest in the possibility of a transaction, (2) a serious commitment to negotiate towards agreement upon a possible transaction, (3) an orderly collection of the necessary contractual terms ready to be binding, but missing the key ingredient—the intent to be bound, or (4) a patently enforceable contract, albeit in an abbreviated or informal format. These types of letters and their distinctions are analyzed below.

A. Agreement of Interest

One view of the letter of intent is that it should be a map of the terrain of the prospective transaction, providing directions to the more important overviews. It should help speed negotiations by clearing and elevating negotiating points. The letter is to provide consultants with a brief outline of the salient points of the prospective transaction, so that the principals can be advised early in the discussions about issues that can turn the orientation of the deal. It should crystallize complex issues and resolve those portions that are noncontroversial. The offeror might look upon a letter as more significant than merely the vehicle for airing possible business terms. But

[15] Childhood's distressing freedoms, which can be hot blooded and cold hearted at the same time, regularly provoke the dismay of adults who were, perhaps, traumatized in their own childhoods. "The two chief characteristics of childhood, and the two things that make it so seductive to a certain type of adult mind, are its freedom from reason and its freedom from responsibility. It is these that give it its peculiar heartless, savage strength." PHILIP LARKIN, REQUIRED WRITING: MISCELLANEOUS PIECES 1955-1982, at 111 (1982).

the urge to have the letter assume greater significance will be restrained by the need for some more uniformly accepted formality to act as a signal that a contract has been effected. The owner expects the parties to consider those contract terms as technically unenforceable, aspirational, and precatory—intended simply as a trial balloon.[16] But sometimes a court will disregard the apparently obvious volition of the parties. This occurs when the court's quest is to find binding intent, even if the writing is inconsistent or inconclusive.[17]

This type of letter of interest is not even a prenegotiation agreement and is used simply to set a starting point for exploratory discussions of possible terms. The discussions may never solidify, but the letter establishes an air of seriousness in the undertaking and results in identifying the extent of any union of vision between an owner and an offeror. It is used ceremonially to demonstrate credibility to third parties, such as lenders or consultants, and in some instances to set the timetable and conditions for pursuing a more formal letter of intent, or for obtaining from senior management further approvals to proceed. However, this type of letter of intent is supposed to have no binding element[18] except the binding self-referential provision that all other provisions are not binding.

B. Contract to Negotiate

A related but more imposing type of letter of intent is an "agreement to negotiate," in which the parties intend to establish the standard of effort to be used in negotiations. The parties could agree to a standard of good faith,[19] best efforts,[20] reasonable efforts,[21] or no standard at all—expressly

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[16] *See* Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989) (approving the appellant's position that a letter of intent's effect depends on the parties' intent, which is a factual issue; but disagreeing with appellant by holding that intent is objective, not subjective, and discernible from the contract language if it is not ambiguous. The letter stated that it was subject to completion of a definitive agreement and to board approval); Anderson Chem. Co. v. Portals Water Treatment, Inc., 768 F. Supp. 1568, 1578 (M.D. Ga. 1991) (concluding that a writing was not intended as a contract to sell because (1) it required a further negotiation and execution of a definitive contract, and (2) subsequent approval by buyer's and seller's boards of an identified contract which had not been completed). *See also infra* Part II.C. (discussing the history of contractual intent); *infra* Part II.D. (discussing the effect of intent in letters of intent).

[17] *See* Arnold Palmer Golf Co. v. Fuqua Indus., Inc., 541 F.2d 584, 586-88 (6th Cir. 1976) (holding that a memorandum could be binding when it reflected a general agreement between the parties, included extensive and sophisticated provisions, and contained the essential elements required for a contract, notwithstanding that (i) it was titled "Memorandum of Intent," (ii) it was missing some contractual elements, and (iii) it included a provision stating: "The obligations of Palmer and Fuqua shall be subject to fulfillment of the following conditions: (i) preparation of a definitive agreement for the proposed combination in form and content satisfactory to both parties and their respective counsel; (ii) approval of such definitive agreement by the Board of Directors of Fuqua; . . . .").

[18] A letter with similar nonbinding breadth is also achieved when it is an Agreement Subject to Written Contract (*see infra* Part I.C) or when a sufficiently significant term is omitted or its ambiguity is sloughed over. *See infra* Part III.B.

[19] *See* Candid Prods., Inc. v. Int'l Skating Union, 530 F. Supp. 1330, 1337 (S.D.N.Y.

reserving the right to break off negotiations summarily and to pursue parallel negotiations with undisclosed competitors. The purpose of this type of letter of intent is to identify conspicuously important points for all parties to consider and to establish the conditions to the negotiation and nonbinding provisional terms that should be the subject of the negotiation. From a practical point of view, the most common desire of the offeror in this type of letter is to win exclusive negotiation rights and the most common desire of the owner is to avoid being bound to a contractual obligation to sell while having the offeror spend, and perhaps forfeit, material amounts of time and money. For this benefit the owner would submit to a contractual obligation to negotiate according to some articulated standard.

Parties customarily enter into this kind of letter as a contract to negotiate on an exclusive basis to attempt to reach agreement during a prescribed period of time, but not as the contract of the prospective business transaction. In this vein, the modern watershed case is *Teachers Insurance & Annuity Ass'n of America v. Tribune Co.*, brought by a lender to enforce a commitment letter.[22] The court's opinion ratified several important principles, which many subsequent courts have fastened upon as authoritative precedent. The *Tribune* court distinguished between two types of "preliminary contracts,"[23] meaning any agreement short of a formal, final executed contract document. In the court's analysis, one type is the preliminary binding agreement that is complete but calls for a more

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1980) ("An agreement to negotiate in good faith is amorphous and nebulous, since it implicates so many factors that are themselves indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise."); GMH Assocs. v. Prudential Realty Group, 752 A.2d 889, 901 (Pa. 2000) (holding that the duty to negotiate in good faith was not breached by defendant's failure to keep property off the market). *See also infra* Part IV.A.2 and notes 126-44.

[20] *See* Pinnacle Books, Inc. v. Harlequin Enters. Ltd., 519 F. Supp. 118, 121 (S.D.N.Y. 1981) (holding that an agreement to negotiate "using best efforts" is unenforceable for indefiniteness unless the agreement elaborates a clear set of guidelines by which the parties' efforts can be measured. The court renounced a prior decision which held that an agreement to negotiate with best efforts was actionable, unlike an agreement to agree.); *but see* Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 613 (2d Cir. 1979).

> Other cases suggest that under New York law a "best efforts" clause imposes an obligation to act with good faith in light of one's own capabilities. . . .
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> A summary definition of the best efforts obligation . . . is . . . to wit, performing as well as "the average prudent comparable" brewer.
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> The net of all this is that the New York law is far from clear and it is unfortunate that a federal court must apply it.

(citations omitted).

[21] *See* Itek Corp. v. Chicago Arial Indus., Inc., 248 A.2d 625, 629 (Del. 1968) ("[I]t is apparent that the parties obligated themselves to 'make every reasonable effort' to agree upon a formal contract, and only if such effort failed were they absolved from 'further obligation' for having 'failed' to agree upon and execute a formal contract.").

[22] 670 F. Supp. 491.

[23] *See id.* at 498 ("Preliminary contracts with binding force can be of at least two distinct types.").

detailed writing primarily as a formality; the other type is an agreement that has some common ground but in which final agreement cannot be achieved without further negotiation.[24] The court called the latter agreement a "binding preliminary commitment" and asserted that it can obligate the parties to negotiate in good faith.[25]

The *Tribune* court further identified six factors (though they actually resolve into four) necessary to decide whether a preliminary commitment is binding. Starting from prior Second Circuit opinions analyzing contractual effect,[26] it adapted the test used to determine if a final, rather than a preliminary, contract is binding, but cautioned that the factors must be applied differently because of the difference between the nature of a final contract and that of a preliminary commitment.[27] The court illustrated this difference by showing that the factors applied to a final contract could establish it was not binding, but when the same factors are applied to a preliminary commitment, they could show it was binding.[28] The court applied the six factors as follows:

1. Expression of intent—does it say it is binding? According to the court, a contract may not be binding if one party reserves the right to terminate if it does not obtain its Board approval.[29] However, a letter of intent may be binding as to issues resolved by its stated terms, even though Board approval is a condition because Board approval would apply to terms and provisions outside of the letter's stated terms.[30]

2. Context of negotiations—did the parties treat it as binding, even though important terms were missing? A letter of intent, which states it is a "firm commitment" and is treated as binding, indicates the parties intend it to be binding. If by adding conditions subsequent the parties intended to make the letter nonbinding, according to the *Tribune* court, the parties should say that expressly, because even though the conditions may

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[24] *See id.* These distinctions appear in current commentaries and authorities. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 26, 27 (1981).

[25] *Tribune*, 670 F. Supp. at 498. This distinction by *Tribune* has now seeped into the nomenclature of the New York and Second Circuit Courts as Tribune Type I and Tribune Type II agreements. *See, e.g.*, Adjustrite Sys. v. GAB Bus. Servs. 145 F.3d 543, 548 (2d Cir. 1998); Shann v. Dunk, 84 F.3d 73, 82 (2d Cir. 1996); Cleveland Wrecking Co. v. Hercules Constr. Corp., 23 F. Supp. 2d 287, 295 (E.D.N.Y. 1998).

[26] *See* Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir. 1985); R.G. Group, Inc. v. Horn & Hardhart Co., 751 F.2d 69, 75-76 (2d Cir. 1984) (listing the four factors for determining if a contract is binding as: (1) intent, (2) context, (3) part performance, and (4) custom and practice). Nonetheless, the letter of intent analysis, naturally enough, focuses on writings. If the letter is nonbinding, whether based on objective intent of the language or a failure of the language to meet the requirements for contractual effect, plaintiffs still will assert an oral contract can exist.

[27] This distinction is one that this Article suggests is without a difference because both letters have contractual effect, with the only distinction being the subject matter of the undertaking.

[28] *See Tribune*, 670 F. Supp. at 499-500.

[29] *See id.*

[30] *See id.* at 500.

prevent a final formal contract from being binding, the letter would be treated as binding the parties to negotiate open terms in good faith.[31]

3. Open terms—did the parties leave too many terms open? A letter of intent may have numerous open terms and still be binding, as long as it covers the important economic terms of the transaction.[32] However, according to the court, a final contract may need all material open terms to be resolved to be binding.[33] The open terms factor is similar to the context of negotiations factor and the conditions subsequent factor.

4. Partial performance—did either party change its financial position or prospects? A final contract may need more than part performance; but a letter of intent, according to the court, has a lower threshold for becoming binding, regardless of whether either party intends that the other party be bound.[34]

5. Customary form—do people in the business expect to be liable in these circumstances? A letter of intent can take a number of forms and can resemble bilateral binding contracts, unilateral binding options, or nonbinding documents. The conclusion will turn on what is prevalent and expected in the marketplace.[35]

6. Conditions subsequent—do the conditions apply to the agreement to negotiate, or the prospective final agreement? A failure of a condition subsequent can extinguish a contract, but it does not automatically make a letter of intent nonbinding.[36] This is similar to the context of negotiations factor and the open terms factor.

The court coaxed out an opinion shaped by the facts that, on the one hand, the borrower needed a firm commitment and knowingly took the risk that the language stated the letter was a "binding agreement," but on the other hand, the borrower tried to create at least ambiguity, and at best a "free option," by adding formal conditions subsequent as conditions of being bound.[37] The court imposed a good faith requirement for the parties

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[31] *See id.* at 500-01.

[32] "The fact that countless pages of relatively conventional minor clauses remained to be negotiated does not render the agreement unenforceable." *Id.* at 501.

[33] *See id.* at 501-02.

[34] *See id.* at 502.

[35] *See id.* at 503.

[36] *See id.* at 505. See *infra* note 205 for a proposed legend to address specifically these six factors. The language of the legend is derived from *GMH Assocs.*, 752 A.2d at 901, 904-06 (overturning a trial court judgment deciding that notwithstanding the fact that the seller stated it had taken the property off the market but was actually conducting parallel negotiations with both the plaintiff and its competitor there was (1) no oral contract because the letter of intent was both subject to resolution of a final business term and was elicited subject to Board approval of the seller, (2) no fraud because the plaintiff did not rely on the misrepresentation to its detriment, (3) no duty to negotiate in good faith because the duty was not expressly provided in the letter, and the parallel negotiations were not expressly forbidden, and (4) no primary estoppel applicable to the seller because the seller's promise to keep the property off the market was conditioned on the buyer's performing according to schedule, which it failed to do).

[37] *See Tribune*, 670 F. Supp. at 503.

to resolve open issues.[38] The court ultimately held that even though the operative documents were only in the first draft form without negotiation, the borrower could not avoid being bound merely by insisting on a provision that was not in the scope of the initial agreement.[39]

The *Tribune* court implicitly distinguished the four alternative classes of preliminary contract formation, which are the explicit subject matter of Part I of this Article: (1) no obligation to negotiate, no obligation to contract, (2) an obligation to negotiate, no obligation to contract, (3) no obligation to negotiate because negotiation is completed, but no obligation to contract, and (4) no obligation to negotiate because negotiation is completed, but an obligation to contract.

The *Tribune* court arrived on this path led by *Mississippi & Dominion Steamship Co. v. Swift*, frequently cited as the bellwether case.[40] The *Mississippi & Dominion Steamship* court identified the following four factors to determine if the parties intend to be bound in contract by an "agreement to agree":

1. absence of reservation not to be bound in absence of writing,
2. acceptance by the party disclaiming the contract of the other party's partial performance,
3. absence of terms left to negotiate or settle, and
4. custom and practice of reducing these kinds of agreement to writing.[41]

Some commentators believe that in these instances intent is relevant because the other fundamental elements may remain incomplete, but

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[38] *See id.* at 498.

[39] *See id.* at 503.

[40] 29 A. 1063 (Me. 1894). This case reviewed a broad range of opinions, primarily from England, analyzing whether a contract had been formed when the two parties had agreed to proceed with the transaction, without waiting for the completion of the formal contract, which never occurred. *See id.* at 1065. The court stated,

> If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.
>
> In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing, whether it is of such nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.
>
> Still, with the aid of all rules and suggestions, the solution of the question is often difficult, doubtful, and sometimes unsatisfactory.

Id. at 1067.

[41] *See id.* at 1067.

determinable.[42] Courts generally have split into two camps when determining whether to enforce agreements to agree or agreements to negotiate. Some courts claim they fail for indefiniteness,[43] and other courts are willing to let a breach of contract action stand when one of the parties did not make every reasonable effort to agree on a contract.[44] But as a general matter, even when there may be a preliminary agreement to negotiate in good faith and to restrict the parties to negotiate exclusively, or other preliminary binding promises, the parties are not required to give up the right to require a final definitive contract.[45]

The problem engendered by the *Tribune* court is that this nuanced approach was just that, a new muddled middle-ground test for preliminary commitments, as if the legal principles for contract creation were inadequate to the task. This approach has spawned and sustained a new

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[42] *See* Knapp, *supra* note 13, at 677 (citing RESTATEMENT (SECOND) OF CONTRACTS § 32 (1932)). *But see* Protocomm Corp. v. Fluent, Inc., No. 93-0518 1995 WL 3671, at *16 (E.D. Pa. Jan. 4, 1995) (concluding, "In Pennsylvania, an agreement is enforceable where the parties intend to conclude a binding agreement and 'the *essential terms* of the agreement are certain enough to provide a basis for an appropriate remedy.'") (citation omitted). The *Protocomm* court also found that agreements lacking material terms other than time and price may still be binding. *See id.* at *15 (citing, among other authority, RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) and U.C.C. § 2-305 cmt. 1. *See also* SKD Invs., Inc. v. Ott, 1996 WL 69402 at *9 (E.D. Pa. Feb. 15, 1996) (narrowing the acceptable criterion for missing elements to be only those that are nonessential terms).

[43] *See* Cain v. United States Testing Co., No. C-94-02159MHP, 1994 WL 564670, at *3 (N.D. Cal. Sept. 29, 1994) (rejecting the enforceability of agreements to negotiate and agreements to agree, stating "under California law an agreement for future negotiations is not the functional equivalent of a valid agreement. Furthermore, the court finds any distinction between an agreement to agree and an agreement to negotiate a future agreement to be disingenuous. . . ."). *See also Pinnacle*, 519 F. Supp. at 121 (holding a "best efforts" to negotiate clause unenforceable for lack of clear and definite terms). Another court has misleadingly embraced the possibility that "an agreement to agree, . . . may, in certain circumstances, have binding effect." *Cleveland Wrecking Co.*, 23 F. Supp. 2d at 295. In this case, no agreement on price occurred because the written price was based on an assumed circumstance that changed, so the court concluded no definitive agreement or binding contract arose. *See id.* at 298.

[44] *See* Channel Home Ctrs., Div. of Grace Retail Corp. v. Grossman, 795 F.2d 291 (3d Cir. 1986) (reversing the lower court dismissal of claims for breach of contract because the breach was of the agreement to negotiate in good faith, not the agreement to lease); Chrysler Capital Corp. v. Southeast Hotel Prop., 697 F. Supp. 794, 797-801 (S.D.N.Y. 1988) (holding that a preliminary agreement had been achieved despite the lack of a signature by the borrower, even when it was characterized as "not a commitment but rather a proposal which outlines the terms and conditions which will form the basis for a commitment" and requiring the proposed borrower to "execute the enclosed copy of this letter acknowledging their acceptance. . . ." The court reasoned the parties acted as if, and by other writings believed that, it had been signed. However, the court went further to confirm that it was merely a preliminary agreement to enter into a commitment and not itself an accepted commitment, let alone a final contract. For additional discussion on whether to allow a breach of contract action to stand when parties only executed letters of intent, see *SKD Invs., Inc.*, 1996 WL 69402, at *11, *Protocomm*, 1995 WL 3671, at *16, and *Itek Corp.*, 248 A.2d at 629.

[45] *See Shann*, 84 F.3d at 82 (finding that if the parties agreed to negotiate in good faith then failed to reach agreement despite good faith negotiations, no breach occurred).

cottage industry of analysts trying to make sense out of "precontractual contracts;" the clause itself being a paradigm of ambiguity, because the agreements in *Tribune* were not precontractual, they were absolutely contractual as prepurchase-and-sale contracts. The court would have been better served to follow more strictly the *Mississippi & Dominion Steamship* court, and to distinguish the provisions that were contractual, albeit subject to conditions subsequent, from those that were not.[46] Instead, the *Tribune* court lumped them together and devised a new type of standard for so-called precontractual or preliminary binding commitments.

C. Agreement Subject to Written Contract

Another common and even more deceptively finished variant of the letter of intent is one in which all terms are concluded, but the intent is that no contract arise. In this preliminary negotiation, the agreement will not be binding until its significance is consummated in a purchase-and-sale written definitive contract. This position is most plainly championed by the Restatement (Second) of Contracts,[47] though couched as if a rebuttable presumption. In these instances, all the elements necessary for a contract are in place, save only intent to be bound, and intent is the only test for enforceability.[48] The risk recumbent in this distinction is exposed by those

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[46] *See Mississippi & Dominion Steamship Co.*, 29 A. at 1067-68.

[47] § 26. Preliminary Negotiations
A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.
§ 27. Existence of Contract Where Written Memorial is Contemplated
Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

[48] *See* Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 72 (2d Cir. 1989) (holding in an action for summary judgment that there was no contract when the language anticipated that negotiations could fail and that a final formal agreement was required, but also finding that the seller knew the buyer was making costly expenditures, and by breaking off negotiations, the seller may have breached its duty of good faith negotiation); *Winston*, 777 F.2d at 80 (reversing the district court's holding that the parties intended that a satisfactory binding agreement would be reached prior to the execution of a final written document due to the consideration of factors such as express reservation and partial performance); Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 262 (2d Cir. 1984) (holding that the parties' intent not to be bound except by a written, signed agreement was established conclusively by a reservation in the letters that the contract would be valid and binding "when executed and delivered," and that the courts will uphold the parties' intent); *R.G. Group, Inc.*, 751 F.2d at 751 (upholding the lower court's summary judgment for dismissal, the court reiterated its support of the doctrine that "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent."); P.A. Bergner & Co. v. Martinez, 823 F. Supp. 151, 156 (S.D.N.Y. 1993) (reversing a lower court's holding that the parties intended to be bound prior to executing a final written agreement, when a number of letters were exchanged, none of which expressly reserved the right to be bound, but in which the lower court found that

courts which adopt the doctrine that once all terms are agreed upon, a contract emerges, even though the parties may say it does not.[49] Another risk is that even if the agreement is not a transaction contract, it still may be construed as at least a contract to negotiate.[50] A further condition pushing the edge of the envelope of contractual effect but for the omitted element of intent is the limiting condition of "approval by the board of directors." This condition may be so clearly within one party's control that it makes illusory any premise that such party gave good consideration.[51]

D. Contract for Settlement

Lastly, the letter of intent can be the fully binding transaction contract with all essential elements reflected,[52] notwithstanding that nonessential terms may be added later to complete a final definitive contract. But outside of loan commitment letters, usually one of the parties is very surprised by this result. In the case of an intended definitive contract, the modern concept of formality is a synonym for a final written contract.[53]

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intent existed from other circumstances). *See also Empro Mfg. Co.*, 870 F.2d at 425-26 and *Anderson Chemical*, 768 F. Supp. at 1577-80 (using analysis that is a reflection of the dichotomy, adduced by *Mississippi & Dominion Steamship Co.*, that the terms are not binding if a written contract is a requirement, but are binding if a written contract is merely a convenience). *See* 29 A. at 1066-67. *Tribune* applied this dichotomy to preliminary commitments. *See* 670 F. Supp. at 498-99. This Article proposes that preliminary commitments should have the singular purpose of establishing rules for future negotiation of a possible final contract.

[49] *See* V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1968) ("[F]irst, if the parties intend not to be bound until they have executed a formal document embodying their agreement, they will not be bound until then; and second, the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event."); Field v. Golden Triangle Broad., Inc., 305 A.2d 689, 691-93 (Pa. 1973). *But cf.*, *Tribune*, 670 F. Supp. at 491 ("One [kind of binding preliminary contract] occurs when the parties have reached complete agreement (including the agreement to be bound) on all issues perceived to require negotiation. Such an agreement is preliminary only in form—only in the sense that the parties desire a more elaborate formalization of the agreement. The second stage is not necessary; it is merely considered desirable."). *See also* I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882 (Colo. 1986) (following the reasoning of *Tribune*).

[50] *See Tribune*, 670 F. Supp. at 499 (stating "a term stating the agreement would be effective 'when executed' could conclusively establish that no binding force was intended prior to execution. That reasoning is of diminished force, however, where the inquiry is not whether the parties had concluded their deal, but only whether they had entered into a binding preliminary commitment which required further steps [of good faith negotiation of open issues in an attempt to reach the ultimate objective within the agreed framework].").

[51] *See infra* Part IV.A.7.

[52] *See SKD Invs., Inc.*, 1996 WL 69402; *Protocomm Corp.*, 1995 WL 3671; APCO Amusement v. Wilkins Family Rests., 673 S.W.2d 523 (Tenn. Ct. App. 1984).

[53] The term "formal contract" in this Article is being used in its common sense non-technical meaning. Technically, formal contracts are those contracts that are binding as a result of their form, rather than as a result of consideration or intent. Examples of formal contracts are those that are under seal, negotiable instruments, documents of title, and letters of credit. *See* 1 WILLISTON, *supra* note 10, § 2.1 at 57-58. Commentaries on contracts generally dismiss as archaic, or expressly disregard, the distinction between formal

III. A SMATTERING OF CONTRACT LAW HISTORY

To investigate the legal foundation of contractual effect in a letter of intent under the laws of the United States, probing through the strata of history for the emergence of contract law in England may help in the investigation, notwithstanding the lack of significant materials to resolve its origination dispositively. The study of Roman law, canon law, and Saxon law is in some ways more of an archeological than jurisprudential exercise. Nonetheless, the knowledge of the past that the following stratigraphy may produce should provide a better understanding of the causes behind the current assumptions of contract law by comparing early and contemporary analyses of similar contract issues.

A. Roman Giants: The Rise of the Roman Empire (55 B.C.) to the Fall of the Roman Empire (450 A.D.)

In Rome's expansionist period, when Julius Caesar first conquered Gaul and thrust into Britain in 55 B.C. to push back the Picts, the Scots, and the other Celtic Britons, England was one of the most remote of the Roman outposts. Caesar's success in conquering Gaul stopped the Germanic migration across Gaul's western border.[54] For the ensuing 500 years, Roman power created peace within the region of Britain that it controlled. It was a period of Roman achievements that were later looked back upon with reverence and adulation, poetically aggrandized as an era of giants.[55]

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contracts and so-called simple contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS § 6, cmt. a at 18 (1981) ("'Formal contracts.' The contracts referred to in this Section are sometimes referred to as 'formal contracts,' and other contracts may then be called 'informal' or 'simple' contracts. This usage is avoided in this Restatement because contracts other than those enumerated are also subject to formal requirements. Thus statutes modeled on the English Statute of Frauds make certain classes of contracts unenforceable unless evidenced by a writing."). *See infra* Part II for some of the historical context of formal contracts.

[54] Soon after 100 B.C. southern Germany had been occupied, and [Germanic tribes] were attempting to flood Gaul. This inundation was stemmed by Julius Caesar. Now all these peoples who expanded over western Germany from the original seats between Oder and Elbe we will class as the West Germans [the Franks, Saxons and Frisians].

The other movement was a migration from Scandinavia to the opposite coasts of the Baltic, between the Oder and the Vistula . . . . These comers from Scandinavia formed [as] a group which in dialect and customs may be distinguished from the West Germans . . . and we designate them as East Germans [the Goths, Vandals, Burgundians and Lombards] . . . .

There is also a third division, the *North Germans* of Scandinavia . . . [the Danes, Swedes, and Norwegians—generally Vikings].

J.B. BURY, THE INVASION OF EUROPE BY THE BARBARIANS: A SERIES OF LECTURES 5-6 (1928).

[55] "a poison welled; then the nobleman went,
still wise in thought, so that he sat
on a seat by the wall. On that work of giants he gazed,

Then, trembling from the shocks that created turmoil in the political structure of the continent, the Roman Empire's rule over Britain fell in the fifth century around 410-450 A.D., and the Anglo-Saxon[56] control began. The Empire abandoned its protection of Britain.[57] Currency and capital disappeared.[58] Because Saxons had already been stationed in Roman garrisons in Britain as mercenaries, with the withdrawal of Roman control, the mercenaries began to battle to assert their dominance over Britons.[59]

The disintegration of *pax Romana* was accompanied by two parallel efforts to preserve some of its legal traditions. Even as the Roman Empire broke apart under the waves of Germanic invasions and immigrations, the late Empire jurists were gathering and filtering Roman civil law by preparing codifications of rules and decisions. The last great effort was the *Corpus Iuris Civilis* prepared in the sixth century under the auspices of the Eastern Emperor Justinian.[60] Separately, the Christian Church also acted as an important preservationist of Roman legal doctrines and adopted them as part of canon law in the Ecclesiastical courts. The spread of Christianity during the later centuries of the Romano-British period[61] helped spread the

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saw how stone arches and sturdy pillars
held up the inside of that ancient earth-hall."
BEOWULF 136, ll. 2715-19 (R.M. Liuzza trans., 2000).

"Snapped rooftrees, towers fallen,
the work of the Giants, the stonesmiths,
mouldereth.
Rime scoureth gatetowers
rime on mortar."
The Ruin, *in* THE EARLIEST ENGLISH POEMS 2, ll. 3-5 (Michael Alexander trans., 3d ed. 1991).

[56] "One group of them [Saxons], calling themselves *Engle*, gave their name to the country which they invaded." PETER HUNTER BLAIR, ROMAN BRITAIN AND EARLY ENGLAND: 55 B.C. - A.D. 871, 150 (1963). *But see* THE EARLIEST ENGLISH POEMS, *supra* note 55, at 140 ("ANGEL The continental home of the Angles, to be located in Denmark and the Danish islands." (citations omitted)); THE EARLIEST ENGLISH POEMS, *supra* note 55, at 144 ("SAXONS The inhabitants of the German North Sea coast who invaded southern England." (citations omitted)).

[57] "In 410 . . . Honorius, the western Emperor, wrote to the *civitates* of Britain enjoining and authorising them to look to their own defences." BLAIR, *supra* note 56, at 155.

[58] "[I]t is believed that by about 430 the circulation of coins had entirely ceased in Britain." *Id.* at 256.

[59] "There is good evidence that Frisians were prominent among the settlers in Britain in the fifth and sixth centuries, but Frisians had already been numbered among the garrison of Roman Britain in the fourth century. There was a cohort of them stationed at Rudchester . . . . [Vortigern] aimed to employ the same means to the same end, namely the defence of Britain. . . ." *Id.* at 161-62.

[60] "This [attempt at codification] produced what was intended to be a complete statement of Roman law: the *Corpus Iuris Civilis*." THE LAWS OF THE SALIAN FRANKS 19 (Katherine Fischer Drew trans., University of Pennsylvania Press 1991).

[61] "Tertullian . . . and Origen . . . both allude to the preaching of Christianity in Britain in terms which . . . testify to the widespread dissemination of Christianity in Britain well before the middle of the third century." BLAIR, *supra* note 56, at 146. "In fact, St. Patrick was not only the son, but also the grandson of a Christian." *Id.* at 148.

respect for Roman law. Christianity became even more established by the time of the Anglo-Saxon invasions in the fifth and sixth centuries.[62] Compared to the rest of Europe, however, the influence of Roman civil law was at its weakest in England.[63]

B. Invasions and Ignorance: From Anglo-Saxon Conquest (450 A.D.) to Norman Conquest (1150 A.D.)

The break in Britain from the Roman past was sharp because very little of the Roman presence in Britain influenced subsequent development, even though Roman legal principles carried by the Church and the Germanic tribes became a substantial influence on English law. On the continent, at the turn of the sixth century, Alaric, King of the Visigoths, had already successfully subjected part of the Roman Empire to his rule and had set his servants laboring to collect the Roman laws in the West,[64] as Justinian's jurists created the *Corpus Iuris Civilis* in the East. But Clovis conquered Alaric and the Visigoths in 507 and attempted to reunify the continent of Europe as a Frankish-Roman Empire under the Merovingian dynasty. Clovis was unsuccessful in re-igniting the learning, power, and durability of the Roman Empire. The subsequent efforts of the Holy Roman Emperor Charlemagne and the Carolingian dynasts in the ninth century were also unsuccessful. During the same time span, the Germanic tribes continued to invade Britain and settle outside of the failing Romano-British towns.[65] The first waves of invasions in the fifth and sixth centuries were by Anglo-Saxons, Jutes, and Frisians. Two hundred years later in the eighth and ninth centuries, those Anglo-Saxons having settled and domesticated to some degree in Britain found themselves the victims of the ruthless Viking

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[62] "[t]he Anglo-Saxon settlers are seen as heathen intruders upon a civilisation which certainly by the end of the sixth century, and perhaps considerably earlier, had become predominantly Christian." *Id.* at 224.

[63]
> When the various Germanic peoples known as the Anglo-Saxons settled in Britain between the middle of the fifth and the middle of the sixth centuries, they encountered an area that had been part of the Roman Empire since the mid-first century, but which had been to a degree cut off from its Roman contacts for some time (the last Roman legions had been withdrawn at the beginning of the fifth century) and had always been out on the fringes of Roman Territory. . . .
>
> . . . So the Anglo-Saxon kings issued no laws for their Roman population, and in issuing laws for their Germanic population, the Anglo-Saxon rulers alone of the early Germanic kings employed their native Germanic tongue rather than Latin. As a result, Roman survivals were weaker here than in any of the other Germanic kingdoms.

THE LAWS OF THE SALIAN FRANKS, *supra* note 60, at 25.

[64] "Three principal statements of barbarized Roman Law arose at the close of the fifth and at the beginning of the sixth century: the Edicts of the Ostrogothic kings, the Lex Romana Burgundionum, and the Roman Law of the Visigoths (Breviarium Alaricianum) compiled in 506 by order of King Alaric II." PAUL VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE 7 (1909).

[65] *See* DOROTHY WHITELOCK, THE BEGINNINGS OF ENGLISH SOCIETY 13-17 (1952).

pirates from Denmark and Norway who first plundered, then conquered, and later settled the land. The Danish incursions culminated in King Cnut of Denmark and Norway becoming King of England in the tenth century. Two generations later, another scion of Viking piracy, William the Conqueror from Normandy, solidified the domination of the Northern Germanic tribes over Britain. He routed the incumbent King in 1066 at Hastings and claimed due succession to the kingship as the bastard son of the brother of King Cnut's wife.

For purposes of contract law history, this period between 450 and 1150 A.D. was a time of little learning[66] and violent justice. The distance between the contemporary concepts of justice and the concepts of justice in Medieval times is illuminated by the fact that prior to 1150, English justice relied on wager of battle,[67] wager of ordeal,[68] or wager of law[69] to establish the proof of a cause. There were few written laws and few written contracts.[70] Legal relationships were routine and inflexible, and coupled with the fact that there was little literacy, there was very little need for or ability to draft contracts. Simultaneous transfers were the rule. Barter and land-holding supplanted cash and credit as the economic basis of society.

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[66] Though a string of teachers in Oxford and Cambridge sustained some learning, including Anselm, Bede, Aldhelm, and John of Saintsbury, as a general matter the aristocrats, the prelates, and the populace were illiterate and unlearned. "But there is no reason to think that [King] Alfred [869 A.D.] was exaggerating much when he said of his own youth: 'So completely had learning decayed in England that there were very few men on this side of the Humber who could apprehend their [Latin] services in English or even translate a letter from Latin into English, and I think that there were not many beyond the Humber. There were so few of them that I cannot even recollect a single one south of the Thames when I succeeded to the kingdom.'" CHRISTOPHER NUGENT LAWRENCE BROOKE, FROM ALFRED TO HENRY III 40 (1969).

[67] Trial by battle or combat was fought between champions who at its origin, may have been opposing witnesses. Over time, champions became professional service providers, hired by litigants. "Some very great landowners, such as the larger monasteries, were so constantly involved in litigation that they maintained their own full-time champions." THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 117 (5th ed., Little, Brown and Co. 1956) (1929).

[68] In a criminal trial, the accused would be required to "make their law before the justices," by holding hot irons or having their hands plunged into boiling water, then "the hand was sealed and kept under seal for three nights and afterwards the bandages removed. If it is clean, God be praised; but if unhealthy matter is found. . . he shall be deemed guilty and unclean." *Id.* at 114. Alternatively, the accused would "go to the water," be tied, and "let down gently into the water so as not to make a splash. If he sinks down to the knot he shall be drawn up saved; otherwise let him be adjudged a guilty man by the spectators." *Id.*

[69] The wager of law was essentially proof by character witness. Usually twelve or more credible peers, called compurgators, were called upon by the litigant to swear by oath to the credibility of the party. *See id.* at 115.

[70] "There was no comprehensive code; equally, there were no professional lawyers. . . The Anglo-Saxon court [of the shire and the "hundred"] had no jury, in anything like the modern sense." BROOKE, *supra* note 66, at 68.

Feuds[71] and tribute[72] were a source of revenue, and crimes and brutality were commonplace.

If we start with the premise that a contract means an obligation voluntarily entered into and enforceable by courts, the first English contracts, from which the current common law of contracts stemmed, contained none of the elements we now consider essential (and which are examined in this Article further below), including consideration, terms, and intent. In trying to pull a thread of logic through the inferences, deductions, and assumptions forced on modern historians by the ancient silence surrounding contract law, the following conclusions can be adduced. The relationship that was the progenitor of contractual obligation was the duty of a criminal to his victim. That duty arose from the criminal act for which a penalty must be paid.[73] If the duty was not met, though there was no obligation to perform the duty, the failure to perform put the malefactor outside the law,[74] which meant both he and his property were at risk and unprotected. This established an indirect liability. This duty was enhanced subsequently by imposing direct liability on the wrongdoer. The wrongdoer and his property were liable for nonpayment, or a substitute property, person, hostage, or pledge was liable for the nonpayment: it was "bound," "entangled," and "liable" for the performance of the payment.[75] Once the duty was performed, "the object bound by the 'Haftung' [liability], as by a fetter, [is] freed."[76] Though its origin was in criminal law, the relationship of duty and liability developed into the relationship on which contracts in private law relied.[77] A thing was made liable by pledging it to the obligee,

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[71] ". . . either illness or age or the edge of vengeance
shall draw out the breath from the doom-shadowed."
The Seafarer, *in* THE EARLIEST ENGLISH POEMS, *supra* note 55, at 54, ll. 71-72.

[72] Then stood on strand and called out sternly
a Viking spokesman. He made speech -
threat in his throat, threw across the seamen's
errand to the Earl where he stood on our shore.
The swift-striking seafarers send me to thee,
bid me say that thou send for thy safety
rings, bracelets. Better for you that
you stay straightaway our onslaught with tribute
than that we should share bitter strife.
We need not meet if you can meet our needs:
for a gold tribute a truce is struck.
The Battle of Maldon, *in* THE EARLIEST ENGLISH POEMS, *supra* note 55, at 102-03, ll. 25-35.

[73] *See* RUDOLPH HUEBNER, HISTORY OF GERMANIC PRIVATE LAW 472 (Francis S. Philbrick trans. 1918).

[74] "Outlawry was the sole weapon wherewith the oldest law could both enforce atonement for misdeeds and punish the wrongdoer." *Id.*

[75] *Id.* at 469.

[76] *Id.* at 470. "And just as a thing pledged was liable but not obligated, so the person who was made a pledge of another's debt was not himself obligated. The legal duty remained exclusively that of the obligor who was bound to perform that which was the object of the duty." *Id.* at 471.

[77] *See id.* at 472.

who could hold it and enjoy it, but "the obligee did not [have the] power to destroy the thing, or to sell it, or take its profits."[78]

The primitive Germanic-Saxon contracts occurred when possession was given of a property as security, or a person was given as surety, called a wed,[79] to compensate the obligee if the asset was not paid over. Those contracts were more determinants of automatic liability than promises to perform,[80] not so much because promises did not exist prior to Henry II, but because courts would not enforce them.[81] These incipient contracts that courts could enforce were those in which one party had received value but the recipient had not tendered the corresponding value back.[82] Those obligations of contract parties, or liabilities of sureties, were primarily related to homicides by delivery of blood money, known as *wergild*,[83] as the conclusion of a treaty to avert a blood feud.[84] These relationships were in the nature of a bailment and the duties were called a debt. They were enforceable as actions upon the debt and did not need any terms, written or oral,[85] because the performance by one party automatically created the well-known and widely recognized duty in the other party. The existence of the relationships and duties did not need any separate evidence because they were self-evident. These expectations became formalized by the time of Glanvill.

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[78] *Id.* at 474.

[79] "Remember that the mediaeval 'pledge' (*plegius*) is almost always a person, not a thing. The Teutonic *wed* has come down to us by various routes as 'gage,' 'engagement,' 'wage,' 'wager,' and 'wedding'." PLUCKNETT, *supra* note 67, at 603, n.2.

[80] "The history of English contract law is in a measure the history of a transition from the conception of contractual duty imposed by law to that of contractual obligation resulting from promise." THOMAS ATKINS STREET, THE HISTORY AND THEORY OF ENGLISH CONTRACT LAW 3 (photo. reprint 1999) (1906).

[81] The author of the *Tractatus de Legibus et Consuetudinibus Regni Anglie* (traditionally attributed to Ranulf Glanvill) thus excuses his handling of the subject:

> We deal briefly with the foregoing contracts which are based on the consent of private persons because, as was said above, it is not the custom of the court of the lord king to protect private agreements, nor does it even concern itself with such contracts as can be considered to be like private agreements.

A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 4 (1975) (quoting G.D. HALL, THE TREATISES ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND CALLED GLANVILL 132 (1965).

[82] Holmes described the early avatars of what are now consider contracts as, "a sale by some accident remaining incomplete." HOLMES, *supra* note 4, at 251.

[83] "All its [family] members were liable to contribute towards the payment and also to share in the receipt of the wergild, the sum of money by which proper atonement could be made to the kindred for the death of one of its members and which could be honourably received by those to whom offence had been given." BLAIR, *supra* note 56, at 253.

[84] *See* PLUCKNETT, *supra* note 67, at 628-29.

[85] "We observe then that the early real contract or simple debt was founded directly on legal duty and did not derive its obligatory force from any word or promise of either party." STREET, *supra* note 80, at 2.

C. Common Law Emerges: From the King's Court Cases (1150 A.D.) to The Enlightenment (1750)

Before 1066, the scant amount of English law that was written was being written in vernacular. The Christian Church's use of Roman law lightly infused the law in England with a Roman flavor.[86] Roman law did not become important in the development of legal theory and doctrine in England until the *Corpus Iuris Civilis* became the renewed focus of study in the schools of Bologna and Pavia in the eleventh century. When Roman law was imported to the receptive legal culture in England, it was applied in ways that created new English principles of law rather than perpetuated Roman principles.[87]

Ranuf Glanvill, King Henry II's chief justiciar (a mixture of prime minister and chief justice), wrote his Treatise on the Laws of England in 1187-89, which historians point to as the commencement of the common law in England,[88] meaning a law common to all English subjects of the King.[89] Glanvill applied the Roman law he interpreted from the *Corpus Iuris Civilis* in the context of the Norman-Danish-Anglo-Saxon-British society of his day.[90] His practical efforts were followed in the mid-thirteenth century by Henry of Bratton, called Bracton, who applied Roman law to English concepts of contract law[91] and property law[92] with a greater

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[86] "[T]he church, Catholic and Roman, carried with it wherever it went the tradition of the older civilization, carried with it Roman institutions, such as the will, but in a popularized and vulgarized form." F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 6 (16th prtg. 1965) (1908).

[87] "The *Digest* [portion of the *Corpus Iuris Civilis*], the work of the pagan jurists, seems to have been forgotten altogether until its rediscovery in the eleventh century when it would become the subject of academic study at one of the first great medieval universities, the university of Bologna. From that date would grow a revival of Roman law that would influence the law of all of modern Europe and much of the modern world, although England and overseas territories settled by the English would resist that influence more than the rest of the continent." THE LAWS OF THE SALIAN FRANKS, *supra* note 60, at 20.

[88] "[T]he king [Henry II]'s court began, in that period of the twelfth century, to gather up the heterogeneous customs of the local courts and to weld them into that body of universal custom which we know as the common law. There was not common law before there was a common court." STREET, *supra* note 80, at 1.

[89] There were other courts, such as courts of the shire, the "hundred," or the manor, that might adjudicate issues not eligible for the royal court. "The function of this grave allegation in the early fourteenth century, and earlier, had been to justify the intervention of the royal courts by showing that the King had a special interest in the wrong, for at this period there was a feeling—one could almost call it a theory—that, in general, cases involving private wrongs should be determined in the local courts." SIMPSON, *supra* note 81, at 202.

[90] "But whether he borrowed it from the ecclesiastical courts, or went directly to the fountain-head, certain it is that Glanvill makes use of the classification and technical language of the *Corpus [Iuris Civilis]* throughout his tenth book." HOLMES, *supra* note 4, at 266.

[91]
> Bracton appropriates the fundamental idea that a nude pact [without *quid pro quo*], a convention bereft of particular form, does not constitute an obligation enforceable at law.

emphasis on organizing the judge-made law as expressions of rules and theories.

After the Norman invasion, to commence litigation in the King's court, a plaintiff needed a writ to issue from the King, prepared by the King's Chancellor. A writ could not be issued unless it was based on one of the permitted causes, and the formal contract and real contract complied with the permitted causes.[93] But from the time of Henry III (1216), the Chancellor also began to perform equity by fashioning special writs for special cases.[94] This special power grew, though in a hard-to-trace process because no early Chancery cases were preserved. By the fifteenth century, the Chancery was expected to review cases that deserved relief which common law could not provide.[95]

. . . .

. . . and this "reception" of the Roman doctrine provides a starting-point for subsequent development. First, the ecclesiastical courts and the Chancery, later on Common Law Courts, took part in the development of a doctrine concerning obligations which took account of informal agreements, and laid down rules as to their validity and enforcement.

VINOGRADOFF, *supra* note 64, at 103-04.

[92] Another case, where the study of Roman doctrine has left a distinct trace on English legal thought, is the well-known distinction between real and personal property. . . . The root of it lies in the teaching of Roman lawyers on actions. There are real actions—*actiones in rem*—which aim at obtaining the property of a certain thing, and personal actions, urging certain claims against persons, requiring them to do something, to give something, or to forbear from something. . . . But Bracton and his fellow-judges, working on this basis, went a step beyond their Roman guides. They used the distinction between actions to differentiate between different kinds of property. Land and interests connected with it appeared to them to be naturally the object of real actions, because here the claim was directed to a definite thing and to nothing else. On the other hand, chattels were, as a rule, claimed in the same way as rights, for example, as the performance of some labour or office. The aim of the action was to obtain either the thing or service, or its equivalent from the person under obligation.

Id. at 101-02.

[93] *See* SIMPSON, *supra* note 81, at 10.

[94] "[t]here was a certain power reserved to the Chancery of making new writs to suit new cases, of introducing modifications in the established forms." MAITLAND, *supra* note 86, at 222.

[95] [I]t justifies its existence by its convenience, and in the reign of Henry VII we must reckon the Court of Chancery as one of the established courts of justice, and it has an equitable jurisdiction; beside the common law there is growing up another mass of rules which is contrasted with the common law and which is known as equity.

. . . Of the equity of the fifteenth century, even of the sixteenth, we know but little, for the proceedings in the chancery were not reported as those of the common law courts had been ever since the days of Edward I. But this fact alone is enough to suggest that the chancellors did not conceive themselves to be very strictly bound by rule, that each chancellor assumed a considerable liberty of deciding causes according

In Glanvill's day, the existence of a debt could be evidenced by a "formal" contract, meaning a writing sealed by the debtor's seal because it evidenced that the contract was the act of the person who sealed the document, or a "real" contract, meaning the actual transfer of the *res*, reflecting the existence of the duty.[96] But Henry II not only initiated common law in the King's court by case decisions recorded for later guidance; he also elevated proof and evidence of an enforceable contract from the trials by wager of battle or wager of ordeal. In developing the precursor of the jury trial, instead of gathering credible witnesses selected by the litigants to attest to the credibility of the litigants, as in the wager of law, the court selected the jury members for the purpose of giving testimony about disputed matters of fact.[97] Evidence became a source of proof; evidence would need to be verifiable and would be a reflection of the contemplation of the parties, rather than simply the formality of their acts.

Though old inflexible doctrines eroded slowly over time, commentaries single out the sixteenth century opinion of *Strangborough v. Warner*,[98] as the seminal case that expanded legal enforceability of contracts to encompass mutual promises. The decision was a transcendent event.[99] An action upon the case, meaning an action for damages, could be based on a promise, rather than on a transaction or independent duty. Enforceability was no longer limited to the formal or real contracts. Some consider this case to be the point in legal history when intention became a critical element of contractual effect.[100]

> to his own notions of right and wrong. . . . [T]he rules of equity became just as strict as the rules of common law—the chancellors held themselves bound to respect the principles to be found in the decisions of their predecessors—a decision was an authority for future decisions.

Id. at 225.

[96] There were certain special contracts in the Roman system called real, which bound the contractor either to return a certain thing put into his hands by the contractee, as in a case of lease or loan, or to deliver other articles of the same kind, as when grain, oil, or money was lent. This class did not correspond, except in the most superficial way, with the common-law debts. But Glanvill adopted the nomenclature, and later writers began to draw conclusions from it.

HOLMES, *supra* note 4, at 266.

[97] "This was the beginning of our trial by jury." *Id.* at 263.

[98] 74 Eng. Rep. 686 (K.B. 1588). "Note, that a promise against a promise will maintain an action upon the case, as in consideration that you do give to me 101. on such a day, I promise to give you 101. such a day after." *Id.* at 686.

[99] One commentary exults with rapture, "The conception of contractual obligations embodied in the bilateral contract is, to our mind, the most beautiful notion that ever appeared in contract law." STREET, *supra* note 80, at 60.

[100] "The bilateral contract came and with it all notion of vestments fell away from our idea of obligation; men could now think and talk of intention to bind." *Id.* at 56.

> The exercise of the will of the two parties to the contract in making their respective promises was now [upon the acceptance of bilateral contracts] capable of being separated from other elements and made the subject of legal contemplation. . . . Form [imposed by ancient concepts of formal contracts] was thus

The case was followed by an equally, if not more important case, *Slade's Case*, which essentially eliminated the importance of debt as the sole source of an obligation to pay, broadening the obligations to other kinds of undertakings or assumptions of duty.[101] The principle was that once a relationship of reliance is entered into, a breach of trust, a breach of representation, or a breach of promise will result in similar harm and entitle the aggrieved party to similar rights of redress. These were all assumptions of "undertakings" enforceable at law.[102]

This expansion of liability created a backlash of fear that perjury would run rampant because liabilities could be imposed as a result of a jury making decisions with very little evidence other than suspect testimony of an alleged witness to an oral promise.[103] Another feared effect of *Slade's Case* was the judicial recognition of liability for implied contracts.[104] The linkage of the indebtedness or obligation with the undertaking to discharge it added flexibility to contracts beyond the rigid formal or real contracts, so that contract law became centered on the undertaking. The results were explosive. The Statute of Frauds was enacted to address the problems of establishing proof of the undertaking.

These movements in legal thinking were accompanied by the development of consideration as a contractual requirement. Parallel to the initiatives and evolution of contracts in common law, the treatment of contracts in the canon law more closely followed the Roman law conventions that nude pacts will not create obligations, while vested, or clothed, pacts do. Separately, canon law also embraced the requirement from Roman law of *causa*, something closer to intent, as the framework for analyzing contracts.[105] The term *causa* was adopted in the Elizabeth period

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altogether eliminated from the conception of the simple contract, and from that time external acts became significant merely as symbols of internal volition.

Id. at 59.

[101] *See* 4 Eng. Rep. 92 b (K.B. 1602).

[102] *See* PLUCKNETT, *supra* note 67, at 647.

[103] Many people had reason to feel that they had lost a valuable safeguard. Chancery, indeed, affected to scorn wager of law; but Chancery did at least put the defendant on his oath and hear (or read) what he had to say, but in a court of common law the defendant's mouth was closed. Misgivings were therefore well founded, and the Statute of Frauds was a direct result of the difficulties in matter of proof caused by *Slade's Case*.

Id. at 648 (footnote omitted).

[104] If an *assumpsit* could be implied, might not a contract be implied? This step was quickly taken. . . . Soon a large variety of implied contracts, and eventually of quasi-contracts, were remedied by *indebitatus assumpsit*. This development over a wide and hitherto untouched field was only rendered possible by the bold decision in *Slade's Case*.

Id.

[105] In their view *caus[a]* might consist in any definite object which the promisor at the time proposed to attain; if his promise was deliberately made with some definite aim in view there was sufficient *caus[a]* to sustain an action. The end in view need not necessarily be of a

in 1588-1610 as something synonymous with consideration.[106] These diverse notions and rules began to consolidate and condense under the overarching concept of consideration: detriment to promisee (failure in promisor's undertaking), lack of *quid pro quo* (real contracts premised on transfers with corresponding obligations to repay), mutual promises, and contracts under seal (formal contracts premised on an obligation to pay as a result of a formalized relationship).[107]

D. Contract Law Matures: From the Enlightenment (1750 A.D.) to the Present

The establishment of mutual promises as the basis of contract lead to the refinement that contractual effect required evidence of a "meeting of the minds."[108] The prevalent use of a meeting of the minds as a touchstone

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> business character; peace, charity and moral obligation were all sufficient *caus[a]* to make a promise actionable.

Id. at 652.

[106] > [A]s late as the reign of Queen Elizabeth we find a trace of this original connection. It is said, "But the common law requires that there should be a new cause (i.e. consideration), whereof the country may have intelligence or knowledge for the trial of it, if need be, so that it is necessary for the Public-weal."

HOLMES, *supra* note 4, at 259 (citation omitted).

> But "cause" does not mean exactly the same as "consideration"; it lacks the suggestion of what was in the mind, what was considered, what motivated. Nor is the word "reason" a precise equivalent, for an explanation of the reasons for an action need not be confined to an account of conscious motives; in the sixteenth century "reason" possessed all sorts of special connotations, and the word is not usually found in company with causes and considerations. . . .

SIMPSON, *supra* note 81, at 331.

[107] ". . . the doctrine of consideration became something of a dog's breakfast." SIMPSON, *supra* note 81, at 325. *See also* PLUCKNETT, *supra* note 67, at 651 (discussing theories of consideration).

[108] > It was a consequence of the emphasis laid on the ego and the individual will that the formation of a contract should seem impossible unless the wills of the parties concurred. Accordingly we find at the end of the eighteenth century, and the beginning of the nineteenth century, the prevalent idea that there must be a "meeting of minds" (a new phrase) in order to form a contract; that is, mental assent as distinguished from an expression of mutual assent was required.

Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 368 (1920-21). In an exhibition of scholarly one-upsmanship, a subsequent commentator was able to trace the concept of the meeting of the minds back to the sixteenth century.

> The doctrine that a contract requires a "meeting of the minds" had a curious origin. It is often erroneously supposed that it was an invention of the late eighteenth century; Williston, for example, believed this. . . . In truth it had been born more than two centuries earlier.
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> . . . Serjeant Pollard argued: "[A]s to the definition of the word (*agreement*) it seems to me that *aggreamentum* is a word compounded of two words, viz. (b) of *aggregatio* and *mentium*, so that *aggreamentum est aggregatio mentium in re aliqua facta vel faciendâ*. And so by the contraction of the two words, and by the short pronunciation of them they are made one word, viz. *aggreamentum*, which is no other than a union, collection, copulation, and conjunction of two or more

grew in the era when "natural law" led to new theories of freedom and liberty. This era was the high water mark of the "subjective theory" and was invigorated by the "will theory," which enjoyed popularity in the mid-nineteenth century.[109] One consequence was the development of the parol-evidence rule, which provides that the contract language reflects the entirety of the parties' intention.[110] As the expansion of capitalism, colonialism, and industrialization proceeded and as the cash and credit based economy supplanted the land-holding barter economy, the importance of both contractual flexibility and predictability received more attention. In contracts, society's need for predictability led to a greater emphasis on the external indications, the so-called objective criteria, and less on the internal individual thoughts, the subjective criteria. The legal thinking that characterized the contract as a reflection of what is "contemplated by the parties,"[111] receded in prominence, and the concept of manifest mutual assent rose in jurisprudential appreciation, as reflected in the Restatement (Second) of Contracts. This objective approach reached its apogee with Oliver Wendel Holmes, Jr., who stated: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."[112] The

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minds in any thing done or to be done."

Farnsworth, *supra* note 5, at 943-44 (quoting Reniger v. Fogossa, 75 Eng. Rep. at 27 (Ex. 1551)).

[109] *See* Roscoe Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1, 5 (1954-55) ("[from 1853 to 1904] the willed assumption of duties was put at the foundation of all law," and perpetuated by the use of the standard law school text book). *See also* Williston, *supra* note 108, at 366 (reciting that "Adam Smith, Ricardo, Bentham, and John Stuart Mill successively insisted on freedom of bargaining. . . [t]o Mill. . . *laissez faire* was a passionate exhortation to allow the free development of the individual. . . .").

[110] *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 276 (1973). Parol evidence has also been buffeted by the storms raised between "formalism" and "realism." Formalism adopted it to prevent extraneous information from diminishing the perceived meaning, and realism insisted that all circumstances should be available to the court to interpret the meaning of the text.

> It is increasingly difficult to justify the restrictive view of the parol evidence rule. Once it is recognized that all language is infected with ambiguity and vagueness, it is senseless to ask a court to determine whether particular language is "ambiguous" or "vague" as opposed to "plain." But it is possible to give content to the terms "ambiguity" and "vagueness," and it does make sense to ask a court to determine whether evidence is offered for the purpose of resolving ambiguity or vagueness. By limiting "interpretation" to the resolution of ambiguity or vagueness, we can give meaningful content to the more liberal rule.

Farnsworth, *supra* note 5, at 965.

[111] Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (Ex. 1854) (stating "loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract").

[112] HOLMES, *supra* note 4, at 309. *See also* 1 WILLISTON, *supra* note 10, § 3.5 at 219 stating:

> That [the contracting parties] think that there has been mutual assent, or sufficient consideration or that their contract is enforceable without a writing is wholly immaterial. It is the law, rather than the parties, which fixes the requirements of

adulation of objective intent and castigation of subjective intent appears as an overreaction to prior attitudes towards both judicial reticence and *laissez-faire* principles. Even the framing of the issue as objective versus subjective colors the analysis: objective sounds pure, elemental, and true, compared to subjective, which sounds suspect, arbitrary, and fallible.[113] This arrogation of objective intent and the derogation of subjective intent bluntly shifts to the finder of fact the power to impose or dismiss enforceability based on its interpretation of the agreement.[114] The contracting parties are compelled to produce what third parties would need to perceive as the contractual manifestation, not what each contracting party conceives it to be. This controversy between objective and subjective intent is fundamentally a question of evidence of contractual effect.

> a legal obligation. As Judge Learned Hand aptly stated 80 years ago, "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 20 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. Of course, if it appears by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent." (footnotes omitted).

But compare an earlier statement of a similar faith articulated by Brian, C.J. in Y.B. 17 Edw. 4 i (1478) ("Minds or wills are not in themselves existing things that we can look at and recognize. We are restricted in our earthly experience to the observation of the changes or actions of more or less animated bodies in time and space; and disembodied minds or wills are beyond the scope of earthly law.").

[113] The terms objective and subjective appear to have been adopted from philosophical arguments of the eighteenth and nineteenth centuries, and therefore are overworked, having to carry the heavy baggage from other disciplines used and misused over centuries of debate. One classical contrast of objective and subjective in philosophy has been described, as "one [side of the philosophical enquiry] refers to objects of pure understanding, and is intended to expound and render intelligible the objective validity of its *a priori* concepts. . . . The other seeks to investigate the pure understanding itself. . .; and so deals with it in its subjective aspect." IMMANUEL KANT, CRITIQUE OF PURE REASON 12 (Norman Kemp Smith trans., 1965) (1787). In literary criticism, those interpreters seeking to avoid being condemned for having fallen for "the intentional fallacy" insist, "Once the work is produced it possesses objective status—it exists independently of the author and of his declared intention." And yet in drawing up opposing correlatives, the same commentary links "objective, intrinsic or resident values", against "subjective, extrinsic or non resident values." PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS, *Intentions*, 399-400 (Alex Preminger ed., 1974).

[114] There are many other approaches to interpretation, specifically as to interpretation of intent. The modern day battle of the books is a skirmish militated by schools, schisms, and philosophies, subjecting the issue to a vast range of methods and standards, based on wildly divergent theories including: originalism, formalism, strict constructionism, sociological jurisprudence, legal realism, majoritarianism, countermajoritarianism, material law, fundamental rights, neo-pragmatism, structuralism, poststructuralism, deconstruction, reader-response, hermeneutics, historicism, anthropomorphism, and of course, interpretivism. These, and numerous other theories affecting interpretation, are examined in KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999).

Evidence of contractual effect has always been a concern.[115] For objectivists, the modern homily "perception is reality" is not merely a cliché, it is the law.

Objectivism, sometimes called formalism, in turn triggered a reaction by self-styled realists who questioned the ability of language to capture exactly the express intent of anyone[116] and the inability of anyone to articulate comprehensively the particulars of her own intent.[117] The

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[115] A review of the prior law shows, by example, the fifth century Burgundian Code of King Gundobad and his son Sigismund, which provided:

> OF SALES WHICH ARE MADE WITHOUT WITNESSES.
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> 1. If anyone has bought a bondservant, or field, or vineyard, or landsite and house built in any place, we order that if it has not been confirmed in writing or witnessed, he shall lose his payment; that is, provided that the writing has not been subscribed and sealed by seven or five witnesses dwelling in that place.
>
> 2. Indeed, if five witnesses are not found to be present, we order that it be signed by three suitable witnesses of blameless reputation from those dwelling in that place; but, if this is not done, we order the document to be invalid.

THE BURGUNDIAN CODE 85 (Katherine Fischer Drew trans., 1949).

[116] "The very concept of plain meaning finds scant support in semantics, where one of the cardinal teachings is the fallibility of language as a means of communication." Farnsworth, *supra* note 5, at 952.

[117] This is the realist attack on the inadequacy of intent as the basis for judicial interpretation of contractual effect. This attack on intent is as strong as that of the formalists who refuse to try to understand a party's purpose and deem it irrelevant. The formalist attack is from the inability of anyone knowing another's inner thoughts about intent. The realist attack is from the inability of anyone knowing her own inner thoughts about intent. "It is [an]. . . ill conceived premise that a party can be expected to deal in appropriate language with all situations he can foresee." E. Allan Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860, 885 (1968). This mismatch between language and thought has been recognized regularly by those whose works are based on the power of words,

> I say then that my insufficiency derives from a twofold source, just as the grandeur of the lady is transcedent in a twofold manner, in the way that has been to leave aside much that is true about her and much that shines, as it were into my mind, which like a transparent body receives it without arresting it; and this I say in the following clause: *And surely I must leave aside.* Then when I say *And of what it understands* I assert that my inability extends not only to what my intellect does not grasp but even to what I do not understand, because my tongue lacks the eloquence to be able to express what is spoken of her in my thought.

DANTE'S "*IL CONVIVIO*" (THE BANQUET) 95-96 (Richard H. Lansing trans., New York: Garland 1990). This text is described as modeled on that of St. Thomas's philosophy:

> Whenever speech is the cause of the intellect, as in those things learned by instruction, what the intellect grasps is not equal to the power of speech; and the intellect can then hear, but not understand the things spoken. . . . But whenever the intellect is the cause of speech, as in those things known by invention, then the intellect exceeds speech, and many things are understood that cannot be spoken.

Giorgio Agamben, THE END OF THE POEM: STUDIES IN POETICS 38 (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., Stanford University Press 1999) (1996). Though this unsettling problem has been the play toy of twentieth century philosophy, it can be traced back, before Dante and St. Thomas, to a nihilistic version by the Sophist Cratylus, the neo-Heraclitean, who is ascribed with the belief that can be summed up as: Nothing is; but if it were it could not be known; and if it could be known it

presumed leader of realism was Karl Llewellyn, one of its most vocal proponents[118] in his role as the chief drafter of the Uniform Commercial Code, which codified personal property contract law.[119] But Judge Cardozo, another advocate of realism, pointedly suggests, "The truth indeed, is, as I have said, that the distinction between the subjective or individual and the objective or general conscience, in the field where the judge is not limited by established rules, is shadowy and evanescent, and tends to become one of words and little more."[120] The tempestuousness of the controversy has been described as subsiding, with proponents of realism continuing to suggest there was no great fundamental difference between objective and subjective tests.[121] But the respect accorded the doctrine of objective intent and the predominance of written perceived intent over unwritten conceived intent remains almost beyond question, and approaches dogmaticism.

IV. IS THERE A CONTRACT, A DUTY, OR A LIABILITY?

The erratic development of contract law does little to distinguish it as more valuable, reliable or fundamentally fair as the means for establishing the responsibilities between two parties, compared to other legal reasons for imposing duties and liabilities. The variety of reasons to justify whether a party is entitled to relief in the form of performance or damages are marshaled under distinct but related parallel theories relating not only to contract law, but also regulatory law, tort law, and equity, usually including the following causes of action: (1) breach of contract, whether written, oral, or implied in fact,[122] (2) breach of covenant to bargain in good faith, whether implicit or explicit,[123] (3) fraud,[124] (4) misrepresentation,[125]

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would be incommunicable. *See* FREEMAN, *supra* note 5, at 284-85.

[118] "The 'realist' group was neither so united nor their program so crystallized as to make the view or actions of any one thinker a touchstone for assessing the movement. But Llewellyn stands out . . . as the author of 'the first self-conscious statement of Realism' . . . ." Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 621 n.4 (1975) (quoting G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1017 (1972)).

[119] "We do know that the design and text of the Code bears the inimitable imprint of its chief draftsman, Karl N. Llewellyn. . . ." James J. White & Robert S. Summers, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1 at 5-6 (2d ed. 1980).

[120] CARDOZO, *supra* note 14, at 110.

[121] *See* Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1250 (1999).

[122] *See* Milandco Ltd., Inc. v. Washington Capital Corp., No. CIV.A. 97-8119, 2001 U.S. Dist. LEXIS 20770, at *1 (E.D. Pa. Dec. 12, 2001).

[123] *See* Seaman's Dist. Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158, 1177 (Cal. 1984).

[124] *See* Runnemede Owners, Inc. v. Crest Mortgage Corp., 861 F.2d 1053, 1059 (7th Cir. 1988) (stating that one element of fraud, justifiable reliance, cannot be demonstrated when the oral assurances of the defendant are inconsistent with the written terms of the letter); *see also* Venture Assocs. Corp. v. Zenith Data Sys. Corp., 96 F.3d 275, 278 (7th Cir. 1996) ("[I]f the plaintiff can prove that had it not been for the defendant's bad faith the

(5) intentional interference with contractual relations,[126] (6) intentional interference with a prospective business advantage,[127] (7) conspiracy,[128] (8) promissory estoppel as to certain provisions, notwithstanding that the letter taken as a whole is unenforceable,[129] and (9) unjust enrichment based on equitable grounds.[130] When no contract exists, but a party suffered a wrong, the aggrieved party may still obtain relief. If the contract can be established, or the wrong proven, then the true effect of the question of specific performance or liability emerges: "What remedies may be available?" The remedies usually permitted are damages.[131] All of these causes of action, of course, trigger opposite, though not always equal, reactions. Contract principles supporting the defense to an action for breach include: (1) lack of consideration, (2) lack of definiteness, (3) lack of written description of the transaction, and (4) lack of reliance.

A. Intent

At present, courts generally hold that there are three necessary elements for contractual effect, notwithstanding their recent birth from a historical perspective:[132] (1) adequate consideration; (2) definite terms, and

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parties would have made a final contract, then the loss of the benefit of the contract is a consequence of the defendant's bad faith, and provided that it is a foreseeable consequence, the defendant is liable for that loss—liable, that is, for the plaintiff's consequential damages.") (citation omitted).

[125] *See* Budget Mktg., Inc. v. Centronics Corp., 927 F.2d 421, 428 (8th Cir. 1991) (upholding a lower court dismissal by summary judgment in part because the plaintiff did not show that the defendant was a person in the business of supplying the disputed representations and who owed a duty of care to third parties). *See also Milandco*, 2001 U.S. Dist. LEXIS 20770, at *1.

[126] *See Seaman's Dist. Buying Serv., Inc.*, 686 P.2d at 1177.

[127] *See* Pac. Gas & Elec. Co. v. Bear Stearns & Co., 791 P.2d 587 (Cal. 1987).

[128] *See GMH Assocs.*, 752 A.2d at 905.

[129] *See Budget Mktg., Inc.*, 927 F.2d at 427 (reversing the lower court's summary judgment in part, and concluding that a promissory estoppel claim was a jury question whether (1) there was an agreement, (2) the aggrieved party acted to its detriment, and (3) equities support enforcement); *Arcadian Phosphates*, 884 F.2d at 73 (stating there was a jury question whether seller breached a good faith obligation to negotiate because the seller permitted the buyer to make significant expenditures before the seller broke off negotiations. The court suggested buyer's recovery might be limited to out-of-pocket expenses); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 817 (7th Cir. 1987); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

[130] *See Reprosystem, B.V.*, 727 F.2d at 263 (overturning the lower court award of damages based on the principle of unjust enrichment or breach of contract).

[131] *See infra* Parts III.F, IV.A.5.

[132] *See* ATACS Corp. v. TransWorld Comm., 155 F.3d 659, 665-66 (3d Cir. 1998); *Channel Homes Ctrs., Div. of Grace Retail Crop.*, 795 F.2d at 298-99. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 22 (1981) (stating that the ordinary practice is an offer by one party and assent by the other). Some have alluded to the "classical concept of contract" as requiring (1) at least two parties with capacity, (2) consideration, (3) mutual assent, and (4) a lawful subject matter. 1 WILLISTON, *supra* note 10, § 1.1 at 4. This model is in turn challenged by the putatively more modern concept of contract "based on two fundamental notions: first, that the obligation of a contracting party is based on his promise and second, that whether a promise or set of promises falls within the definition of contract

(3) manifestation of an intent to be bound. Of these elements, intent is generally presumed to be timeless and immutable in importance, though the preceding section of this Article proves both of those presumptions to be groundless.

In some circumstances, even the contemporary proposition that intent is necessary raises dispute. On the one hand, some believe it is irrelevant, and on the other hand some believe it can not be discovered. Williston's articulation of the common principle is " . . . the nature of agreement requires a manifestation of mutual assent, and the concept of manifestation generally requires an objective indicium of mutual assent."[133] Similarly, Corbin challenged the issue more boldly by stating: "Agreement consists of mutual expressions; it does not consist of harmonious intentions or states of mind."[134] From a practical point of view, mutual assent rather than intent seems to create a false perspicuity because it begs the question of where and how mutual assent is to be better discovered than intent. To find mutual assent, some commentators direct that evidence be sought outside of the "four-corners" and "plain-meaning" of the writing.[135] Because the finding of fact is not based on anything stronger than belief in a likelihood, this discovery of intent or mutual assent requires the finder of fact to find the probable, rather than some ideal truth, by inference from observation and experience. Ultimately, it is based on the premise that the parties expected to cause an effect.[136] Similarly, the expectation that the meaning

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is dependent upon whether the law will enforce the promise or set of promises." 1 *id.* Older theories of contract included as additional elements: capacity of the parties, legality of the undertaking. *See* LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 83 (1965).

[133] 1 WILLISTON, *supra* note 10, § 1.3 at 15.

[134] 1 CORBIN, *supra* note 10, § 1.9 at 25. Corbin gets caught up in metaphysical musings: "It may well be that intentions and states of mind are themselves nothing but chemical reactions or electrical discharges in some part of the nervous system." 1 *id.* § 1.9 at 25. On the other hand, the commentary states, "A promise is an expression of intention. . . ." 1 *id.* § 1.15 at 41.

[135] "[A]n agreement as a factual matter, includes not only the words and non-verbal expression of the parties but also the added meaning as revealed by the context of their expressions. This is what is meant by mutual assent." 1 *id.* § 1.19 at 26.

[136] This is an issue roundly questioned by philosophers because repetition may prove predictability but it does not prove truth.

> Tis certain, that not only in philosophy, but even in common life, we may attain the knowledge of a particular cause merely by one experiment, provided it be made with judgment, and after a careful removal of all foreign and superfluous circumstances. Now as after one experiment of this kind, the mind, upon the appearance either of the cause or the effect, can draw an inference concerning the existence of its correlative; and as a habit can never be acquir'd merely by one instance; it may be thought, that belief cannot in this case be esteem'd the effect of custom. But this difficulty will vanish, if we consider, that tho' we are here suppos'd to have had only one experiment of a particular effect, yet we have many millions to convince us of this principle; *that like objects, plac'd in like circumstances, will always produce like effects*; and as this principle has establish'd itself by a sufficient custom, it bestows an evidence and firmness on any opinion, to which it can be apply'd.

can be deduced or inferred from the circumstances is based on the presumption that the external can be accurately perceived and meaningfully interpreted.[137] Consequently, blind faith in external indicia may be another judicial fiction for attempting to perform equity.

The most ironic part of the ambiguity surrounding letters of intent is that even though this type of writing is generally captioned "Letter of Intent," the most contentious element is first, whether intent exists,[138] and second, if it does, whether it is the intent to form or not form a contract. Because finders of fact are the final determiners of contractual effect, they cannot determine only whether intent to be bound was manifested, even though the parties expressly disclaimed that intent, but they can also determine that no intent to be bound existed even when the parties may have attempted to establish intent.[139] In court, the existence of legal intent must be resolved by a finding of fact. The contemporary approach follows the doctrine that objective intent is not based on the actual state of mind of the parties.[140] Contractual intent, the intent to be bound, is a question of

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DAVID HUME, A TREATISE OF HUMAN NATURE, Book I, Pt. 3, § 8, para. 14, at 104-05 (1739).

[137] This issue has also been roundly challenged by philosophers because appearances can be deceiving:

> . . . we clearly perceive, that all our perceptions are dependent on our organs, and the disposition of our nerves and animal spirits. This opinion is confirm'd by the seeming encrease and diminution of objects, according to their distance; by the apparent alterations in their figure; by the changes in their colour and other qualities from our sickness and distempers; and by an infinite number of other experiments of the same kind; from all which we learn, that our sensible perceptions are not possest of any distinct or independent existence.

Id. at Book I, Pt. 4, § 2, para. 45 at 211.

[138] "What should a court do when a party failed to foresee the situation and so had no expectation as to it?" Farnsworth, *supra* note 117, at 860.

[139] Mellon Bank, N.A. v. Aetna Bus. Credit, 619 F.2d 1001, 1009 (3d Cir. 1980) (stating, "It would be helpful if judges were psychics who could delve into the parties' minds to ascertain their original intent. However, courts neither claim nor possess psychic power. Therefore, in order to interpret contracts with some consistency, and in order to provide contracting parties with a legal framework which provides a measure of predictability, the courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent. As Justice Holmes observed: '[T]he making of a contract depends not on the agreement of two minds, in one intention, but on the agreement of two sets of external signs—not on the parties' having *meant* the same thing but on their having said the same thing.'" *But cf.*, *Tribune*, 670 F. Supp. at 497; *Skycom*, 813 F.2d at 814-15 (suggesting that courts should be careful not to trap parties into contracts they never intended).

[140] *See Empro Mfg.* 870 F.2d at 425; *Skycom*, 813 F.2d at 814 (stating "'intent' does not invite a tour through Walters' [plaintiff's] cranium, with Walters as the guide," but instead, is derived from the words and actions of the parties); Rand-Whitney Packaging Corp. v. Robertson Corp., 615 F. Supp. 520, 534-35 (D. Mass. 1986) (stating, "I accept that Mr. Grieb in his mind may have considered the letter to be a letter of intent. That does not alter the conclusion that he intended the parties to be bound by it."); Mazzella v. Koken, 739 A.2d 531, 536 (Pa. 1999). Similarly, if two parties agree on the same verbal expressions though they had two different meanings, the intent to agree will be deemed to have been met. Courts will construe what the words mean by external evidence. The

fact determined by inference, at a minimum, from the external circumstances and manifestation.[141]

As a further variation on the issues of contractual intent and agreement, if two parties meet and perform all the essential elements of a contract, but merely lack an overall written agreement to be bound, they will be bound regardless of the absence of a writing.[142] Commentaries point out that not only is positive intention not a requirement for contractual effect, but contractual effect may arise even in the absence of an agreement.[143] Therefore, the consternation surrounding intent is thrown into higher agitation when some part of the evidentiary writing speaks of an agree-

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objective test for intent would prevail. This is what the *Tribune* court construed when faced with an agreed upon writing that the parties claimed had two different meanings. See 670 F. Supp. at 497. *See also Runnemede Owners, Inc.*, 861 F.2d at 1056 (stating a letter of intent is only "to provide the initial framework from which the parties might later negotiate a final . . . agreement, if the deal works out."); *Reprosystem*, 727 F.2d at 264 (concluding that parties intended to be bound only after execution of formal contracts); *V'Soske* 404 F.2d at 499 (holding that parties are not bound until they intend to be).

[141] *See Arnold Palmer Golf Co.*, 541 F.2d at 588 (stating that "except in the clearest cases, the question [of whether the parties intended a contract] is for the finder of fact to resolve."); *I.M.A.*, 713 P.2d at 887 (overruling the appeals court decision to grant a directed verdict that no enforceable contract was created, the court confirmed that the interpretation of a contract is a question of law, but the existence of a contract is a question of fact, and held that a jury could find a contract existed, notwithstanding the writings clearly stated that the terms were subject to more definite agreements); Terracom Dev. Group, Inc. v. Coleman Cable and Wire, 365 N.E.2d 1028, 1031-32 (Ill. 1977) (affirming the lower court's judgment that a series of letters which ended with a letter containing an express disclaimer of any contract arising prior to a formal agreement, the upper court pursued a relatively common sequence of analysis: first, determine whether the writing is ambiguous as a question of law; second, if it is not ambiguous, the intent of the parties is determined solely from the writing; third, if the writing is ambiguous, intent can be found with the use of parol evidence and extrinsic circumstances. In each instance, intent is a question of fact.); *Field*, 305 A.2d at 691-93 (noting that when evidence is in conflict, it is a question for the trier of fact to determine whether a contract exists. The trier can determine one exists even when the writing repeatedly states it is subject to a formal contract being entered into, when the formal contract is the formalization of an already existing agreement); *see also Empro Mfg.*, 870 F.2d at 425; *Anderson Chem. Co.*, 768 F. Supp. at 1578.

[142] *See* Shovel Transfer & Storage, Inc. v. PLCB, 739 A.2d 133, 138 (Pa. 1999) (quoting Ketchum v. Conneaut Lake Co., 163 A. 534, 535 (Pa. 1932)) ("Where the parties have agreed orally to all the terms of their contract, and a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, such oral contract may be enforced, though one of the parties thereafter refuses to execute the written contract."). *See also infra* note 178 (describing the elements of an oral contract).

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> [T]he common law has long recognized the possibility of contractual liability under a formal contract by the mere act of the obligor, even without agreement, if he executes an appropriate form, the formal contract. Too, as is recognized by the Restatement (Second), because the term agreement does not imply whether legal consequences exist, it is possible and, indeed likely, that some contracts may be formed without agreement.

1 WILLISTON, *supra* note 10, § 13 at 14. *See also supra* text accompanying note 53 (discussing formal contracts).

ment, but another part calls for a subsequent formal contract to be satisfactory.[144] Some cases stand for the proposition that parties will be bound notwithstanding that the express language of a letter states it is not binding.[145] In these cases, courts have concluded that the disclaimer language is sufficiently ambiguous such that a finder of fact must review evidence of the circumstances surrounding the writing, as well as the writing itself, to determine whether contractual intent existed.[146]

Most courts, fortunately for drafters, respect the written statement of intent of the parties as an important correlative element in determining whether in fact intent exists to form a contract.[147] But opinions do range between the two poles.[148] When a party seeks to rely on circumstances

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[144] See *supra* notes 6-11 and accompanying text.

[145] *See Mazzella*, 739 A.2d at 536 (stating "Where the parties have agreed on the essential terms of a contract, the fact that they intend to formalize their agreement in writing but have not yet done so does not prevent enforcement of such an agreement."). *See also Arnold Palmer Golf Co.*, 541 F.2d at 586 (reversing and remanding the district court's summary judgment holding that a document entitled "Memorandum of Intent" and signed by both parties was not a contract because it evidenced the intent of the parties to not be contractually bound).

[146] If it is ambiguous, parol evidence is admissible to explain what parties intended. *See Terracom Dev. Group, Inc.*, 365 N.E.2d at 1032.

[147] *See* Rennick v. O.P.T.I.O.N. Care, Inc., 77 F.3d 309, 315-16 (9th Cir. 1996) (breezing past the confusions addressed in this Article of drafters mixing up binding and nonbinding provisions, the court affirmed the lower court's summary judgment finding that the letter of intent signed by the parties was not a contract, by applying the following conventional method of analysis: (1) a letter of intent is generally used to negotiate toward an agreement, and not intended to be a binding contract—its purpose being a "useful intermediate device between vague feelers and a binding contract," and (2) the subject letter of intent explicitly stated it was of no binding effect. The court also paid respect to the rule of objective intent stating, "Regardless of the title, if the content shows that the parties intended to be bound, and the other requisites of a contract have been satisfied, it may be a contract."); *Runnemede Owners, Inc.*, 861 F.2d at 1056 (affirming the lower court's dismissal of a claim for breach of contract by a lender under a letter of intent to lend money, the court concluded that the intent of the parties that a contract would not arise without further consideration and formal execution was made express in the letter to eliminate misunderstandings.); *Skycom Corp.*, 813 F.2d at 814-15 (affirming the lower court's dismissal of contract claims by construing a letter that characterized itself as "an agreement in principle," and that contained six contingent conditions, as well as references to a future formal agreement as nonbinding. The court stated, "If unilateral or secret intents could bind, parties would become wary, and the written word would lose some of its power."); *Milandco Ltd., Inc.*, 2001 U.S. Dist. LEXIS 20770, at *13-15 (denying the existence of a contract for various reasons, including that the intent was for the parties not to be bound and the terms were not sufficiently definite); Frutico v. Bankers Trust Co., 833 F. Supp. 288, 298 (S.D.N.Y. 1993) (ordering a summary judgment dismissal of claims for alleged breach of an agreement contained in a sequence of term sheets to provide debt or equity financing, and holding that when written draft agreements state that a condition precedent to enforceability is execution and delivery of final documents, unsigned drafts are not enforceable).

[148] *See Skycom Corp.*, 813 F.2d at 816-17 (describing the doctrines as ranging between, on one hand, finding no contract when all terms are agreed to except the execution of a formal contract, and on the other hand, binding the parties when essential terms are agreed to without a formal writing, but subject to a future contractual arrangement).

outside of a single definitive writing to prove intent, the party must overcome the effect of the statute of frauds, whether by relying on rights outside of contract law or by showing that the compilation of writings is evidence that the contract was made.[149] The more subtle problem with the disclaimer that no contract is intended is that when there is a writing, such as a term sheet with all material terms, qualified as requiring a written agreement, the statute of frauds objections may have been overcome. Then, if a court concludes an oral agreement or course of conduct has amended the writing, a court may still find that the parties reached a binding agreement.[150]

Manifestations of intent have been inferred not only from the language of the parties, but also from the external circumstances of the language such as completeness. Consideration of completeness includes whether all of the material elements are present even if some important elements are missing or whether there is a reservation for a formal contract to be prepared merely as a memorialization.[151] Another and still weaker manifestation of intent is whether the format exhibits a contractual effect by being more sophisticated than an ordinary writing, being written in a stiffer and more legalistic jargon, including legalistic boilerplate language, such as "IN WITNESS WHEREOF," or other affronts to plain language.[152] An even weaker but still signal symptom of the intent to be nonbinding is to use words that look forward to future resolution, words of tentativeness, hope, belief, expectation, and negotiation, rather than words of agreement, understanding, confirmation, and acknowledgment that could be deemed to reflect current contractual effect.[153]

Altogether, there are usually four indicia of lessening significance to find what intent exists in the letter of intent:[154] (1) does it contain an express statement by the parties, (2) did one party perform based either on the terms of the letter or on the party's reliance that the letter would reflect

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[149] *See infra* Part III.D. and text accompanying notes 93-103.

[150] *See Chrysler Capital Corp.*, 697 F. Supp. at 800-01; *I.M.A., Inc.*, 713 P.2d at 888; James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367, 371-72 (Colo. Ct. App. 1994); *see also infra* note 158.

[151] *See infra* Part III.D.

[152] *See Skycom Corp.*, 813 F.2d at 816.

[153] *See Arnold Palmer Golf Co.*, 541 F.2d at 589 (emphasizing that the unqualified use of imperatives like "will" and "shall" created a possibility that the requirement for a subsequent writing was merely a memorialization of an existing agreement); *APCO Amusement*, 673 S.W.2d at 528 (stating, "The letter of intent itself is worded much like a contract. The instrument speaks through words such as 'agrees,' 'acceptance,' and 'accepts.'"). *But see* Video Central, Inc. v. Data Translation Inc., 925 F. Supp. 867, 870 (D. Mass. 1996) ("[The Letter of Intent] uses language in the present tense. . . and there is no evidence to suggest that the Letter of Intent was signed at a point of 'imperfect negotiation' between the parties.").

[154] *See Frutico*, 833 F. Supp. at 298 (quoting Shearson Lehman CMO, Inc. v. TCF Banking & Savings, F.A., 710 F. Supp. 67, 70 (S.D.N.Y. 1989)) (setting forth four factors to determine if the parties contemplated being bound by an oral or written agreement).

the performance,[155] (3) are the essential terms of a contract included, or determinable,[156] and (4) does it contain formalities and other displays of solemnity which are customary for contracts of that kind?[157]

B. Essential Terms

The principle that contractual effect requires essential terms to be included with sufficient definiteness that they can be enforced is like a divining rod that pulls its believer all over creation in a herky-jerky perambulation by begging the question: "What are essential terms?" It is axiomatic that a proposal will not qualify as a contract if the parties have not come to agreement on the essential terms.[158] But some terms may be less essential than others for confirming the existence of the contract when taken as a whole.[159] Even the seemingly irreducible essential of price need

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[155] Partial performance can be refuted by distinguishing the independence of the transactions: the making of a short term loan does not unequivocally require the making of extensions or long term loans. *See Frutico*, 833 F. Supp. at 298. Similarly, part performance must be performance of the subject contract, rather than an independent act, such as divulging one's private matters on the belief that the contract will be performed. *See Anderson Chem. Co.*, 768 F. Supp. at 1581.

[156] *See* Melo-Sonics Corp. v. Cropp, 342 F.2d 856, 859-60 (3d Cir. 1965).

[157] *See Skycom Corp.*, 813 F.2d at 816 (distinguishing between a sophisticated corporate merger, in which a court would expect a formal writing, drafted and negotiated by the parties, and a routine lease under a preprinted form written by neither party, in which a court would expect the letter agreement to bind because the boilerplate agreement merely memorializes the agreement already made).

[158] See *ATACS Corp.*, 155 F.3d at 666 ("[i]t is well established that evidence of preliminary negotiations or a general agreement to enter a binding contract in the future fail as enforceable contracts because the parties themselves have not come to an agreement on the essential terms of the bargain and therefore there is nothing for the court to enforce"); *Melo-Sonics Corp.*, 342 F.2d at 859-60 (reversing the dismissal of a complaint for failure to state a cause of action, in the circumstance in which letters and meetings to formalize "a preliminary agreement along the lines previously discussed" were broken off because a trier of fact might find that the parties had settled on the essential terms with the only remaining act being the formalization of the agreement); *Video Central, Inc.*, 925 F. Supp. at 870 (applying the rule that even when a document is titled "Letter of Intent," and states that it is subject to a future contract to be signed later, it is as binding as a contract when "all material terms" are included and the parties are past the state of "imperfect negotiation"); Rand-Whitney Packaging Corp. v. Robertson Group, 651 F. Supp. 520, 535 (D. Mass. 1986) (stating the language contemplating a future agreement did not mean the parties believed they were still at the stage of preliminary negotiations, but rather that the agreement had been reached, but would need to be formalized to be consummated); American Cyanamid Co. v. Elizabeth Arden Sales Corp., 331 F. Supp. 597, 603-06 (S.D.N.Y. 1971) (denying dismissal for failure to state a cause of action, in the circumstance of a signed letter that only omitted representations and warranties, a closing date, escrow conditions, and accounting principles to verify net worth, finding there were sufficient essential elements to act as an offer that would be binding upon acceptance).

[159] Conversely, it is equally well established in contract law that an agreement with open terms may nevertheless constitute an enforceable contract. *See ATACS Corp.*, 155 F.3d at 667-68; *Protocomm Corp.*, 1995 WL 3671 at *14; Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157, 163 (Pa. Super. Ct. 1997); U.C.C. § 2-311(1) (2002) ("An agreement for sale which is otherwise sufficiently definite. . . to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties.");

not be a fatal omission.[160] The consequence is that the finder of fact must winnow through the evidence to determine if the parties not only had intent, but had sufficiently definite terms for enforcement.

C. Consideration and Promissory Estoppel

The third significant contractual element of enforceability is consideration. Its absence would interfere with meeting the material elements of a contractual relationship. It distinguishes private agreements from enforceable agreements. Though it is difficult to define, consideration is generally considered to exist when one party either diminishes its own position, enhances the other party's position, gives a promise in exchange for a promise,[161] or when sufficient solemnity has been demonstrated.[162] But, when one party has an exclusive right of discretion to proceed under an irrevocable offer (in the case of a buyer, when there is an unfettered inspection right, and in the case of a seller, when there is an unfettered approval right by the board of directors), there is a threat that the exclusive discretion prevents the existence of consideration.[163]

The importance of consideration has continued to wax and wane. The eighteenth century jurist, Lord Mansfield, considered it an archaicism.[164] Pennsylvania, in attempting to codify the modern concept, adopted the

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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."); 1 CORBIN *supra*, note 10, § 2.8, at 138-39.

[160] Indeed, the omission of an essential term in a contract, such as price, does not vitiate contract formation if the parties otherwise manifested their mutual assent to the agreement and the terms of that agreement are sufficiently definite. *See, e.g.*, Kuss Machine Tool & Die Co. v. El-Tronics, Inc., 143 A.2d 38, 40 (Pa. 1958); Greene v. Oliver Realty, Inc., 526 A.2d 1192, 1194 (Pa. Super. Ct. 1987).

[161] *See Channel Home Ctrs., Div. of Grace Retail Corp.*, 795 F.2d at 299 (quoting Curry v. Estate of Thompson, 481 A.2d 658 (Pa. 1984)) ("Consideration 'confers a benefit upon the promissor or causes a detriment to the promisee and must be an act, forbearance or return promise bargained for and given in exchange for the original promise.'").

[162] "'The court will hold people to their bargains but will not enforce gratuitous promises unless they are made in solemn form.'" PLUCKNETT, *supra* note 67, at 655.

[163] RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981):

> *Illusory promises; mere statements of intention.* Words of promise which by their terms make performance entirely optional with the "promisor" whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise. Although such words are often referred to as forming an illusory promise, they do not fall within the present definition of promise. They may not even manifest any intention on the part of the promisor. Even if a present intention is manifested, the reservation of an option to change that intention means that there can be no promisee who is justified in an expectation of performance.

[164] Lord Mansfield showed his intuition of the historical grounds of our law when he said, "I take it that the ancient notion about the want of consideration was for the sake of *evidence* only; for when it is reduced into *writing*, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration." HOLMES, *supra* note 4, at 259.

Written Obligations Act, which provides that consideration will be presumed if there is a written statement that the parties intend to be bound.[165]

Just as the legal formalities required under the Statute of Frauds can be circumvented by the principles of significant partial performance, the legal formality of consideration may be circumvented similarly under the doctrine of promissory estoppel to the extent a party is seeking only damages rather than specific performance. When the party claiming promissory estoppel expects the other party to rely on the letter of intent to commence performance, a court can use its discretionary power to find that the promisee relying on the letter is entitled to damages notwithstanding the promisor's reservation of discretion.[166] A party seeking to establish a cause of action based on promissory estoppel must establish the following: "(1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise."[167] If, however, the party claiming the discretion (usually the owner) watches the other party perform diligence or undertake additional costs that diminish its position, even if the actions do not enhance the discretionary party's position, consideration likely emerges because the position of the performing party has been diminished by the expenditures of time and money.[168] However, support for promissory estoppel is undercut when the diminished party expressly accepted the risk of paying its own costs[169] and unreasonably relies on an ambiguous writing, or the promise relied upon is too nebulous, conditional, or illusory.[170]

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[165] *See* 33 PA. CONS. STAT. § 6 (1997) ("A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.").

[166] *See* Hoffman v. Red Owl Stores, Inc., 133 N.W. 2d 267 (Wis. 1965) (upholding a lower court award of damages to the prospective buyer of a business in which even though final terms were unresolved, the seller induced the buyer to change the buyer's position adversely). *But see* Knapp, *supra* note 13, at 688 (interpreting *Hoffman* as providing damages for a failure to negotiate in good faith).

[167] Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. 1997).

[168] *See* Borg-Warner Corp. v. Anchor Coupling Co., 156 N.E.2d 513, 517 (Ill. 1958) (finding a strong indication that both parties did or should have expected that acceptance by the diligencing party would create a contract when parties entered into a writing that committed them to enter into a contract subject to four minor conditions, and one party spent significant sums, and undertook a diligence review). *See supra* text accompanying note 32 and *infra* note 182 (discussing the requirements of partial performance).

[169] *See Anderson Chem. Co.*, 768 F. Supp. at 1582; *GMH Assocs., Inc.*, 752 A.2d at 904 ("The doctrine of promissory estoppel allows a party, under certain circumstances, to enforce a promise even though the promise is not supported by consideration. Thus, '[p]romissory estoppel makes promises enforceable.'").

[170] *See Anderson Chem. Co.*, 768 F. Supp. at 1583.

D. Statute of Frauds

Even assuming the three fundamental contractual elements are present (intent, terms, consideration), real estate agreements generally are expected to be written contracts and subject to the Statute of Frauds.[171] The purposes of the statute have been identified as both the apparent prevention of fraud and perjury (as reflected in its title) and, on a more subtle level, the implicit imposition upon the parties of deliberateness and a hoped-for caution when entering into contracts.[172] Notwithstanding that, courts sometimes will construe or construct essential contract terms that are otherwise vague or overlooked,[173] and may, when pressed, leap the hurdle presented by the Statute of Frauds to find a different reason to support relief for the plaintiff. The Statute of Frauds prescribes the statutory elements necessary for a court to compel conveyance of real estate in accordance with the contract.[174] If the aggrieved party cannot prove a contract complies with the Statute of Frauds, then specific performance is not available to the aggrieved party. Though the gaps in an agreement might be remediated and plugged by court intervention when the subject asset is not inside the Statute of Frauds, courts are traditionally reluctant to insert missing terms to rehabilitate the contract for it to comply with the Statute of Frauds.[175] On the other hand, when a sequence of writings can be combined and all

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[171] *The English Statute.* The English Statute of Frauds, entitled "An Act for the Prevention of Frauds and Perjuries," 29 Charles II, c. 3, was enacted in 1677. Sections 4 and 17, dealing with contracts, were as follows:

> § 4. . . . no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

See also RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981) (setting forth the classes of contracts subject to the Statute of Frauds).

[172] *See* 9 WILLISTON, *supra* note 10, § 211 at 170.

[173] "Moreover, although no express quantity term was set forth, none was necessary here. An "'agreement will not be held deficient [under the statute of frauds] for the failure to express that which is clearly *implied* when the writing is interpreted in accordance with the intentions of the parties."'"; *Seaman's Dist. Buying Serv., Inc.*, 686 P.2d at 1163 (citations omitted).

[174] *See Shovel Transfer & Storage, Inc.*, 739 A.2d at 136. Though contracts may possess the contractually necessary incidents to be binding, they may still be illegal, invalid, or unenforceable for other reasons.

[175] "Because both alleged contracts here were for the conveyance of interests in land, it was required that there be writings expressing the consideration for each sale, signed by Arrowhead. . . . [T]he trial court concluded that the two writings relied upon by Moore . . . were too indefinite to allow their enforcement." *James H. Moore & Assocs. Realty, Inc.*, 892 P.2d at 370.

essential terms for a binding agreement can be found, the contract may be enforceable.[176] In addition, once the Statute of Frauds requirement for a writing has been met, notwithstanding language in the written contract disclaiming the enforceability of subsequent written modifications, oral modifications may be effective if they do not modify essential terms.[177]

The concept of an oral contract provides an alternate theory of recovery that recognizes parties in a failed real estate negotiation must respect the policy that the Statute of Frauds protects against the imposition of specific performance, but nevertheless finds that an oral agreement exists for purposes of damages.[178] Courts therefore apply the tact that when the aggrieved party is damaged by a valid oral contract, then the aggrieved party may obtain reliance damages.[179]

A contract implied-in-fact is similar to an oral contract as an alternative to the application of the Statute of Frauds. An implied-in-fact contract, however, is manifested non-verbally, with neither written nor oral provisions, but for which a mutual agreement and intent to promise can still be found based on external circumstances.[180]

Another alternative method to address Statute of Frauds challenges is to arrive at the same measure of damages as would be available if a contract existed, but establish the right to compensation on a fairness argument, rather than a contract basis. These arguments may provide a more direct route to the same destination. One means is by applying the doctrine of unjust enrichment, which is like restitution damages.[181]

Even as the Statute of Frauds was adopted, a parallel doctrine of "part performance" was adopted to reinforce that partially performed contracts would be specifically enforced, even if they otherwise failed to comply with the Statute of Frauds.[182] Thus courts can continue to find a different

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[176] *See id.* at 372.

[177] *See id.*

[178] The required elements for an oral agreement to be deemed a binding contract are whether (1) the parties do not expressly reserve to be bound only by a writing, (2) partial performance has occurred, (3) all terms have been agreed upon, and (4) the type of contract is not usually written. *See Winston*, 777 F.2d at 80; *R.G. Group, Inc.*, 751 F.2d at 74-75; *Cleveland Wrecking Co.*, 28 F. Supp. 2d at 295. *But see Shovel Transfer & Storage, Inc.*, 739 A.2d at 136 (stating that when elements for forming a contract are given by statute, the contract is not enforceable until the elements are met).

[179] *See* Stalnaker v. Lustik, 745 A.2d 1245, 1248 (Pa. Super. Ct. 1999).

[180] *See Milandco*, 2001 U.S. Dist. LEXIS 20770 at *23 ("Implied-in-fact contracts may arise, for example, in situations where there have been previous contractual dealings and performance continued even though written contracts have lapsed, or where at least one party has fully or partially performed.").

[181] *See Reprosystem*, 727 F.2d at 263 (identifying the doctrine of unjust enrichment as "a party should not be allowed to enrich himself at the expense of another."). *Stalnaker*, 745 A.2d at 1248 (allowing recovery of reliance damages only); *see also infra* Part III.F. (discussing damages).

[182] *See* RESTATEMENT (SECOND) OF CONTRACTS § 129 cmt. a (1979) ("*a. Historical note and modern justifications*. . . .The [part performance] doctrine is contrary to the words of the Statute of Frauds, but it was established by English courts of equity soon after the enactment of the Statute. . . . Enforcement [in the United States] has instead been justified

path to relief for the plaintiff by using the part performance doctrine. With part performance, because no contract is found, the court may find damages equivalent to reliance, rather than expectation damages.[183]

E. Remedies

In analyzing the effect of the letter of intent, apparently some courts reason backwards from their sense that an injustice has occurred. Once the suffering has been determined, the courts find that either a contract existed because the essential terms have been agreed upon, or damages should be recoverable out of fairness because of reliance or other changes in position.[184] Courts are also sympathetic to the use of specific performance as a remedy.[185] Specific performance is applied to impose restoration of the subject matter and to prevent unjust enrichment. However, specific performance requires the following: (1) sufficient detail in the agreement reached, and (2) confirmation that an award of money would be inadequate because the contract resists quantification, meaning damages as a remedy would not be a justifiably reasonable substitute for the consummation of the transaction.[186] Generally, because specific performance requires a

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on the ground that repudiation after 'part performance' amounts to a 'virtual fraud.' A more accurate statement is that courts with equitable powers are vested by tradition with what in substance is a dispensing power based on the promisee's reliance, a discretion to be exercised with caution in the light of all the circumstances."). "[T]he man who may have drafted section 4 [of the Statute of Frauds] suggests that the idea that part-performance as an alternative to writing was then recognized in the Chancery as a prerequisite to specific performance, and that the intention was that this should continue to be so; this would entirely explain the silence of the Statute on the matter." SIMPSON, *supra* note 81, at 615-16.

[183] *See* SAMUEL A. GOLDBERG, SALES OF REAL ESTATE IN PENNSYLVANIA 53-54 (1958). *See also infra* Part III.F (discussing damages).

[184] *See I.M.A., Inc.*, 713 P.2d at 888-89 (holding that a finder of fact must decide first, if both parties agreed to essential terms and conditions, as revealed by their words and conduct, and second, if the aggrieved party had substantially performed its promises).

[185] *See Rand-Whitney Packaging Corp.*, 651 F. Supp. at 534 (stating that specific performance of a contract is possible and appropriate when the assets are unique and the business opportunity is unique such that there would be irreparable harm with no adequate remedy at law if the contract were not specifically enforced).

[186] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 359-60 (1981):

> § 359. Effect of Adequacy of Damages
>
> (1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.
>
> (2) The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance or injunction as to the contract as a whole.
>
> (3) Specific performance or an injunction will not be refused merely because there is a remedy for breach other than damages, but such a remedy may be considered in exercising discretion under the rule stated in § 357.
>
> § 360. Factors Affecting Adequacy of Damages
>
> In determining whether the remedy in damages would be adequate, the following circumstances are significant:
>
> (a) the difficulty of proving damages with reasonable certainty,
>
> (b) the difficulty of procuring a suitable substitute performance by

showing that money damages are an inadequate remedy, money damages are the more common remedy.[187] But because of the unique nature and quality of real estate as an asset, specific performance is a meaningful and available remedy.

F. Damages

Courts may fashion damage calculations commonly grouped under expectation damages, reliance damages, and restitution damages (though liquidated damages[188] and punitive damages may also apply).

1. Expectation Damages

Courts prefer to apply expectation damages.[189] Sometimes referred to as "benefit of the bargain" damages, these are a buyer's interest in capturing the benefit of the bargain by being put in as good a position as the buyer would have been in had the contract been performed.[190] Expectation damages are the monetary equivalent of specific performance. Consequently, expectation damages are not only losses suffered, but also the gains unrealized, to the extent those two amounts exceed results obtained from not performing the contract.[191] The unrealized gains are sometimes the equivalent of consequential damages.[192] Sometimes, even in the absence of an enforceable contract, the aggrieved party is entitled to recover a "reasonable price" if it had given up an asset.[193]

2. Reliance Damages

If expectation damages are unascertainable or otherwise too difficult to

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means of money awarded as damages, and
(c) the likelihood that an award of damages could not be collected.

[187] *See* First Nat'l State Bank of N.J. v. Commonwealth Fed. Sav. and Loan Assoc., 610 F.2d 164, 171 (3d Cir. 1980).

[188] One conspicuous problem with liquidated damages is that they may be unenforceable as a penalty. A less obvious problem is that if they are enforceable, they cannot be rescinded even though other damage calculations may put the aggrieved party in a better position. *See Carlos R. Leffler, Inc.*, 696 A.2d at 162.

[189] *See ATACS Corp.*, 155 F.3d at 669 (stating "[t]he preferred basis of contract damages seeks to protect an injured party's 'expectation interest.'").

[190] *See In re* Liquidating Corp. v. LaSalle Capital Group Inc., 44 F. Supp. 2d 552 (S.D.N.Y. 1999); Venture Assocs. Corp. v. Zenith Data Sys. Corp., 887 F. Supp. 1014, 1018 (N.D. Ill. 1995). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981):

§ 347. Measure of Damages in General
Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
(b) any other loss, including incidental or consequential loss, caused by the breach, less
(c) any cost or other loss that he has avoided by not having to perform.

[191] *See* Am. Air Filter Co. v. McNichol, 527 F.2d 1297, 1299 (3d Cir. 1975).

[192] *See Associates Corp.*, 96 F.3d at 278.

[193] *See Kuss Mach. Tool & Die Co.*, 143 A.2d at 40.

measure reasonably, courts will protect the injured party by permitting compensation for its reliance interest.[194] Reliance interest is the interest in being reimbursed for loss caused by reliance on the contract. Damages are measured by the amount necessary to be put in as good a position as the buyer would have been in had the buyer never entered into the contract.[195] This is frequently equated with recovery of costs for a failed negotiation.[196] Some courts limit damages arising from promissory estoppel to out-of-pocket expenses, rather than benefit of the bargain damages.[197]

3. Restitution Damages

A third form of damages is based on restitution interest, or the interest in restoring to the buyer any benefit a third party has conferred on the seller. This interest protects against unjust enrichment.[198] A restitution interest may be protected if a party not only changed its own position in reliance on the letter but also conferred a benefit on the other party. The court may require the other party to disgorge the benefit received by returning it to the party who conferred it.

There are, in addition to these damages, punitive damages.[199] As an alternative, the parties can agree to use solely liquidated damages[200] to

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[194] *See ATACS Corp.*, 155 F.3d at 669. Reliance damages can be the fallback damages for failure to negotiate in good faith, if the plaintiff cannot prove that good faith negotiations would necessarily have resulted in a final contract. *See also infra* Part IV.A.2 (discussing good faith).

[195] "[The] reliance damages . . . put [a party] back in the position in which he would have been had the contract not been made." *See Shovel Transfer & Storage, Inc.*, 739 A.2d at 140. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981):

> § 349. Damages Based on Reliance Interest
>
> As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

[196] *See In re Liquidating Corp.*, 44 F. Supp. 2d 552.

[197] *See Arcadian Phosphates, Inc.*, 884 F.2d at 73.

[198] *See Reprosystem*, 727 F.2d at 263. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981):

> § 371. Measure of Restitution Interest
>
> If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either
>
> (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
>
> (b) the extent to which the other party's property has been increased in value or his other interests advanced.

[199] *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981):

> § 355. Punitive Damages
>
> Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

[200] *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981):

> § 356. Liquidated Damages and Penalties

impose certainty on the possible exposure.

V. SEPARATING BINDING AND NONBINDING PROVISIONS

The suspicion surrounding the use of a letter of intent stems from the fact that its incontrovertibly enforceable provisions add to the impression that all its provisions are enforceable, even those the parties originally professed were not. The parties may expect initially that the terms of the letter of intent only foreshadow the terms of the anticipated purchase-and-sale contract, and are not yet to be enforceable; but before disappointment sets in, one of the parties will start to act as if the essential nature of the letter is that it is generally enforceable. Conventional wisdom would predict that reasonable minds should recognize some or all of the provisions in a letter of intent are clearly not binding because they require either further negotiation and approval, or finalization by a formal definitive written contract.[201] But sound wisdom is rarely conventional, and the better practice is to make clear what would otherwise be obscure and to separate and constitute as enforceable those important ancillary matters that determine the framework in which the negotiation will be conducted, such as intent, exclusivity of negotiation, disclaimer of conditions, confidentiality, expenses, and access. The careful drafter would contemporaneously and in a corresponding process collect nonbinding provisions in a separate term sheet relating to the possible transaction itself. If the provisions considered enforceable are sprinkled through the letter, the letter should at least distinguish which specific provisions are

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(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.
(2) A term in a bond providing for an amount of money as a penalty for non-occurrence of the condition of the bond is unenforceable on grounds of public policy to the extent that the amount exceeds the loss caused by such non-occurrence.

[201] *See Skycom Corp.*, 813 F.2d at 817 (holding that both plaintiff and defendant were wrong in the belief that the agreement in principle was contractually binding or not binding as to all its provisions, because particular provisions may bind under the doctrine of promissory estoppel); *ATACS Corp.*, 155 F.3d at 666. *See also Reprosystem*, 727 F.2d at 262 (overruling the lower court decision that as a matter of fact a contract was made by a series of negotiations starting with a meeting, proceeding to a simple letter offering a purchase price subject to execution of a final agreement, then an "agreement in principle," then drafting a formal agreement to final executable form, and finally written notice that the agreement was in final form subject to government approval and final signing, the higher court reasoned that no contract existed because at all times the parties intended to be bound only after execution of formal contracts, as shown by (1) the first letter of proposal, (2) the public press releases, (3) the condition in the final agreements for authorization, execution and delivery of the agreements to be binding, as well as (4) the exchange of legal opinion letters that the agreements are binding. This result embraces the doctrine of freedom of contract over the principle of good faith requiring that a negotiation cannot be revoked for reasons unrelated to the negotiation.).

enforceable.[202]

A. Binding Provisions

1. Intent

Stated intent is still the strongest evidence of empirical intent.[203] Though intent is a question of fact, fact finders will look first to the words, then to the circumstances surrounding the words.[204] Both parties should expect the courts to enforce their stated intent. If the intent is to prepare a letter which is intended to be not enforceable in any regard, except for the statement of intent itself, it should so state.[205]

2. Good Faith

The heart of the effective letter of intent is establishing with binding effect what governs the negotiation: the restrictions, conditions, covenants, qualifications, and disclaimers of the parties in dealing with each other during the negotiation phase. The obligation, explicit or implicit, to continue negotiations in good faith is one of the paramount battlegrounds

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[202] *See Anderson Chem. Co.*, 768 F. Supp. at 1578 (upholding summary dismissal of claim that letter of intent was an enforceable contract because the court concluded, though some parts of the letter created independent obligations, the obligations were not the same as a contract to sell).

[203] *See Arcadian Phosphates, Inc.*, 884 F.2d at 72 (upholding the dismissal of a claim to enforce a memorandum of understanding by applying the doctrine that the "language of agreement is the most important [factor in determining intent]." Significant negotiations resulted in a complex and detailed memorandum which still suffered certain omissions dealing with purchase money financing terms and future equity participation "to be subject to mutual agreement." The court found the memorandum revealed that at least one of the parties did not intend to be bound. This court, and many New York courts, referred to and invoked the authority of *Tribune* with approval.). *See generally Tribune*, 670 F. Supp. at 491. *See also Empro Mfg.*, 870 F.2d at 425-26 (affirming a finding that no contract existed when parties' written intent was not to be bound); *Reprosystem*, 727 F.2d at 262 (reversing a finding that a contract existed when parties' written communications conclusively established an intent not to be bound); *Arnold Palmer Golf Co.*, 541 F.2d at 587 (noting that parties can maintain complete immunity from all obligation by expressed intention, e.g., writings); *Frutico*, 833 F. Supp. at 297 (noting that if parties state their intent not to be bound by any agreement until it is in writing, and signed, no contract exists until that point); *supra* Part III.A.

[204] *See Empro Mfg.*, 870 F.2d at 425.

[205] *See GMH Assocs.*, 752 A.2d at 894. Consequently, a letter could be legended with text similar to the following language which addresses the six points raised in *Tribune*:

> Notwithstanding that either party, or both, may expend substantial efforts and sums and may change its financial position and prospects to its detriment in anticipation of entering into a binding contract of purchase and sale of the subject property in the future, the parties acknowledge, following customary tradition and practice with nonbinding "letters of intent," that in no event will this letter, or the materials provided by the parties in connection with it, be construed as an enforceable contract either to purchase and sell the subject property or to negotiate for such contract, and each party accepts the risk that no such contract might be executed or might otherwise arise.

for dispute between parties, and the letter should directly address it.[206] There is no consensus among cases and commentaries whether there is an implicit obligation to negotiate in good faith outside of a contractual relationship.[207] The legal doctrine of good faith has been identified as occurring as early as Roman law.[208] Good faith is based on the presump

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[206] The following language articulates a number of the issues discussed in Part IV.A.2, which are otherwise implicit in the principle of good faith, and explicitly provides how the owner would intend them to be treated:

> Definitive Transaction Contract Prospective Buyer understands and agrees that unless and until a final and formal definitive written agreement has been executed and delivered by Owner and Prospective Buyer ("Definitive Transaction Contract"), (i) no contract or agreement or any legal obligation of any kind whatsoever with respect to a Possible Transaction shall be deemed to exist between Prospective Buyer and the Owner, (ii) Prospective Buyer hereby waives, in advance, any claims (including, without limitation, breach of contract, breach of duty to negotiate in good faith, tortious inducement, misrepresentation, fraud, or conspiracy) against the Owner, its Representatives or any of their respective directors, officers, employees, stockholders, owners, affiliates or agents ("Owner Parties") arising out of or relating to any transaction involving the Owner Parties (other than those as against the parties to the Definitive Transaction Contract in accordance with the terms thereof) in connection with any Possible Transaction, (iii) although the parties may reach an oral understanding or otherwise manifest mutual assent on one or more issues, neither party shall be bound by and no rights or liabilities, either express or implied, shall arise on the part of either party on account of any oral agreement, understanding, alleged course of conduct or other perceived or apparent manifestation of mutual assent. By way of example, and not limitation, (i) this letter agreement is not an agreement either to negotiate or to negotiate in good faith, or to use best efforts or reasonable efforts to reach further agreement, (ii) this letter agreement is not an estoppel with respect to any Possible Transaction, and (iii) the terms and conditions set forth in any Discussion Information (defined in this Letter Agreement) shall be provided for discussion purposes only and shall not constitute an offer, agreement, or commitment. Prospective Buyer further acknowledges and agrees that the Owner and its Representatives may in their sole and absolute discretion (i) reject any and all proposals made by Prospective Buyer or any of Prospective Buyer's Representatives with regard to a Possible Transaction, refuse to compromise any issue, and terminate discussions and negotiations with Prospective Buyer at any time, and (ii) adopt and change any position or procedures relating to any process or transaction involving the Owner or the Property, at any time with respect to any or all interested parties, without notice to Prospective Buyer or any other person. Neither this paragraph nor any other provision in this letter agreement can be waived or amended except by written consent of the Owner, which consent shall specifically refer to this paragraph (or such provision) and explicitly make such waiver or amendment.

[207] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (1981) ("*Good faith in negotiation.* This Section, like UNIFORM COMMERCIAL CODE § 1-203, does not deal with good faith in the formation of a contract. Bad faith in negotiation, although not within the scope of this Section, may be subject to sanctions."). One commentary considered cases that support the doctrine of "*culpa in contrahendo*," meaning fault in negotiating, as creating liability for the wrongdoer. *See generally* Friedrick Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

[208] *See* FREDERICK H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 124-25 (1955) ("In the actions on the consensual contracts, on the other hand, the judge, after

tion of enforcing principles that are so fundamental they are implicit in every contractual undertaking. Its current status in contract law is codified in one instance in the Uniform Commercial Code as "honesty in fact and the observance of reasonable commercial standards of fair dealing,"[209] which "may not be disclaimed by agreement," though "[t]he parties, by agreement, may determine the standards by which the performance is to be measured if those standards are not manifestly unreasonable."[210] "Honesty in fact" has been identified as a subjective test and referred to as the rule of "the pure heart and the empty head."[211] Such notions are linked to common notions of decency, fairness, and reasonableness.[212] Honesty in fact is essentially a test of what the party knew, whereas fair dealing raises the prospect that it also encompasses what the party should have known, a more external test. This codification in the U.C.C. should have some effect on applying the doctrine to real estate contracts, even though it is in the context of common law rather than statutory law. Commentators espousing the U.C.C. test have considered disclosure as a means of effectively meeting a reasonableness standard, by exercising "attention-calling," which in turn avoids surprise.[213] Disclosure educates the parties and manages their expectations. Disclosure should satisfy even an extreme form of the

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being merely told in the most general terms that the plaintiff had sold a particular thing to the defendant, or bought it from him, and so on, in such a way as to specify the form of action, the parties, and the subject-matter of the action, was directed to order the defendant, if unsuccessful, to pay the plaintiff whatever he found to be due *ex fide bona*, that is to say, in accordance with the requirements of good faith; and this cast on the judge, or rather the jurists who advised him, the burden of deciding what the defendant ought in good faith to have done, in other words what kind of performance the contract called for. This meant that, in contrast to the stipulation, where all the terms had to be expressed, the parties would be bound not only by the terms they had actually agreed to, but by all the terms that were naturally implied in their agreement.") (citations omitted).

[209] UCC revised § 1-201(b)(20) (2002).

[210] UCC revised § 1-302(b) (2002).

[211] Rubert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 812 (1958).

[212] *See* E. Allen Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 668 (1963).

[213]
> To secure a discretionary power insulated from subsequent review, rather, that party should be required to negotiate a clear and unambiguous agreement that the subsequent exercise of such discretion will not be subject to any external standards of reasonable conduct. Anything less than an explicit agreement permitting exercise "for any reason" or "with or without cause" should not satisfy this exacting standard.
>
> . . . This conception of the force of good faith resonates with what Karl Llewellyn once generally referred to as an obligation of "attention-calling." Llewellyn argued that the law should require a party to call affirmative attention to any desire to contract at variance from extant community (in specific, commercial) standards of fairness and reasonableness. For the law to permit otherwise, he reasoned, would result in the frustration of the actual expectations that may arise in the relational and commercial context.

Van Alstine, *supra* note 121, at 1296-97 (footnotes omitted).

principle of commercial reasonableness.

That some good faith obligation exists usually is founded on the same three fundamental principles that support the determination of contractual enforceability[214] because that obligation, in its most essential form, arises from an anticipatory contractual relationship including: (1) intent to be bound,[215] (2) definiteness, and (3) consideration. A precondition may be that all material terms have been agreed to.[216] The language of the contract can distinguish whether the parties are required to use best efforts[217] or reasonable efforts[218] to achieve a final agreement, or simply to negotiate the issues in good faith.[219] Notwithstanding the highly vaunted and laudable purpose of good faith—"justice, and justice according to law"[220]—honest, honorable, fair, reasonable, and decent contracting parties may also choose to discriminate between points in the negotiation that are to be restricted to the requirements of good faith and points that are to be unrestricted. The parties can predetermine whether the resolution of those negotiations should or should not result in the creation of a contract. The parties can

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[214] *See* Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1223 (7th Cir. 1998). Some jurisdictions impose the implicit obligation in the case of contracts to negotiate in good faith, but only upon determination that a contract exists. *See Rennick*, 77 F.3d at 317. Other jurisdictions have flatly rejected the implication of a general duty of good faith and fair dealing in all contracts. *See* City of Midland v. O'Bryant, 18 S.W.3d 209, 215 (Tex. 2000).

[215] *See Budget Mktg., Inc.*, 927 F.2d at 425 (sustaining a lower court ruling dismissing the claim of breach of an agreement to negotiate in good faith, when the letter of intent included a formal written contract condition, concluding that the presence of that condition meant there was no intent to be bound). *But see Itek Corp.*, 248 A.2d at 629 (stating if the parties obligate themselves to make every reasonable effort to agree upon a contract, then only failing to agree absolves them from liability.

[216] In the six-part test of *Tribune*, open terms are not a fatal defect. *See supra* text accompanying notes 22-23. *Tribune* also states "if the agreement is too fragmentary, in that it leaves open terms of too fundamental importance, it may be incapable of sustaining binding legal obligation." 670 F. Supp. at 497. *See also SKD Invs., Inc.*, 1996 WL 69402, at *9 (disregarding the omission of "nonessential" terms when finding a good faith obligation to negotiate). *But see* Teachers Ins. & Annuity Ass'n of America v. Olympia and York Battery Co. and O&Y Battery Park Corp., No. 14617/86 (N.Y. Sup. Ct. June 26, 1992) ("Where parties have reached an agreement intending to be bound by such agreement but have left open certain significant terms for further negotiations the parties have a duty to negotiate in good faith. . . ."); VS&A Communications Partners Ltd. P'ship v. Palmer Broad. Ltd., 1992 WL 339377, at *10 (Del. Ch. Nov. 16, 1992) (stating that an agreement identifying itself as a preliminary understanding and which permitted the seller to terminate negotiations if the financing conditions were unsatisfactory, did not support the spurned prospective purchaser's complaint that the seller was prohibited by good faith from repudiating terms that were previously settled during negotiations. Rather, the court concluded the seller's good faith obligation was to keep the asset off the public market and not to negotiate with others. The court upheld the seller's right to change its mind.).

[217] *See Pinnacle Books*, 519 F. Supp. at 122 (finding contract terms requiring best efforts unenforceable).

[218] *See Itek Corp.*, 248 A.2d at 629.

[219] *See Feldman*, 850 F.2d at 1223.

[220] Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 198 (1968).

agree that no contract exists during the prelude to that resolution.

When applied to letters of intent, some courts distinguish the common law good faith requirement as applying to the contract only,[221] and therefore as not applying to the negotiations that either precede the contract or precede the letter of intent, if the letter has a contractual effect.[222] Courts have also found that letters of intent can be agreements to negotiate requiring best efforts.[223] Some courts have gone to the extreme of imposing an obligation of good faith and best effort, even when no promise exists.[224]

The requirement of good faith has been distinguished in its application to different phases of the life cycle of a contractual relationship. Commentators have identified different manifestations of good faith as they apply to negotiation, performance, and remedies. Good faith conduct would include sincere effort, continuousness, and diligence in the negotiation,[225] but need not include abandoning self-interest,[226] continuing negotiations after a stalemate[227] or disinterest, or the attraction to a better deal elsewhere.

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[221] *See* A/S Apothekernes Lab. v. I.M.C. Chem., 873 F.2d 155, 159 n.2 (7th Cir. 1989) (stating, "the implied duty of good faith and fair dealing in the performance of contracts . . . must be distinguished from the duty to negotiate in good faith that arises from a preliminary letter of intent.").

[222] *See GMH Assocs.*, 752 A.2d at 903 (holding that neither party had a duty to negotiate in good faith).

[223] *Cf. Reprosystem*, 727 F.2d at 264 (holding that any implied agreement to negotiate in good faith was too indefinite to enforce); *Channel Home Ctrs.*, 795 F.2d at 299 (stating "an agreement to negotiate in good faith . . . is an enforceable contract."); *Frutico*, 833 F. Supp. at 300 (stating that parties can bind themselves to negotiate in good faith, but without an agreement, there is no duty); Ogden Martin Sys., Inc. v. Tri-Cont'l Leasing Corp., 734 F. Supp 1057, 1071 (S.D.N.Y. 1990) (holding that a duty to negotiate in good faith arises only once the parties have agreed to do so).

[224] The *Duff-Gordon* rule states, "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917). "Under the [*Duff-Gordon*] rule, the implication to use 'best efforts' is clearly predicated on the lack of an express promise." Perma Research & Dev. Co. v. Singer Co., 308 F. Supp. 743, 748 n.16 (S.D.N.Y. 1970). The *Duff-Gordon* case was decided by Justice Cardozo, who later quoted from it to distinguish between the older "'primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal,'" and the approach of realism, which supports the exercise of discretionary judgment by the court to avoid inequitable outcomes. CARDOZO, *supra* note 14, at 100.

[225] *See A/S Apothekernes Lab.*, 873 F.2d at 159. *But see Tribune*, 670 F. Supp. at 500 (stating that if it is determined that the parties intended to be bound by the letter, then the presence of a reservation for approval by counsel, the board, or final documents in approved form "does not free a party to walk away from its deal merely because it later decides that the deal is not in its interest.").

[226] *See* Schwanbeck v. Federal-Mogul Corp., 578 N.E.2d 789, 795 (Mass. App. Ct. 1991) (stating, "good faith means something less than unremitting efforts to get to 'yes,' with the players at all times playing their cards face up. Rather, the obligation means that the preliminary agreement has not been entered into for some ulterior purpose, such as to set up the proposed buyer from the outset as a stalking horse for another buyer, or to satisfy a creditor that steps to transform an asset into cash are actually under way.").

[227] *See* Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza Ltd. P'ship, 734 F. Supp. 1181, 1190 (D. Md. 1990) (holding that when the defendant executed a letter of intent requiring it to negotiate in good faith mutually acceptable provisions as were agreed to in

Examples of bad faith negotiation could include the following: (1) unjustifiable refusal to negotiate,[228] (2) insistence on improper or unreasonable conditions,[229] (3) illegal, unethical, or otherwise improper negotiating tactics,[230] including negotiation without serious intent to contract and taking advantage of another in driving a bargain,[231] (4) misrepresentation or nondisclosure of assumptions fundamental to the commencement of the negotiation, including entering a deal not intending to perform or recklessly disregarding prospective inability to perform,[232] (5) reopening closed issues,[233] and (6) repudiation,[234] including abusing the privilege to withdraw a proposal or a offer.[235] Other examples of bad faith conduct that usually apply to performance, but which can also apply to negotiation include: (1) evasion of the spirit of the deal; (2) lack of diligence and slacking off; (3) willfully rendering only substantial performance; (4) abuse of power to specify terms; (5) abuse of power to determine compliance; (6) interference with or failure to cooperate in the other party's performance.[236] Examples of bad faith conduct applying to enforcement that can also apply to negotiation include: (1) conjuring up disputes, (2) adopting overreaching or "weaseling" interpretations and constructions of language, (3) taking advantage of another to get a favorable readjustment or settlement of a dispute, (4) abusing the right to adequate assurance of future performance, (5) wrongfully refusing to accept the other's performance, (6) willfully failing to mitigate damages, and (7) abusing the power to terminate.[237]

A duty to negotiate in good faith can be achieved even while an independent requirement calls for official approval of the final agreement.[238] The reservation that the approval or authority of the board is a necessary condition to final agreement, however, may not be sufficient to

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another project between plaintiff and defendant, the defendant was not liable for refusing to agree because "[r]efusing to budge is hardly an indication of a lack of good faith.").

[228] *See Tribune*, 670 F. Supp. at 498 ("The [good faith] obligation does, however, bar a party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement."). However, one court's unjustifiable refusal to negotiate may be another court's permissible right to break off negotiations.

[229] *See id.* at 498.

[230] *See A/S Apothekernes Lab.*, 873 F.2d at 158. *But see Schwanbeck*, 578 N.E.2d at 801 (holding that though the defendant's actions could fit within the meanings of the words "shabby," "infuriating," "deceit[ful]," and "posturing," there was no legal duty on the part of the defendant to act better because the letter of intent had expired).

[231] *See* Summers, *supra* note 220, at 230-32.

[232] *See id.* at 227-30.

[233] *See Tribune*, 670 F. Supp. at 506. One court's bad faith reopening of issues may be another court's permissible right for a party to change its mind. *See VS&A Communications Partners, Ltd. P'ship*, 1992 WL 339377 at *167.

[234] *See Feldman*, 850 F.2d at 1223; *Olympia and York Battery Co.*, No. 14617/86 (N.Y. Sup. Ct. June 26, 1992).

[235] *See* Summers, *supra* note 220, at 223-27.

[236] *See id.* at 233-42; RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

[237] *See* Summers, *supra* note 220, at 243-52; RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

[238] *See A/S Apothekernes Lab.*, 873 F.2d at 159.

permit a party to abandon negotiations.[239] The disclosed right to terminate negotiations at any time for any reason would negate the expectation (or implication of a duty) to continue to negotiate. The parties should consider an express acknowledgment or statement that the cessation of negotiations, the failure to resolve open issues or make compromises, the failure to disclose information which may later be considered material, or the termination of the letter for any other reason without cause does not expose either party to liability. Supplemental acknowledgments that each party proceeds at its own risk and knowingly intends to bear its own costs if negotiations cease for any reason should buttress the central acknowledgment.[240] The parties can compromise on the degree of good faith negotiation by identifying those reasons that support termination of negotiations with cause including: (1) economic unfeasibility, (2) misrepresentation, or (3) change in circumstances of parties, markets, assumptions, or conditions.

3. Disclaimer of Exclusivity

A covenant that is related to, and sometimes a component of, good faith is the promise of exclusivity. This promise provides that a party to the letter not only will continue discussions with the other interested party to the letter, but will not entertain discussions with someone else who could ultimately replace such other interested party.[241] Within the battle over good faith, the issue of parallel negotiations is a common flash point when negotiations blow up. A careful drafter for the owner would seek to make an express disclaimer of exclusivity. But the offeror might want to restrict the owner from "shopping" the offer, and would look for an exclusivity provision,[242] a break-up fee provision,[243] and a right of first refusal

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[239] *See Tribune*, 670 F. Supp. at 499.

[240] *See Venture Assocs.*, 887 F. Supp. at 1018 (upholding the disgruntled purchaser's right to pursue a claim for expectation damages resulting from the seller's failure to negotiate in good faith, with the basis of the calculation being "the amount that will put [the damaged party] in as good a position as he would have been in had the contract been performed as agreed," if the plaintiff can prove good faith negotiations would have required consummation of the contract. If the contract was not a necessary outcome, damages may be limited to reliance damages, meaning the cost of having engaged in futile negotiations.) (quoting Collins v. Reynard, 607 N.E.2d 1185, 1186 (Ill. 1992)).

[241] The earliest forms of English merchant law, developed from Roman law by the handiwork of Anglo-Saxon merchants, had achieved a similar effect by using "earnest." "[Earnest] did not have the same effect as part payment, for the passage of earnest did not complete the sale and make it irrevocable as did part payment. Where only earnest was given to bind the bargain, the purchaser might recede from the contract, but forfeited the earnest." STREET, *supra* note 80, at 5.

[242] The following language incorporates common issues which owners and offerors negotiate to limit the owner's right to engage in parallel negotiations. The language, both overtly and in spirit, is in conflict with the protective provisions an owner may seek as reflected in the sample language of note 206, *supra*.

> Exclusivity. Within _____ (__) days after the Owner executes and returns this letter to the undersigned (the "Prospective Buyer"), the Prospective Buyer shall deliver to Owner a proposed contract (the "Contract"). The Prospective Buyer

provision.[244] Furthermore, it is important to the offeror that the owner

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and Owner agree to negotiate the terms of the Contract in good faith, and to use reasonable efforts to mutually execute and deliver the Contract by a date ("Effective Date") which is within ___ (__) days after the receipt of the Contract by Prospective Buyer. If the Contract has not been signed and delivered by all required signatories within such ___ (__) days after it's delivered to Owner, this letter may be terminated by either party upon written notice to the other. By acceptance of this letter, Owner agrees to negotiate exclusively with the Prospective Buyer and to refrain from offering or negotiating with any other party for the sale of the Property and the Prospective Buyer agrees to refrain from negotiating with any other party for substitute or alternate property. Such period of exclusive negotiations shall continue for a period of (__) days after the date of this letter.

[243] The following language incorporates issues that the parties may consider if the owner is not limited in entertaining additional negotiations with other parties, but that would protect the offeror to the extent it was relegated to the status of a stalking horse:

Break-up Fee. In the event that Owner breaches its obligations under the sections captioned Exclusivity, Consents, Expenses, or Rights of First Refusal, or this letter is terminated by Owner pursuant to the section captioned Termination and, within twelve (12) months after such breach or termination, Owner closes a transaction relating to the acquisition of a material portion of the Property or majority or controlling interest in the ownership in the Property, or of the Owner, whether through direct purchase, merger, consolidation or other business combination (other than exceptions set forth in the section captioned Rights of First Refusal herein) then, immediately upon such closing, Owner shall pay to Prospective Buyer the sum of $_____.

[244] The following language addresses some of the issues that arise from rights of first refusal. For a more expansive discussion, see Gregory Gosfield, *A Primer on Real Estate Options*, 35 REAL PROP. PROB. & TR. J. 129 (2000):

Right of First Refusal. Owner shall not solicit, initiate, pursue, or otherwise induce parallel or competing negotiations with respect to the subject matter of this transaction. However, if at any time prior to the expiration or earlier termination of this letter agreement, Owner receives a bona fide offer for the purchase of the Property with a purchase price of at least 105% of the Purchase Price in the Non-Binding Term Sheet for the Possible Transaction by Prospective Buyer to Owner, and Owner desires to accept such offer, Owner shall give to Prospective Buyer written notice thereof, said notice to contain:

(i) the essential terms and conditions of the offer made by the proposed purchaser; and

(ii) an offer to sell the Property to the Prospective Buyer in lieu of the said proposed purchaser, upon the same terms and conditions of the offer made by the proposed purchaser.

The Prospective Buyer shall have a period of twenty (20) days within which to deliver written notice to Seller of Prospective Buyer's agreement to purchase the Property in accordance with the offer to Prospective Buyer set forth in the aforesaid notice. If the Prospective Buyer fails to deliver such notice within said twenty (20) day period, Owner shall have the right to complete the sale of the Property to the proposed purchaser. In the event that Owner shall not consummate the sale to the proposed purchaser, the right of first refusal granted herein shall be again deemed automatically reinstated and shall again be in force and effect.

This right of first refusal shall not apply to instances in which the transfer by Owner is in connection with (1) gifts, (2) transactions for the transfer of a larger parcel or multiple parcel or other assets of which the Property is a part, (3) transfers by operation of law, such as mergers, dissolutions, reorganizations,

maintain the asset in its customary and traditional condition so the offeror is not surprised by a sale or sudden shift in value or opportunity.

A "no shop" provision would also clarify that the owner is not allowed to seek or accept other offers, unless legally required by its fiduciary duty to investors or other superseding duty.[245] If the purpose of exclusivity is to fence off the asset during the negotiation period, the parties may be willing to agree that the owner will not enter into parallel negotiations with another prospect during some set time period.[246] Tactical variations for restricting the right to conduct parallel negotiations can be developed from the procedures used with rights of first refusal and rights of first offer. So, for example, the owner would not be restricted in its pursuit of possible transactions, but the offeror under the letter of intent would have a right of first refusal as to any other agreement entertained by owner. Another variation is that the offeror under the letter of intent would be notified of the owner's inclination to commence parallel negotiations and the offeror under the letter of intent may elect to buy exclusivity for a specified period, perhaps in the form of nonrefundable funds, additional deposits applicable to the price, or an increase in the price to be paid. A different variant is to impose exclusivity for the offeror's benefit, but permit the owner to buy out the offeror's right at a price.

4. Disclaimer, Release, Indemnification, Assumption, and Waiver

Ordinarily, one of the layers of the owner's shield from litigation risk is a separate disclaimer of representations and warranties to address the owner's exoneration from responsibility for any obvious or latent dangerous physical condition,[247] and/or any defect in quality of the

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(4) transfers to Owner's affiliates, (5) transfers of co-ownership interests, (6) involuntary or compulsory transfers such as foreclosure, bankruptcy, condemnation, or court ordered liquidation, or (7) transfers required for an extension of credit or debt by Owner.

[245] *See* STV Eng'rs, Inc. v. Greiner Eng'g, Inc., 861 F.2d 784, 788 (3d Cir. 1988) (reversing a lower court that held the seller breached the promise not to solicit when it accepted a management initiated buyout because the managers were in effect acting for the seller as demonstrated by the fact that the buyout was based on confidential information, did not require the managers to invest capital, and required the pledge of the seller's assets. The upper court reasoned that managers, even if privy to confidential information can still act as individual investors, when decisions are made by the board of directors, not the managers.).

[246] *See Feldman*, 850 F.2d at 1221 (holding that in the case of a letter of intent that stated (1) the seller would not negotiate with any other prospect while the proposed acquisition is being pursued and (2) the letter was not binding but the parties would sign a definitive agreement, the letter was clearly precontractual because it precluded contractual enforceability until a binding agreement was executed).

[247] Language reflecting an owner's position without giving significant weight to the concerns of the prospective buyer could be as follows:

Disclaimer as to Property. Prospective Buyer agrees that its exercise of the license granted under this Agreement, and its proposed offer with respect to the Property shall be subject to the Property condition being "AS IS," including all defects latent and patent, and the Owner makes no representation or warranty,

negotiation materials provided by or on behalf of owner.[248]

Another layer of protection is for the owner to seek a release of claims by the offeror to estop the offeror from prosecuting claims against owner for liability.[249]

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express or implied, in fact or in law, as to (i) title to the Property, (ii) any encumbrances, restrictions or conditions which may affect the Property, (iii) the nature, condition or usability of the Property, including but not limited to the suitability for tests by the Prospective Buyer, (iv) the zoning of the Property, or (v) compliance of the Property with Applicable Law (defined below). Prospective Buyer is relying on its own independent inspection of the Property in accepting and exercising the license granted under this Letter Agreement. **THE OWNER DISCLAIMS ANY AND ALL EXPRESS OR IMPLIED WARRANTIES OF FITNESS, MERCHANTABILITY, SUITABILITY FOR INTENDED PURPOSE, AND HABITABILITY.**

[248] Language reflecting an owner's position without giving significant weight to the concerns of the prospective buyer could be as follows:

Disclaimer as to Negotiation Materials. Prospective Buyer acknowledges and agrees that neither the Owner nor any of its Representatives (including, without limitation, Broker) makes any representation or warranty, express or implied, as to the truth, accuracy or completeness of the Negotiation Material. Prospective Buyer agrees that neither the Owner nor any of its Representatives (including, without limitation, Broker) shall have any liability to Prospective Buyer or to any of Prospective Buyer's Representatives relating to or resulting from the use of the Negotiation Material or any errors, misstatements, or omissions therein. Only those representations or warranties which are made in the Definitive Transaction Contract, and subject to such limitations and restrictions as may be specified therein, will have any legal effect.

[249] Language reflecting an owner's position without giving significant weight to the concerns of the prospective buyer could be as follows:

Release. In consideration of the Owner's delivery to Prospective Buyer of Negotiation Materials, and Owner's permission to provide Prospective Buyer access to enter the Property to perform inspections, surveys, audits, and tests, Prospective Buyer does hereby remise, quitclaim, release, and forever discharge, and by these presents does for Prospective Buyer's heirs, successors, personal representatives, executors and assigns, and Prospective Buyer's agents, employees, contractors, subcontractors, officers, directors, shareholders, owners, and partners, and any person claiming under or through any of them, hereby remise, quitclaim, release, and forever discharge the Owner, its directors, shareholders, owners, agents, employees, officers, and contractors (collectively, the "Releasees") from any and all, and all manner of, actions and causes of action, suits, claims, and demands whatsoever at law or in equity which Prospective Buyer, or any of them may have against Releasees relating in any way whatsoever (a) to any condition, quality, accuracy, or completeness of the Negotiation Materials, (b) to any condition of the Property, (c) to the entry onto the Property by or the presence on the Property of Prospective Buyer, its agents, employees, contractors, subcontractors, officers, directors, shareholders, owners, or partners, (d) to the exercise of any rights or performance of any obligations under this Letter Agreement, or (e) the result of any of Releasees' acts or omissions or to any other matter, known or unknown, foreseeable or unforeseeable, patent or latent, arising from any cause whatsoever. **PROSPECTIVE BUYER IS AWARE OF POSSIBLE DANGEROUS AND HAZARDOUS CONDITIONS AT THE PROPERTY AND PROSPECTIVE BUYER HEREBY VOLUNTARILY ASSUMES ALL RISKS OF LOSS, DAMAGE OR INJURY, INCLUDING DEATH, THAT MAY BE SUSTAINED BY**

Indemnification is a third layer of the legal shield to protect the owner from litigation.[250] After the offeror acknowledges it is assuming the risk and renounces the right to shift the risk back to owner, the owner can expect the offeror to shield the owner against the risk that third parties would assert claims. That protection is provided by the offeror's meaningful indemnifications that survive expiration or earlier termination of the letter. The elements of an indemnification can address a number of issues, such as: (1) duration and survival, limiting the right to indemnification to a period based on when the claim is made or when the claim occurs, in effect, excluding losses occurring outside of the liability period, (2) limitation on the period for initiating a claim for indemnification to a set period after discovery of a loss, (3) limitation on scope of loss, such as excluding punitive, consequential, speculative, special, or unforeseen damages, excluding damages occurring outside a designated period, or excluding damages below a minimum amount and above a maximum amount, on an

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THE PROSPECTIVE BUYER, ITS AGENTS, EMPLOYEES, CONTRACTORS, SUBCONTRACTORS, OFFICERS, DIRECTORS, SHAREHOLDERS, OWNERS OR PARTNERS, WHILE IN, ON, OR ABOUT THE PROPERTY. This section shall survive the Termination (as defined in the letter agreement) for [__] months from such date of Termination.

[250] An indemnitor may propose a number of clauses, including:

a. Indemnitor may adjust or settle the Alleged Claim without the consent of the Indemnitee, unless such adjustment or settlement involves, or is reasonably likely to involve, any performance by or adverse admission by or with respect to the Indemnitee.

b. The Indemnitor's obligation to provide the indemnification contained in this letter for the benefit of the Indemnitee is conditioned as follows: (i) Indemnitee does not contribute to the loss by bad faith, negligence, or willful misconduct; (ii) Indemnitee does not admit liability, settle, compromise or discharge, or take further action with respect to the claim without the Indemnitor's reasonable consent; and (iii) Indemnitor's liability for the loss shall be solely for direct damages from the nonpayment of the Alleged Claim, but not consequential, speculative, unforeseen, or punitive damages.

c. The parties agree that Indemnitee may at any time settle the Alleged Claim if Indemnitee (i) waives its rights to claim reimbursement from Indemnitor, (ii) waives its rights to any indemnity from the Indemnitor that otherwise would be payable in respect of the Alleged Claim, and (iii) pays to the Indemnitor any amount previously paid or advanced by the Indemnitor (including all reasonable out-of-pocket costs and expenses incurred by the Indemnitor in the contest of the Alleged Claim) by way of indemnification or advance for the payment of an amount regarding the Alleged Claim; provided that, in connection with the foregoing sentence in no event shall the Indemnitee admit liability by or on behalf of the Indemnitor, without the prior written consent of the Indemnitor.

d. Indemnitee agrees to cooperate with Indemnitor in its response to and defense of the Alleged Claim, including without limitation, providing Indemnitor with copies of pertinent documents and correspondence, making officers and staff who are significant to the defense of the case available to assist in the investigation of the defense, so long as it does not prevent them from performing their ordinary duties for Indemnitee, in which case making them reasonably available within the circumstances, and providing material evidence relating to the Alleged Claim, whether informally, by examination, by deposition, by interrogatory, by testimony, or otherwise.

aggregate or individual basis, (4) description of indemnified events, (5) content of notice to exercise indemnification with specific detail of the claim sufficient for indemnitor to defend it, such as a description of the event, its compliance with the requirements of the indemnification conditions, the amount of the loss, the required party to provide notice, and the effect of delay or noncompliance with notice requirements, (6) identification of indemnified parties and indemnifying parties, (7) standard of indemnification, such as protect on a proactive basis, or defend on a reactive basis, or hold harmless on a make whole basis, or only indemnify, on an after the fact basis, (8) selection of counsel, (9) participation, review, approval, control, or assumption of defense and settlement, (10) treatment of remedies that require something other than the payment of money, such as the indemnitee's right to refuse the remedy conditioned on its release of the indemnitor from further indemnification obligation, (11) recourse against indemnitor for noncompliance by set-off, escrow, letter of credit, noncash collateral, or liability insurance, (12) the effect of indemnitee's provoking claims or exacerbating dormant liabilities, (13) recourse against indemnitee for inappropriate demand for indemnification, (14) recourse against indemnitor for inappropriate protest or resistance to indemnify, (15) standards of reporting the indemnification process by indemnitor to indemnitee and cooperation in defense by indemnitee, such as providing documentation, testimony, witnesses, and work product, (16) issues of privilege and confidentiality among indemnitee, indemnitor, and indemnitor's counsel, (17) the sharing of losses based on passage of time, the cause of the loss, or the effect of a common loss to indemnitor and indemnitee, (18) maintenance of financial covenants by indemnitor, and (19) alternatives to indemnification if the indemnitee is threatened with criminal or injunctive or emergency sanctions.

In addition to the disclaimer, release, and indemnification revolving about the owner's interest, the owner would also seek additional protections from the offeror focused on the offeror's interest. A fourth layer to the shield is the acknowledgment of assumption of risk by the offeror for any matters that the owner disclaimed or was released from. This protection completes the allocation of risk by not only shifting it away from the owner, but expressly shifting it to the offeror.

A fifth layer to the shield is the offeror's waiver of rights adverse to the owner, over and above the release of claims. These potential rights otherwise available to the offeror could be based on part performance,[251] course of conduct, reasonable reliance, or promissory estoppel or statutory or regulatory rights to object to or prevent owner's exercise of its rights as they existed before it entered into the letter with the offeror.

All of these preemptive owner efforts to layer up a shield against the offeror's equitable claims, however, may be unsuccessful under the theory that preexisting contractually binding terms, including those that forbid

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[251] *See supra* Part III.D.

modification absent a writing, may themselves be modified by the acts of the parties.[252]

5. Limitation of Liability

A final backstop to the defensive protocol of disclaimer, release, assumption, waiver, and indemnification, is a provision for limitation of liability. If structured properly, limiting liability, coupled with allocating expenses, can achieve the goal of a nonbinding letter. As such, limited liability becomes an effective defense to claims for damages based on partial performance and reliance. Without limited liability, one party's inducing the other party to perform partially and to change its position increases the liability of the inducing party. As in a termination of contract clause, limited liability can be buttressed with liquidated damages or other deterrents to block unwanted interest in free looks, nuisance offers, or speculative activity. As with structuring the limitation of liability in other contractual settings, limited liability can be achieved by express statement or by the limited creditworthiness of the parties (such as single purpose entities), escrows, and recourse collateral. Even when there is limited liability, the parties may still seek to retain the right to compel or prevent performance.[253]

6. Confidentiality

Negotiations are kept confidential: for the benefit of the offeror, to prevent the owner from shopping the offer of the specific transaction, or using or otherwise misusing the offer to negotiate in comparable but unrelated transactions. For the benefit of the owner, confidentiality

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[252] *See* Wagner v. Graziano Const. Co., 136 A.2d 82, 83-84 (Pa. 1957) ("The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof. The hand that pens a writing may not gag the mouths of the assenting parties.").

[253] The following is an example of language that reflects concerns an owner, rather than a prospective buyer, may have to protect itself even when recourse for damages is not available or meaningful:

> Injunctive Relief. It is further understood and agreed that money damages would not be a sufficient remedy for any breach of this letter agreement by Prospective Buyer or any of Prospective Buyer's Representatives and that the Owner shall be entitled to equitable relief, including injunction and specific performance, as a remedy for any such breach without the obligation for posting a bond or providing any other security, credit, collateral, or recourse. Such remedies shall not be deemed to be the exclusive remedies for a breach by Prospective Buyer of this letter agreement but shall be in addition to all other remedies available at law or equity to the Owner. In the event of litigation relating to this letter agreement, if a court of competent jurisdiction determines that Prospective Buyer or any of Prospective Buyer's Representatives have breached this letter agreement, then Prospective Buyer shall be liable and pay to the Owner the reasonable legal fees incurred by the Owner in connection with such litigation, including any appeal therefrom. Prospective Buyer agrees to waive, and to cause Prospective Buyer's Representatives to waive, any requirement for the securing or posting of any bond in connection with any remedy referred to in this paragraph.

prevents the offeror from revealing the perhaps sensitive fact that the owner is negotiating with the offeror, or from misusing information about the owner's business strategy, or other proprietary material. The generator of the confidential information will require that the information be kept confidential from third parties and not be used by the recipient,[254] but the

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[254] The following language encompasses a number of the areas that the owner, rather than the prospective buyer, may seek to negotiate in connection with confidentiality:

> Confidentiality. As a condition to Owner's providing or causing to be provided to Prospective Buyer and its Representative any material relating to the Possible Transaction, Prospective Buyer agrees to treat it (herein collectively referred to as the "Negotiation Material") in accordance with the provisions of this letter agreement and to take or abstain from taking certain other actions set forth in this letter. Notwithstanding any other provision hereof, the Owner reserves the right not to make available to Prospective Buyer any information, the provision of which is determined by Owner, in its sole discretion, to be inadvisable or inappropriate.
>
> Prospective Buyer hereby agrees that it and its Representatives shall use the Negotiation Material solely for the purpose of evaluating a Possible Transaction and for no other purpose, that the Negotiation Material will be kept confidential and that Prospective Buyer and Prospective Buyer's Representatives will not disclose either (a) that discussions or negotiations are taking place concerning a Possible Transaction or any of the terms, conditions, or other facts with respect to such discussions, including the status thereof (collectively, the "Discussion Information"), or (b) any of the Negotiation Material in any manner whatsoever, except where (i) the Owner gives its prior written consent or (ii) disclosure is to those Prospective Buyer's Representatives who need to know such information for the sole purpose of evaluating a Possible Transaction, who are provided with a copy of this letter agreement and who agree to be bound by the terms hereof to the same extent as Prospective Buyer. In any event, Prospective Buyer agrees (a) to undertake necessary precautions to safeguard and protect the confidentiality of the Negotiation Material, (b) to accept responsibility for any breach of this letter agreement by any of Prospective Buyer's Representatives, (c) upon becoming aware of any unauthorized disclosure or use of any Negotiation Material or Discussion Information, Prospective Buyer to immediately notify the Owner, and (d) to fully cooperate in assisting the Owner in terminating or preventing any third parties from disseminating or using the Negotiation Material or Discussion Information.
>
> In the event that Prospective Buyer or any of Prospective Buyer's Representatives are requested or required to disclose any of the Negotiation Material or Discussion Information, Prospective Buyer shall provide the Owner with prompt written notice of any such request or requirement and cooperate with Owner so that the Owner may make an appearance, submit objections, seek a protective order, or pursue other appropriate remedy and/or waive compliance with the provisions of this letter agreement. If, in the absence of a protective order or other remedy or the receipt of a waiver by the Owner, Prospective Buyer or any of Prospective Buyer's Representatives are nonetheless, in the written opinion of Prospective Buyer's outside counsel, legally compelled to disclose Negotiation Material or Discussion Information to any tribunal or else stand liable for contempt or suffer other censure or penalty, Prospective Buyer or Prospective Buyer's Representatives may, without liability hereunder, disclose to such tribunal only that portion of the Negotiation Material or Discussion Information which such counsel advises Prospective Buyer is legally required to be disclosed, provided that Prospective Buyer notifies Owner of the scope of such disclosure and its recipients, and Prospective Buyer exercises Prospective Buyer's

recipient would want to preserve its rights to seek or obtain that information elsewhere as if it had not received the confidential materials or the confidentiality conditions of the letter of intent. The elements of a confidentiality clause can include: (1) the duration—the commencement of the term and its survival after the termination of the letter, (2) the subject matter of the protection—the material which is nonpublic, not otherwise known, and not otherwise available or obtained, (3) the class of information recipients—the prospective buyer, its employees and consultants, lenders and their consultants, regulators, and other approval parties only to the extent they need to know, (4) the limitation on use of confidential information for the evaluation of the possible transaction, and (5) the standard of confidentiality exercised by those charged with the duty—whether (a) the same standard the party affords to its own confidential information or other parties' confidential information, (b) general disclosure of confidentiality or individual acknowledgments of confidentiality, or (c) confidentiality on an absolute basis, a best efforts basis, or commercially reasonable efforts basis. The causes of action for appropriation of confidential information may be breach of contract, express or

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best efforts to minimize such disclosure and preserve the confidentiality of the Negotiation Material and the Discussion Information, including, without limitation, by cooperating with the Owner to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Negotiation Material and the Discussion Information by such tribunal.

If Prospective Buyer decides it does not wish to proceed with the Possible Transaction, Prospective Buyer will promptly inform the Owner of that decision, and will promptly deliver to the Owner all Negotiation Material (and all copies thereof) furnished to Prospective Buyer or Prospective Buyer's Representatives by or on behalf of the Owner pursuant hereto, or confirm it has destroyed them, and will continue to be bound by Prospective Buyer's obligations of confidentiality and other obligations under this letter agreement.

To the extent that any Negotiation Material may include materials subject to the attorney-client privilege, work product doctrine, the joint defense doctrine or any other applicable privilege concerning pending or threatened legal proceedings or governmental investigations, Prospective Buyer and the Owner understand and agree that Prospective Buyer and the Owner have a commonality of interest with respect to such matters and that the sharing of such material is not intended to, and shall not, waive or diminish in any way the confidentiality of such material or its continued protection under the attorney-client privilege, work product doctrine, the joint defense doctrine or other applicable privilege.

Notwithstanding any other express or implied agreement, arrangement or understanding to the contrary, the parties are permitted to disclose to any and all persons, without limitation of any kind, the tax treatment and tax aspects of the proposed transaction, and all materials of any kind (including tax opinions or other tax analyses) that are provided to either party or its affiliates related to such tax treatment and tax aspects. To the extent not inconsistent with the immediately preceding sentence, this authorization does not extend to disclosure of any other information including without limitation (a) the identification of participants or potential participants, locations, milestones of performance, or other conditions in this transaction, (b) the existence or status of any negotiations, or (c) any pricing, financial or economic information or any other term or detail not related to the tax treatment or tax aspects of this potential transaction.

implied-in-fact, or more commonly, a tort for misappropriation or conversion, with a remedy in damages or injunction to prohibit further use or dissemination of the confidential information.

7. Approval and Authority

A common reservation in letters of intent is subsequent corporate approval by the appropriate authorized committee,[255] and as a general matter, future conditions on performance are not lightly dismissed.[256] In essence, the negotiated letter is completed by an agent or employee with limited scope of authority, which limitation is disclosed by reserving the need for higher approval. Many cases turn on whether the requirement of board of director approval is meaningful.[257] If the letter is a precursor to the negotiation of a contract, the parties should make clear whether the letter is intended to act as the approved document after approval (for

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[255] The following language highlights some areas of concern the parties may seek to address, and language an offeror would be concerned to have reflected, relative to consent. Therefore, this language is inconsistent with the language an owner would seek, as illustrated by note 206 *supra*.

> Consent. Both parties hereto will use reasonable efforts to cooperate with one another and proceed as promptly as reasonably practicable, to prepare and file or submit all necessary requests for consents and approvals from lenders, landlords, governmental entities with jurisdiction, and other parties in interest whose consent or approval is applicable to this transaction, and to use their best efforts to comply with all other legal or contractual requirements or conditions to the signing and completion of the Definitive Transaction Contract. The parties recognize that the signatories to this letter have neither the power nor the authority to bind their respective companies without further authorization from their respective board of directors. The only parties with the authorized right of consent on behalf of the Prospective Buyer are: _____, _____, and _____. The only parties with the authorized right of consent on behalf of Owner are _____, _____, and _____. The signatories hereto shall submit to the owners and directors who have the duty to review and approve the same, the form of Definitive Transaction Contract with the sole missing material being the signature by the authorized signatories, with a request for approval, shall recommend the approval, shall continuously and diligently pursue the approval until it is obtained or refused, shall regularly advise the other party of the status of the approval process, and shall use the most efficacious and expedient procedures to obtain the approval.

[256] "There is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents." *Tribune*, 670 F. Supp. at 499.

[257] *See A/S Apothekernes Lab.*, 873 F.2d at 156 (specifically distinguishing that even having satisfied the requirement to negotiate in good faith, and the achievement of a mutual assent, a contract did not exist prior to compliance with the condition of board of director approval); Philmar Mid-Atl. v. York St. Assocs., II, 566 A.2d 1253, 1255 (Pa. Super. 1989) (dismissing a claim for breach of contract under a letter of intent to lease premises, the court concluded there was no mutual assent when one condition was the approval by the landlord of its agent's proposal, and its approval of a final lease). *But see Tribune*, 670 F. Supp. at 500 (stating that a preliminary binding commitment which is subject to the conditions of a definitive executed agreement and Board approval, by implication, limits those conditions to issues and documentation not addressed in the preliminary commitment).

example, in a loan application which converts to a loan commitment upon approval); or whether approval is simply for the final elaborated contract. The approval process should be subject to a time limitation and the consequence for nonapproval in a timely fashion should also be clear. The letter may specify the standard for the parties' pursuit of the approval process—submission of the letter with a request for approval, recommendation of approval, and supporting efforts to obtain the approval,[258] continuous and diligent pursuit of the approval until it is obtained or refused, regular advice to the other party of the status of the approval process, and use of the most efficacious and expedient procedures to obtain approval. The letter should state clearly if the party seeking approval will pursue it in good faith. A duty to negotiate in good faith is not by itself a duty to pursue approvals or advocate the negotiated transaction in good faith.[259] But the duty to negotiate in good faith cannot be voided by reserving subsequent approval as a condition of the contract.[260]

8. Expenses

How the expenses of the parties are to be shouldered should be addressed. Traditionally, parties pursue potential business opportunities with the expectation of having to pay their own way. The entrepreneurial challenge is to arrive at the offer and acceptance stage without being impoverished by the effort. Thus, each party would be expected to pay its own legal fees, except perhaps, for the expense of conducting enforcement of the letter, with that expense to be paid by the loser. However, in trying to match risk and reward, expenses related to due diligence might be initially the expense of the offeror as the investigating party. But if discussions terminate and the reports are assigned to the owner, the investigating party may require reimbursement of some or all of the expense of the investigation relating to "Negotiation Material" so that the owner pays for the value of the product it receives.[261] Another way of

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[258] *See A/S Apothekernes Lab.*, 873 F.2d at 156 (stating that completion of negotiations does not impose a duty on the negotiator to advocate the letter of intent position, when approval by a final authority is a condition of enforceability).

[259] *See id.*

[260] *See Tribune*, 670 F. Supp. at 499.

[261] The following language spotlights some issues relevant to expenses the owner may wish to consider:

> Expenses. Each party hereto shall bear its own expenses incurred in connection with the negotiation of this letter and the performance of the obligations required under this letter, including the preparation of the Definitive Transaction Contract and the investigations performed during the Investigation Period (defined below). Any materials generated for the Prospective Buyer's benefit in connection with its analysis of the Property shall be delivered to Owner if Closing under the Contract does not occur.

The following language reflects issues the offeror may wish to consider with respect to expenses:

> If this letter is terminated for reasons other than due to the Prospective Buyer's default, Owner shall reimburse the Prospective Buyer for its costs limited to the

allocating risk would be to have the terminating party pay the nonterminating party previously evidenced costs (which could be limited by amount or source) conditioned upon termination of negotiations without cause. In some instances, shifting the risk of costs has been considered a factor in determining whether a letter of intent is enforceable as a contract.[262] Even if the letter is otherwise not binding, it can contain a binding provision with respect to cost reimbursements.[263]

9. Access

In connection with the evaluation of the negotiation materials, the offeror may request to inspect the property and the negotiation materials before entering into the definitive transaction contract, or an owner may insist the diligence period be exhausted before a contract is initiated. In some instances, in conjunction with a letter agreement taking effect, the owner may grant the offeror access rights to investigate the property, its operations, and its records, subject to the confidentiality provision and other binding terms of the letter.[264]

During the negotiations, if the offeror is granted access to enter the real estate to negotiate with other parties having an interest in the asset, to interact with the occupants, or to make inquiry of governmental authorities, these activities may create subsequent liability for the investigated party. The owner should limit the scope of the access, the procedure for appointing the dates of access, and the offeror's interrogation of staff, vendors, invitees, and regulators of the property. This limitation may be

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appraisal of $_____, the environmental report of $_____, and physical inspection of $_____, the title search of $_____, the land survey of $_____, the feasibility report of $_____, the financing commitment costs of $_____, the financial review of $_____, the legal analysis of $_____, and such amounts shall be Owner's sole liability to the Prospective Buyer at law or in equity.

[262] *See* Opdyke Inv. Co. v. Norris Grain Co., 320 N.W.2d 836, 839 (Mich. 1982) (overruling a summary dismissal of a claim for breach of contract because the existence of a contract is a question of fact to be determined by a trial).

[263] *See VS&A Communications Partners, L.P.*, 1992 WL 339377 at *10 ("Negotiators can create certain binding protections against the risk that moving markets present. They can, for example, negotiate binding provisions with respect to transaction cost reimbursement before they reach agreement on the transaction itself.").

[264] The following language addresses several issues the parties would negotiate relating to access to records:

Access to Negotiation Materials. Owner shall provide to the Prospective Buyer all documents and information in Owner's control relevant to such inspection, including environmental reports relative to hazardous substances or any other adverse environmental conditions of the Property; appraisals; market studies; reports on the physical condition of the Property; leases and tenant correspondence files; violation notices of laws, title restrictions or contracts; utility and zoning letters; tax bills and assessments; service and repair records; permits and licenses; service and employment contracts, and such other documents as the Prospective Buyer may reasonably request which are reasonably available to Owner for delivery to Prospective Buyer.

established by requiring prior approval of and participation in, or at least appearance at, the undertaking of any questions or communications. The permission to gain physical access should be circumscribed and is usually characterized as a revocable license, rather than an interest in real estate.[265] If the owner permits testing, the owner would seek to minimize the risk that the offeror's inspection may exacerbate or trigger an environmentally sensitive situation. The owner would retain prior approval rights over the scope and procedures of the work, the right to elect to receive the results of the investigation, and the right to exercise sole control over any reporting, or situation that could require reporting, to regulatory authorities with the express full cooperation from the offeror.[266]

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[265] The following language addresses issues that the owner may wish to consider relating to access to the real estate:

> License for Access to Property. Subject to the terms and conditions of this Agreement, Owner grants to Prospective Buyer and Prospective Buyer accepts from Owner a temporary, nonexclusive, revocable, and nonassignable license to enter the Property for the sole purpose of performing, at Prospective Buyer's sole cost, the tests. Prospective Buyer shall not enter the Property for any additional purpose(s) without the prior written approval of the Owner. The Prospective Buyer shall take reasonable efforts to avoid unnecessary disruption of Owner's business and that of Owner's tenants. Prospective Buyer shall not alter, remove or damage in any manner the Property or the improvements, if any, on the Property, except to the extent necessary to perform the tests, provided Prospective Buyer shall repair and restore the Property as required by this Agreement. Prospective Buyer shall not interfere with or attempt to move any property on the Property without the prior permission of the Owner or its designee. At all times, the Property shall be deemed to be and remain owned by and titled in the Owner. No legal title or any other interest in real estate shall be deemed or construed to have been created or vested in Prospective Buyer by anything contained in this Agreement.

[266] The following language reflects some of the owner's issues relating to conditions for granting the offeror access for testing but does not address the interests of the prospective buyer:

> a. Prospective Buyer shall schedule each entry to the Property or communication with any employee, contractor, invitee, regulator, or other party with an interest in or jurisdiction over the Property ("Property Parties") at least _____ days in advance, in writing, with the Owner, or its designee. Owner may require its representative be present at any inspection of the Property or any meeting between Prospective Buyer and Property Parties.
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> b. The Prospective Buyer shall obtain the prior written approval of the Owner of any work undertaken by or on behalf of Prospective Buyer and any amendments to its work, relating to its access to the Property and Property Parties.
>
> c. Review, approval, or inspection by the Owner under this Agreement, of any plans or activities relating to access to the Property or communications with Property Parties, including but not limited to any amendments thereto, and work or other materials submitted or performed by Prospective Buyer in connection with this Letter Agreement, shall not constitute any representation, warranty, or guaranty by the Owner as to the substance or quality of the matter reviewed, approved, inspected, or tested, and no person or firm shall rely in any way on such review, approval, test, or inspection, whether undertaken or permitted by Owner, and at all times Prospective Buyer shall use its own independent judgment as to the accuracy and quality of all such matters. Owner may

With respect to liability and damage resulting from access, the owner would seek to impose on the offeror the covenants to restore the property to its prior condition, to acknowledge it is performing the investigation of the property in its "as-is" condition without any representation or warranty by the owner or covenant of the owner to make the condition safe or better in any way, to release the owner and its affiliates from any liability that may result from the inspection, to waive any claims the offeree may otherwise have against the owner in connection with the inspection, to protect the owner specifically from any mechanic's or contractor's liens related to the inspection, and generally to indemnify the owner from claims related to the inspection with adequate insurance to cover the obligations of the offeror.[267]

10. Miscellaneous Provisions

Several other types of provisions should also be considered for inclusion because they solve the same problems in letters of intent as they do in more comprehensive contracts.

One critical provision is determining when "termination" occurs because many legal obligations are tied to or untied by that event. Some identifying moments for termination are: (1) the signing and delivery by both parties of the definitive transaction contract, (2) the failure to have such definitive transaction contract signed prior to expiration of the specified period, (3) the exercise of a right of termination as provided under the letter, (4) the expiration of any mutually agreed upon extension or termination of that period, or (5) a material change or event makes the signing and delivery of the definitive transaction contract illegal, invalid, impracticable, or a violation of the fiduciary duties of the owner or the offeror. One important effect of a termination clause is to preserve survival of specific provisions by confirming that the rights of the parties under the letter generally would cease except for the commencement of expressly imposed survival provisions that would then start to toll.

Other common provisions would address: (1) compliance with applicable laws and requirements of governmental authority with jurisdiction over the property, including securities laws and environmental laws; (2) choice of law, venue, and interpretation provisions that become important when a party believes the case law of one jurisdiction would point to a more favorable outcome in its interpretation of the letter; (3) merger provisions as to the binding provisions to avoid parol evidence and to retain enforceability only to the extent the owner believes it retains significant rights with respect to the obligations it has taken on;[268]

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withhold, delay, or condition any rights of approval or consent which it may exercise under this Letter Agreement.

[267] These disclaimers, releases, and indemnifications are discussed *infra* Part IV.A.4.

[268] The following language addresses, from the owner's point of view, the issues of partial enforceability and that termination may be appropriate when material terms are adversely affected, notwithstanding the limitation of exclusive negotiations that the offeror looks to impose on the owner during the agreed upon period of time:

(4) prohibitions on assignment to confirm the party negotiating will be responsible for contracting and settling; and (5) depending on the circumstances, clauses addressing disclaimer of third party beneficiaries, notice requirements, counterpart and facsimile execution, recording, effective date and time for acceptance.

B. Nonbinding Provisions

Nonbinding provisions are ordinarily terms that continue to be negotiated to reach a final definitive purchase-and-sale contract. Therefore, the terms include price: how much is to be paid, when is it to be paid, and adjustments if the payor pays expenses that the payee might otherwise be expected to pay, such as broker commissions, transfer taxes, and permit fees. Though the price may be considered a binding provision because it is frequently affected by other costs, such as costs for required improvements, subsequently discovered repairs or maintenance, governmental approvals, and the valuation of receivables and payables attributable to the ownership, it is initially nonbinding as a practical matter. Other typical provisions that may seem to lend themselves to simple certainty but in hindsight are actually fluid, are provisions dealing with the scope and duration of diligence inspections because they are qualified by the representations and warranties. An example of provisions that are rarely binding are covenants controlling operations such as noncompetes, exclusive rights and uses, and issues of common usage usually treated in restriction and easement agreements.

In instances when the letter of intent is used to establish a preliminary phase of the transaction's development, binding solely as to the framework of negotiations, site-specific provisions that ordinarily would be carried in the final contract can be pulled into the nonbinding term sheet portion of

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Invalidity, Illegality, or Enforceability of Provisions. Should any one or more of the provisions of this letter agreement be found to be invalid, illegal, or unenforceable in any respect, such provision shall be deemed modified to the minimum extent necessary to make such provision legal, valid, and enforceable, and the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby; provided, however, if the Owner, in its sole discretion, deems the loss, lack, or modification of such provision a material diminution of its rights under this letter agreement, it may terminate this letter agreement.

the letter, such as representations,[269] covenants,[270] and conditions.[271]

VI. CONCLUSION

Using a simple contract presumes that intent has been manifested, adequate consideration has been exchanged, and the essential terms relating to parties, price, timing, and assent have been offered and accepted. Tradition holds that the contract process is a very brightline, binary process. Consequently, contract law traditionally disregards the negotiation process. Exclusivity and other protections that specifically attend the negotiation process are likewise disregarded. Using the letter of intent, by contrast, is an effort to frame, buttress, and promote negotiation.

The negotiation process, under the protection of a prenegotiation contractual letter of intent, can be likened to the art of painting. The business terms develop from some fundamental inspiration, some rough shapes and shadows, and continue to take on more recognizable form as the sketch is refined, the blank areas are improved with detail, and the force and intensity of various parts are modulated for balance and efficiency, usually seriatim rather than all at once. The letter of intent identifies the conditions surrounding the negotiation of the essential elements—to permit and encourage the exchange of information necessary to arrive at the essential terms for contract formation. The traditional reflex of the contract model, offer and acceptance, does not fit the process of letter of intent negotiations.

The process can be slow or fast, guileless or cunning, and carries rhythms and themes that are like those of courtship or seduction.[272] As the

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[269] Common examples of representations are: (i) status of the site, such as its size, use, tenant mix, fixed costs, "approved" condition, "improved" condition, compatibility with intended use, (ii) status of the parties, such as their authority, assignment rights, and creditworthiness, (iii) list of required approvals, (iv) accuracy of information provided, (v) use restrictions, (vi) improvement "envelope" restrictions, (vii) contributions for capital improvements (on and off-site) and common expenses, (viii) certifications of inapplicability of regulatory obstacles such as the Employee Retirement Income Security Act, Foreign Investors Real Property Tax Act, and Hart-Scott-Rodino Act, (ix) real estate tax assessments, millage, appeals, abatements, or in-lieu programs, and (x) leasing and revenue information.

[270] Common examples of covenants are: (i) continuing operations, (ii) diligent and good faith pursuit of duties such as to investigate, obtain approvals, and complete design or planning requirements, (iii) schedule for document preparation and execution, (iv) access rights to site and data related to site, (v) release, disclaimer, indemnification, and insurance liabilities, and (vi) notice upon change in conditions of the site.

[271] Common examples of conditions are: (i) financing, (ii) permitting, (iii) inspection, (iv) completion of negotiations, (v) third party equity investment, and (vi) title/survey.

[272] "A lover should pave the way with letters: make sure you detail
A trustworthy maid to act as your go-between.
Examine each message, deduce from his own expressions
Whether it's faked, or written or genuine
Heartfelt distress. Wait a little before you reply: a lover's
Honed up by delay—provided it's not too long.
Don't yield too easily to a lover's entreaties,

parties warily press to expose each other's strengths and weaknesses and try at the same time to discover a path of step stones or common ground, they can follow together to the ultimate destination of the prospective transaction.

When the business people expect that a letter of intent is not binding, they are thinking of the substantive terms. But if you ask them about the surrounding context, the assumptions, the ground rules for entering into the letter of intent, they usually assume both parties should play by the same rules. The best way to address that expectation is by expressly writing it into the letter. The drafters should distinguish the elements of the transaction for the clients to determine which items they expect to be enforceable or unenforceable. A blurred articulation between the positions that, on the one hand, there is an agreement on terms but, on the other hand, there is a reservation for future terms to be agreed upon, reflects the fuzzy thinking that leads to problems with letters of intent. This type of letter will prove to be a weak shield against a later claim that a contract exists, based on the proposition that all necessary terms of the letter are together enforceable, even if some purport to be nonbinding.

In the end, the question usually tested is whether interim writings are preliminary negotiations that have not yet reached the level of a contract, or are a binding contract compelling the parties to change their positions. Alert to these issues, the drafter can shape the letter so that the distinctions between enforceable provisions and precatory provisions can be properly drawn. The drafter's instinct is to seek certainty, though the client may be unwilling or unable to give the needed direction. The drafter would like to convert each nonbinding provision to a binding provision as the means to

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But, equally, don't overdo
Those stubborn refusals. Scare him, yet leave him hopeful;
Let each letter reduce his fear, increase his hopes.
A girl should write elegantly, but in everyday language—
Familiar phrases have their own appeal.
How often a hesitant lover takes fire from letters—
And how often a barbarous style
Will undo the prettiest writer! Even though you're not married
You're anxious to fool your men,
So have slave-boy or handmaid write your letters for you,
Don't compromise yourself with each new beau;
Only a cad, it's true, would hang on to such proofs of passion—
But as evidence they pack a thunderbolt punch.
I've seen girls, pale with terror, submitting, wretched creatures,
To blackmail for life, all because of a letter. In my view
To counter fraud by fraud is permitted—the law will sanction
Arms for self-defense against an armed attack.
So practice writing in a number of different
Hands (bad cess to those who make such advice
Essential!), and take care, always to erase the wax completely
Before you use it: avoid any legible trace
Of a previous message. . . ."

OVID, *The Art of Love in* THE EROTIC POEMS Book 3, 11.469-98 (Peter Green trans., Penguin 1982).

advance the completion of negotiations. But that effort frequently fails to grasp a practical need of the client, which is to enjoy both the protection and the risk of continuing freedom of negotiation until a definitive transaction contract is signed. Business people may continue to expect to preserve flexibility, even if it seems like equivocation. But notwithstanding the economic transaction's freedom and flexibility, the terms as to the framework for the negotiation should be binding so that they remain unchanged and enforceable obligations, and that as the rules of the engagement, they will prevail.