Preliminary Negotiations or Binding Obligations? A Framework for Determining the Intent of the Parties

Neva B Jeffries
PRELIMINARY NEGOTIATIONS OR BINDING OBLIGATIONS?
A FRAMEWORK FOR DETERMINING THE INTENT OF THE PARTIES

By Browning Jeffries

I. INTRODUCTION

It is a fundamental tenet of contract law that mere participation in negotiations does not result in a binding obligation. Rather, to form a contract, all parties to the agreement must manifest an intent to be bound. Sometimes, however, the intent of the parties is not clear, and disputes between the parties can arise.

For instance, think about the following scenario. Two parties enter into negotiations for a potential transaction. Somewhere in the process of the negotiations, the parties execute a preliminary written agreement, with the intention of ultimately replacing that preliminary agreement with a more formal, comprehensive, binding written agreement in the future. The intent of the parties at the time they executed the preliminary written agreement was that it be non-binding. However, two months later, prior to the execution of the formal written agreement, negotiations break down. The disappointed party makes a claim for breach of contract against the other party, asserting that the terms of the preliminary agreement were in fact binding on the parties. If the language of the preliminary agreement is ambiguous as to the parties’ intent, or if subsequent words, deeds, or writings of the parties seem to suggest a change in the parties’ intent from the time of the execution of the preliminary agreement, a judge or jury will be called upon to determine whether the parties are bound by the terms of the preliminary agreement.

Even in the absence of a signed preliminary agreement, disputes between parties can arise over the intent to be bound. If two or more parties are negotiating an agreement – either orally or through the exchange of written (yet unsigned) draft agreements – but a written agreement is never executed, when one party pulls out of the discussions, the disappointed party might assert a claim for breach of oral contract. A court will again be in the position of having to determine the intent of the parties after the fact.

Courts analyzing this issue of the intent of the parties to be bound by informal agreements, in the absence of a signed definitive written agreement, have to weigh competing interests. On the one hand, courts seek to avoid trapping parties in surprise contractual obligations they never intended. On the other hand, courts must enforce agreements that were intended to be binding even if one party has subsequently had a change of heart and even if the parties intended further more comprehensive documentation in the future. Ultimately, it is the aim of contract law to “gratify, not defeat, expectations.”

1 Assistant Professor, Atlanta’s John Marshall Law School. I would like to thank Ross Moore for his diligent research assistance throughout this project.
4 Adjustrite Sys., Inc. v. GAB Bus. Services, Inc., 145 F.3d 543, 548 (2d Cir. 1998).
5 Id.
6 Id.
Unfortunately for courts called upon to weigh these competing interests, there are no bright-line rules for how to determine the parties’ intent to be bound by either a preliminary written agreement or by an oral agreement. To determine intent in such cases, courts generally look at the totality of the circumstances, using objective signs of the parties’ intent.\footnote{Id. at 549; Bitterroot Int’l Sys., Ltd. v. W. Star Trucks, Inc., 153 P.3d 627, 635 (Mont. 2007); Spencer Trask Software & Info. Services LLC v. RPost Int’l Ltd., 383 F. Supp. 2d 428, 441 (S.D.N.Y. 2003). See Part III.C.2 \textit{infra} for a more complete discussion of the objective theory of intent.} These objective signs can come from a number of sources, including the language of the preliminary written agreements, the words and deeds of the parties (as determined by oral testimony), language of un-executed drafts, and other written correspondence between the parties.\footnote{\textit{Restatement (Second) of Contracts} § 26, cmt. b (1981); \textit{Williston}, supra note 3, at § 3:5.} Some jurisdictions, including New York, use a multi-factor test to guide their analysis of the facts and circumstances, while others take a less formulaic approach.\footnote{See Part III.C.2 \textit{infra} for a more complete discussion.} Regardless of the approach used, however, an analysis of the facts and circumstances surrounding any given negotiation will often produce ambiguous results. In other words, frequently some of the facts will suggest the parties intended to be bound at the preliminary stage of negotiations, while other facts will indicate just the opposite – i.e., an intent not to be bound without a formal written agreement. Because this is a highly fact-dependent area of the law and there are no bright-line rules, similar cases produce seemingly inconsistent results across jurisdictions and even within the same jurisdiction.\footnote{See Part III.C.2 \textit{infra} for a more complete discussion of the different approaches courts take to the \textit{ad hoc} interpretation of parties’ intent to be bound.}

The complexity of this area of the law is compounded by the fact that the threshold question of who decides the issue – a judge or a jury – is often a murky one. The basic rule seems simple enough: typically, whether the parties intended to be bound is a question of fact that should be resolved by a jury, but judgment as a matter of law is appropriate where the intent to be bound can be conclusively determined on the record and there is no material dispute of fact.\footnote{Compare \textit{Spencer Trask Software & Info. Services LLC}, 383 F. Supp. 2d at 439, 445, and \textit{Budget Mktg., Inc.} v. \textit{Centronics Corp.}, 927 F.2d 421, 426 (8th Cir. 1991), \textit{with Consarc Corp.} v. \textit{Marine Midland Bank, NA}, 996 F.2d 568, 573-74 (2nd Cir. 1993).} However, a review of the cases exposes inconsistencies in application, with some courts more willing than others to decide such cases on summary judgment.

The submission of such claims to a jury carries several risks for defendants. Laypersons sitting on juries are understandably swayed by negative facts – behavior they perceive to be “unfair” dealing, but that, in the realities of the business world, is not out of line with expectations. For instance, it is not uncommon in negotiations for one side to utter – on a conference call, for instance – “we have a deal,” or some similar statement, once the negotiators believe the major issues have been resolved. Commonly, this casual comment is intended to signal merely that the meeting or discussion can be terminated and the lawyers can get to work finalizing the definitive transaction documents. It may be mutually understood by the parties at this time that the process of finalizing the documents may result in the recognition of additional issues requiring resolution before the deal can be closed. Regardless of whether additional issues arise or not, the practical reality is that the parties understand they are not bound by the terms of the draft agreements until they have been finalized, executed, and delivered. But juries may
interpret these kinds of statements differently, viewing them as literal assertions of the completion of a bargain.

This concern is intensified when courts admit evidence at trial of internal communications between members of the same negotiating team. Looking at the subjective intent of one party should be irrelevant to the critical inquiry of what objective manifestations of assent were made by each party to the other. Moreover, such evidence can be inflammatory when it involves internal communications that suggest callousness toward the disappointed party, as all too often appears in informal emails and other internal communications. Swayed by these facts, jurors understandably may be sympathetic to the disappointed party and more willing to reach verdicts for large damages awards that well exceed the expectations of the alleged injured party.

A recent high-profile case from Georgia highlights some of the difficulties involved in interpreting parties’ intent after-the-fact and the potential danger inherent in leaving such matters to a jury to decide. The case, Turner Broadcasting System, Inc. v. McDavid,13 involved an alleged oral contract for the purchase of two sports teams – the Atlanta Hawks and the Atlanta Thrashers – and certain operating rights involving the use of the sports arena.14 The parties had entered into a mostly non-binding preliminary agreement that expressly stated the parties did not intend to be bound except by a definitive written agreement.15 The preliminary agreement subsequently expired, but negotiations between the parties continued.16 After several additional months of intense negotiations, the discussions ultimately broke down.17 The result was that TBS, the putative seller, spurned McDavid, the putative buyer, and almost immediately inked a deal – on nearly identical terms – to sell the teams to a group headed by Ted Turner’s son-in-law.18 McDavid then sued TBS for breach of oral contract, the claim was submitted to a jury, and the jury awarded McDavid $281 million in damages, an award which ultimately was upheld on appeal.19 The McDavid case vividly demonstrates the potential consequences for parties who do not clearly express their intent in written agreements and the necessity for courts to develop a consistent framework for adjudicating such disputes.

In this article, I use the McDavid case as a backdrop to discuss the lack of clarity in the area of law surrounding determinations of whether preliminary oral or written agreements are binding. I argue that, while preliminary binding agreements may serve a valuable function in the marketplace and should be enforced, they should only be enforced in appropriate circumstances where it is clear it is the intent of the parties to be bound. Particularly in the context of large, complex transactions, parties often have important reasons for not wanting to be bound without a signed written agreement. Off-hand comments in the course of the negotiations and internal, one-sided communications should not be enough to outweigh express language in a preliminary agreement of intent not to be bound without a definitive written agreement.

14 Id. The facts of the McDavid case are more fully set out in Part IV.A infra.
15 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 879.
16 Id. at 876.
17 Id. at 876-77.
To increase certainty in this area of the law, I argue courts should explicitly apply a multi-factor test to analyze intent of the parties, rather than taking the more holistic “totality of the circumstances” approach. Though a bright-line rule may never be achievable in this area of the law, applying such a multi-factor test provides guidance to parties on how they should model their behavior during negotiations to avoid an unintended result. Additionally, in this article, I propose thoughts for how courts should analyze some of the more problematic factors in the test.

Finally, I address the question of who should decide the issue of intent – a judge or a jury. I argue that submitting fewer cases to a jury will better honor the expectations of the parties and potentially achieve more consistent results. Specifically, when there is language in a preliminary written agreement expressing an intent not to be bound, that language should be sufficient for a court to determine the issue on summary judgment. In such cases, I argue that the decision should only be submitted to a jury if, in fact, there has been an express written waiver of the language in the preliminary agreement. Mere expiration of the preliminary agreement should not constitute an express waiver sufficient to overcome the written language and allow the party asserting the existence of a contract to submit the issue to a jury. Subsequent oral statements made by the party disclaiming the existence of a contract also should not be sufficient.

In Part II, the article begins with a brief overview of the nature and purpose of preliminary written agreements. In Part III, I discuss the law surrounding the interpretation and binding effect of preliminary written and oral agreements. Specifically, I address the various types of claims available to a disappointed party alleging the existence of a binding informal commitment. In Part IV, I describe the McDavid case in more detail, analyzing the arguments asserted by both parties and the reasoning of the Court of Appeals. I use the conclusions drawn from the analysis of the McDavid case described in Part IV to then inform a set of recommendations in Part V. Part V begins with a brief discussion of how practitioners might more effectively advise clients in light of cases like McDavid. Then I propose an analytical framework for courts to use in addressing the issue of whether parties intended to be bound by preliminary negotiations.

II. PRELIMINARY AGREEMENTS

When two or more parties enter into preliminary discussions about a proposed transaction, such as a merger, an acquisition, or some other business combination, they will sometimes decide to memorialize the results of those early negotiations in a written document called a letter of intent (“LOI”). The parties will typically intend for this LOI to ultimately be replaced by a later – and much more comprehensive – definitive written agreement. Because it is so often

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20 Sometimes parties refer to their preliminary agreement not as an LOI, but as a “commitment letter,” a “memorandum of understanding,” an “agreement in principle,” a “term sheet” or by some other name. E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 COLUM. L. REV. 217, 250 (1987). Though the terminology may vary and stylistically these documents may look quite different, the same substantive legal principles apply equally to all of them. WILLIAM M. PRIFTI, SECURITIES: PUBLIC & PRIVATE OFFERINGS VOL. 24 § 4:2 (West/Thompson, 1974).

the case that the LOI is just a precursor to the actual transaction agreement(s), the LOI is generally drafted in such a way as to make the majority of the provisions non-binding.  

Because an LOI is typically intended to be mostly non-binding, it is certainly not a necessary part of the negotiation process. Rather, the parties are free to skip the LOI stage entirely and move into performing due diligence in earnest and negotiating the actual definitive written agreement. In fact, there are often good reasons for parties to do just that. First, negotiating and drafting an LOI in the initial stages of the negotiation process can be time-consuming and will inevitably add to the legal fees incurred by the parties. For smaller companies with fewer resources or for parties who are in a hurry to get their transaction closed, the costs – in both time and money – to negotiate a largely non-binding document can seem to outweigh the benefits. Second, as will be highlighted in Part III of this article, sloppy drafting of the LOI can lead to the unintended consequence of parties being bound to a preliminary document they had initially thought was non-binding.

However, even for an LOI that is largely non-binding, parties often find this to be a useful tool for a number of reasons. First, though largely non-binding, the parties can choose to incorporate some binding provisions as well. These binding provisions are typically not deal terms but rather relate to the rights and obligations of the parties in the interim period between

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22 The LOI will typically contain a number of provisions about the actual deal terms themselves. AMERICAN BAR ASS’N, supra note 21, at 107. For instance, it might include the purchase price or how the purchase price will be calculated; the structure of the deal (e.g., whether it will be an asset purchase or a stock purchase); conditions to closing; or any number of other provisions that will ultimately end up fleshed out in the definitive written agreement in more detail. Id. at 110. These deal terms are typically intended to be non-binding. Id. at 110. Since the buyer has usually not completed (or even really begun) its due diligence on the seller at this point, the parties generally want the flexibility to be able to change some of the terms if new, unexpected facts come to light in the course of the due diligence review prior to execution of the definitive written agreement. Id. at 108. Ultimately, these non-binding deal terms would be replaced by the binding written definitive agreement. However, the LOI will often contain some sub-set of provisions that are intended to be binding. These are typically not deal terms, but rather terms that regulate the rights and obligations of the parties during the interim period between the signing of the LOI and the signing of the definitive written agreement. Id. at 110. These are discussed further in Part II infra. Of course, the parties are free to craft the LOI however they want, with whatever combination of binding or non-binding terms they choose. The above-described generalizations merely provide a helpful framework for discussion.

23 Williamson, supra note 21, at 23.

24 In fact, in the case of a small deal, the costs of drafting and negotiating an LOI can be substantial in comparison to the size of the deal and the overall transaction cost. Maryann A. Waryjas, Letters of Intent in the Acquisition or Sale of the Privately Held Company, in ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 2009, at 335 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1610, 2009).

25 Id. at 336. Additionally, for public companies bound by the SEC’s reporting requirements, a signed LOI could trigger an obligation to publicly disclose a potential transaction very early in the process – well before the parties would otherwise wish to do so. Catherine J. Dargan, Confidentiality Agreements, Standstill Agreements, Letters of Intent and Exclusivity Agreements, in DRAFTING AND NEGOTIATING CORPORATE AGREEMENTS 2011, at 83 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1858, 2011). Under the SEC’s reporting requirements, a regulated entity must disclose in an 8-K any contracts it has entered that provide for obligations that “are material to and enforceable against” the company, or “rights that are material to the company and enforceable by the company against one or more other parties to the agreement by the company.” Though a non-binding letter of intent that contains a couple of binding terms like a confidentiality agreement typically does not trigger the filing requirements, if the LOI is deemed to have additional binding provisions, these could be considered “material” rights and obligations that would require disclosure. Disclosure Requirements, Exchange Act Release No. 8400, 82 S.E.C. Docket 1480 (Aug. 4, 2004).
the signing of the LOI and the signing of the actual definitive written agreement. For instance, the parties may include a confidentiality provision whereby the buyer agrees not to disclose information it learns about the seller through the due diligence process. Another common binding provision found in LOIs is the creation of an exclusivity period, such as a no-talk or a no-shop provision, whereby the seller agrees not to negotiate with other potential buyers for some period of time. Other provisions that parties often choose to include as binding terms are those relating to the buyer’s access to due diligence materials, procedures for making public announcements about the transaction, and the provision of break-up fees or reverse break-up fees in the event the deal does not close.

Second, the use of a preliminary agreement can help prevent misunderstandings and selective memory and can serve as a basis for drafting the definitive agreement. For instance, the purchase price or other deal terms are often of such a complicated nature that it is helpful to describe the terms in writing to make sure that each of the parties’ understanding of the terms is consistent. In addition to informing the parties themselves, the LOI can serve as a resource for informing third parties about the basic deal terms, such as lawyers, accountants, and prospective investors. Additionally, at least one party may think that the LOI will enhance its bargaining position in future negotiations, making it harder for the other side to withdraw concessions made in the LOI when it is time to draft the definitive agreement. In other words, though the agreement technically is non-binding, parties may feel morally or psychologically obligated to the key terms set out in the writing unless there has been an important new discovery during the due diligence process that makes a change in position warranted.

Third, a non-binding, or largely non-binding, LOI allows the parties to test one another’s level of commitment before spending large amounts of money on due diligence and in-depth negotiations. If the parties can agree on essential terms quickly, then the parties are encouraged to continue. On the other hand, the drafting of the LOI may make it clear that the parties’ positions are too far apart to warrant further negotiations.

Fourth, the LOI can serve as a means of starting the clock on regulatory filings. For instance, to comply with the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, parties must file a signed agreement with the Department of Justice and the Fair Trade.

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26 AMERICAN BAR ASS’N, supra note 21, at 110.
27 Id. at 110. In fact, even if the parties do not execute an LOI, they will typically enter into a stand-alone non-disclosure agreement to protect the seller’s confidential information from use or dissemination by the buyer in the event the transaction never occurs.
28 Id. at 110.
29 Id. at 110.
30 Waryjas, supra note 24, at 336.
31 AMERICAN BAR ASS’N, supra note 21, at 107.
32 Farnsworth, supra note 20, at 258; see also 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.16 (rev. ed. 1993).
33 Farnsworth, supra note 20, at 258.
34 AMERICAN BAR ASS’N, supra note 21, at 107. Parties particularly develop a psychological or moral commitment to the terms of the transaction when the parties have issued press releases or otherwise made the proposed transaction known to employees or the public. See Williamson, supra note 21, at 23.
35 AMERICAN BAR ASS’N, supra note 21, at 107.
36 Williamson, supra note 21, at 23.
37 AMERICAN BAR ASS’N, supra note 21, at 107.
Commission, which then starts the clock on a 30-day waiting period during which the transaction is reviewed and the business combination may not be consummated.\textsuperscript{38} However, the signed agreement that must be filed need not be binding nor particularly detailed.\textsuperscript{39} Therefore, a cursory, non-binding LOI can help the parties position themselves such that the regulatory requirements will have been fulfilled by the time they are ready to close the transaction, instead of having to wait for the 30-day period to run after the definitive written agreement has been negotiated and signed.\textsuperscript{40}

Finally, in addition to helping start the clock on regulatory filings, a signed LOI can help the parties line up financing with a lender who will not approve a loan without a signed agreement.\textsuperscript{41}

Because of its many advantages, the LOI is frequently used to memorialize the parties’ understanding of the outcome of their preliminary negotiations. As mentioned above, the LOI typically includes a combination of binding and non-binding provisions. However, it is possible to make the entire LOI binding, either expressly or accidentally, or to make the entire agreement non-binding.\textsuperscript{42} The parties to an LOI who do not wish to be bound can say so in the preliminary agreement with language such as “not binding until a final definitive written agreement is executed.”\textsuperscript{43} Or the LOI can clearly differentiate between the binding and non-binding provisions.\textsuperscript{44} But often the drafting of the LOI is not so clear or circumstances change and a question of whether the LOI is binding arises.\textsuperscript{45} When negotiations go awry and one party tries to enforce the terms of a preliminary agreement against the other, courts are often called upon to determine the intent of the parties after the fact.\textsuperscript{46} The way in which courts analyze the question of whether a preliminary agreement is binding or not binding is the subject of Part III of this article and the potentially drastic consequences of a court’s decision that a preliminary agreement is binding are illustrated by the case study set forth in Part IV.

III. POTENTIAL LIABILITY ARISING UNDER PRELIMINARY AGREEMENTS

When parties to preliminary negotiations have not yet reached a final written binding contract, their negotiations fall into one of four categories. First, as a preliminary matter, if the parties have engaged in negotiations by discussing the deal but not agreeing to one, the parties are not bound to any of the terms discussed in their negotiations nor do they have any obligation to continue discussions with one another. In short, no liability attaches and the disappointed

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\textsuperscript{39} See \textit{Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions} § 3(b) (available at http://www.ftc.gov/bc/hsr/hsrform-instructions1_0_0.pdf).

\textsuperscript{40} Williamson, \textit{supra} note 21, at 23; see also \textit{American Bar Ass’n, supra} note 21, at 107.

\textsuperscript{41} \textit{American Bar Ass’n, supra} note 21, at 107.

\textsuperscript{42} Williamson, \textit{supra} note 21, at 23.

\textsuperscript{43} Farnsworth, \textit{supra} note 20, at 257.

\textsuperscript{44} See, e.g., Waryjas, \textit{supra} note 24, at 343, app. 2 (providing a sample LOI that carves out the binding provisions in the first paragraph.)

\textsuperscript{45} Indeed, the question of whether an LOI is binding has been said to be “the thorniest – and the most litigated – issue associated with the topic of preliminary agreements.” Williamson, \textit{supra} note 21, at 24.

\textsuperscript{46} \textit{Id.} at 24.
party cannot recover anything. The next three categories involve preliminary agreements pursuant to which a remedy may be available for the disappointed party.

The first of these next three categories involves those situations where the parties have engaged in preliminary negotiations and not agreed to a contract, but where equitable concerns prevail and the court allows the disappointed party to recover under a theory of promissory estoppel ("Equitable Claims"). As discussed in more detail in Part III.B below, because no contract has actually been formed in this scenario, the recovery to which the disappointed party is entitled will be limited.

The next two categories involve preliminary agreements that, unlike the Equitable Claim scenario, will actually have binding force. One such agreement occurs when the parties have made a preliminary agreement to certain terms but left others open. While normally the presence of open terms would suggest a binding agreement has not been reached, a court might determine that it was the intent of the parties to obligate themselves to bargain in good faith over open terms toward the consummation of a transaction. In other words, while the parties would not have bound themselves to the actual deal terms found in the preliminary agreement, they would have obligated themselves to negotiate further in good faith. Under this theory, a court would allow the disappointed party to recover due to the other contracting party’s failure to negotiate further in good faith ("Good Faith Claims"). As in the Equitable Claims for promissory estoppel, and as further discussed in Part III.B below, a plaintiff’s recovery under a Good Faith Claim will be limited.

The other such binding agreement is created when the parties have reached complete agreement (including the agreement to be bound) on all of the material issues requiring negotiation and a court allows a disappointed party to recover under a theory of breach of contract ("Fully-Formed Contract Claims"). Even if the parties desire a more formal definitive written agreement in the future, this is viewed as merely desirable, not actually necessary. In other words, the parties are bound to the actual terms of the preliminary agreement if it is determined it was their intent to be so bound, even though the formal instrument may have never

48 Judge Leval defined these two types of binding preliminary agreements in the seminal case Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987). See also 1 CORBIN, supra note 32, at § 1.16.
49 Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. at 498; see also Schwartz, supra note 47, at 664.
50 Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. at 498.
52 Stephen L. Brodsky, Federal Courts in New York Provide Framework for Enforcing Preliminary Agreements, 73-APR N.Y. ST. B.J. 16, 17 (2001); see also Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. at 498 (When the parties have reached complete agreement, including the agreement to be bound, such an agreement “is preliminary only in form – only in the sense that the parties desire a more elaborate formalization of the agreement.”); Adjustrite Sys., Inc. v. GAB Bus. Services, Inc., 145 F.3d 543, 548 (2d Cir. 1998). (“A binding preliminary agreement binds both sides to their ultimate contractual objective in recognition that, ‘despite the anticipation of further formalities,’ a contract has been reached. Accordingly, a party may demand performance of the transaction even though the parties fail to produce the ‘more elaborate formalization of the agreement.’”)
been executed. Under these Fully-Formed Contract Claims, full breach of contract remedies—such as benefit-of-the-bargain damages—are available to the plaintiff, as described more fully in Part III.C below.

Because Fully-Formed Contract Claims are likely the only ones under which a disappointed party will have access to broader remedies, a smart plaintiff will always try to make out such a claim to the extent the facts support it. When a plaintiff believes his facts are weak, though, he may choose to argue in the alternative—i.e., the plaintiff asserts a Fully-Formed Contract Claim, but in the event the court does not hold in plaintiff’s favor, he also asserts secondary Equitable and Good Faith Claims to hopefully ensure some recovery.

Any of these three types of claims can be asserted based on a preliminary writing or merely by preliminary oral communications. Due to the greater appeal Fully-Formed Contract Claims have for plaintiffs—and the fact that the larger damages awards make these claims potentially devastating for defendants—the law surrounding Fully-Formed Contract Claims will be the focus of this article. However, by way of background and to give a more complete understanding of this murky area of the law, I start by briefly describing the law relating to Good Faith Claims and Equitable Claims in Parts III.A and B below.

A. Good Faith Claims: Liability Arising from Breach of the Duty to Negotiate in Good Faith

Every contract imposes upon the parties to that contract a duty of good faith and fair dealing in the performance and enforcement of the contract. However, that duty typically only extends to issues of contract performance, not contract formation—in other words, it applies only after the parties are bound. Generally, there is no requirement that the parties negotiate in good faith unless the parties agree to such an obligation. This is not the case in a number of foreign jurisdictions, a contract will not be enforceable if one of the parties to the contract was forced into it under duress. RESTATEMENT (SECOND) OF CONTRACTS § 174-77 (1981).

53 See, e.g., Trowbridge v. McCaigue, 992 A.2d 199, 202 (Pa. Super. Ct. 2010) (agreement was not merely an unenforceable “agreement to agree” because there were no other terms to be agreed upon in the future and the only future occurrence contemplated was execution of the definitive agreement); see also 1 CORBIN, supra note 32, at § 1.16 (“If there are times when letters of intent are signed with the belief that they are letters of commitment. If this belief is shared, or if one party is aware of the other’s belief, the letter is a memorial of a contract.”)


57 Delphine Descamps & Robert C. Macdonald, Withdrawing from Pre-Contractual Negotiations Under French Law: An Increased Risk, 15 No. 5 M & A LAW. 10, 11 (May, 2011); see also Feldman v. Allegheny Int’l, Inc., 850 F.2d at 1223 (“No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not to sue for ‘bad faith’ in negotiations.”); A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Group, Inc., 873 F.2d at 159 (holding that there is no general duty to negotiate in good faith and that “the scope of any obligation to negotiate in good faith can only be determined from the framework the parties have established for themselves in their letter of intent.”). There are, however, certain exceptions to the basic rule that there is typically no obligation to negotiate in good faith during the formation of a contract. For instance, a contract will not be enforceable if one of the parties to the contract was forced into it under duress. RESTATEMENT (SECOND) OF CONTRACTS § 174-77 (1981).
jurisdictions – in fact, the opposite is true. But in the U.S., the basic rule is that parties to pre-contractual negotiations can break them off without incurring liability at any time, for any reason at all (or for no reason whatsoever), even if the disappointed party has been led to believe the transaction will likely be consummated. The risk that any party takes by entering negotiations is that the other party will terminate the discussions and walk away, leaving the disappointed party without a remedy.

However, while a general duty to negotiate in good faith does not exist, most jurisdictions recognize that parties can contractually obligate themselves to such a duty. In such jurisdictions, a court would enforce a preliminary agreement containing express language of such an obligation. For example, the parties might have entered into an LOI that states the LOI is

Similarly, a contract will not be enforceable by a party that used fraud to induce the other party into the contract. Id. at § 7 cmt. b (“Typical instances of voidable contracts are those where one party was an infant, or where the contract was induced by fraud, mistake, or duress . . . .”). Additionally, sometimes parties may be subject to a statutorily created duty to negotiate in good faith, such as under section 8(d) of the National Labor Relations Act and the Federal Truth in Lending Act. Id. at § 205 cmt. c (1981); see also Friedrich Kessler & Edith Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 HARV. L. REV. 401, 408 (Jan. 1964).

For instance, European courts tend to be more willing than American courts to accept this notion of pre-contractual liability based on a general obligation of fair dealing. Farnsworth, supra note 20, at 239. For instance, under French law, a disappointed party can bring a claim sounding in tort for withdrawing from contract negotiations in bad faith. A French court will find bad faith where: (i) the withdrawing party never had any intention to sign the contract; (ii) the negotiations went on for an extended period of time; (iii) there was no legitimate ground for the withdrawal; (iv) the withdrawal was unexplained, unilateral, and “brutal”; and (v) the withdrawing party willfully maintained negotiations, knowing that the other party was incurring costs. Descamps, supra note 57, at 11; see also Klein, supra note 51, at 16. Similarly, under German law, once parties enter into negotiations for a contract, a relationship of “trust and confidence” is created and a party can be held liable under contract law theory for negligently creating the expectation in the other that a contract would be completed. Kessler, supra note 57, at 404; see also Klein, supra note 51, at 17.

R. Peter Fontaine, Letter of Intent and the Obligation of Good Faith Negotiation, ACCA DOCKET, Fall 1992, at 76. A number of policy reasons have been put forth to support this general rule. First, there is the practical difficulty of courts trying to determine when exactly in the particular negotiation process such a duty of good faith to negotiate would arise. Farnsworth, supra note 20, at 242-243. Additionally, when a court imposes a duty to negotiate in good faith, the court has little guidance in instructing parties exactly what they are supposed to negotiate over or at what point a refusal to do so constitutes bad faith. Schwartz, supra note 47, at 675-76. In other words, courts struggle with fashioning an appropriate remedy for the breach since there is no way to know the terms of the agreement that would have resulted from the negotiations. Farnsworth, supra note 20, at 267. Imposing such a duty could be said to have a chilling effect on negotiations by discouraging parties from entering negotiations in the first place if they thought the likelihood of consummation of the transaction was low. Id. at 243. Conversely, imposing such a duty could also have an accelerating effect, making parties inclined to bring negotiations to a conclusion more quickly than may be appropriate, potentially leading to errors and incomplete deal terms. Id. at 242. Finally, courts struggle with what should be the remedy for a party who has successfully shown bad faith. Schwartz, supra note 47, at 675-76.

Descamps, supra note 57, at 11. In fact, even in the face of a more general statement in an LOI that the LOI is non-binding, if the parties elsewhere clearly state they intend to be bound to an obligation of good faith negotiation, courts may enforce that obligation. Fontaine, supra note 60, at 76. For instance in Itek Corp. v. Chicago Aerial Indus., Inc., the LOI stated that “[i]f the parties fail to agree upon and execute [a definitive agreement,] they shall be under no further obligation to one another.” 248 A.2d 625, 627 (Del. 1968). However, the LOI also stated that the parties “shall make every reasonable effort to agree upon and have prepared as quickly as possible a contract providing for the foregoing purchase…embodying the above terms and such other terms and conditions as the parties shall agree upon.” Id. at 627. The court held that if all the provisions are read together, it became apparent
intended to evidence the parties’ “mutual intent to negotiate in good faith to enter into a definitive Agreement.” Obviously the converse is true as well – a court would also enforce clear language in a preliminary agreement disclaiming any duty to negotiate in good faith. Of course, sometimes the contractual language – rather than being clear or “express” on this issue – is ambiguous. In those instances, courts will typically try to determine whether the parties intended to create an agreement to negotiate in good faith.

Though historically some jurisdictions have refused to enforce an agreement by the parties to negotiate in good faith even in the face of explicit language spelling out such an agreement, the “modern trend” appears to be an increased willingness to enforce agreements that were intended to be binding, even if some terms are still left open. By enforcing these agreements to negotiate in good faith, parties are provided with some assurance that the deal will get done unless there is a genuine disagreement. But there are still a minority of jurisdictions that either will not enforce an agreement to negotiate in good faith even in the face of an express agreement

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62 Descamps, supra note 57, at 11.
63 An example of such language might be: “This summary of terms is for discussion purposes only, and is not intended to constitute a legally binding or enforceable agreement or commitment, including any duty to negotiate or conclude an agreement, on the part of either party or any of their affiliated entities or parties ...” Deborah J. Ludewig, A Pragmatic View of Term Sheets and Ancillary Agreements, in DRAFTING AND NEGOTIATING CORPORATE AGREEMENTS 2011, at 99 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1858, 2011).
64 See supra note 61, (citing Itek Corp. v. Chicago Aerial Indus., Inc. 248 A.2d 625 (Del. 1968)).
65 Descamps, supra note 57, at 11. In attempting to glean the parties’ intent, courts will look at a number of factors, including the language of the agreement; the extent of open terms; whether there has been partial performance; the customary practice for such contracts regarding formalities; and the context of the negotiations. Schwartz, supra note 47, at 675–676. Similar factors are used to ascertain the parties’ intent to be bound to the actual terms of a preliminary agreement where the language of such agreement is ambiguous. As such, these factors will be discussed in greater detail in Part III.C.2.a infra.
66 Farnsworth, supra note 20, at 267. The justifications for such a position were largely policy-based, as described more fully in note 60 supra. Other courts relied on the notion that they would not be able to determine the scope of the obligation to negotiate in good faith. Id. However, many of the policies relied upon by courts to ignore a duty to negotiate in good faith have come to be recognized as unimportant – at least in the face of the counter-veiling concern that contract law “gratify, not defeat expectations.” Burbach Broad Co. of Del. v. Elkins Radio Corp, 278 F.3d 401, 409 n.6 (4th Cir. 2002). Professor Farnsworth has provided some insight into why some of the policy concerns initially asserted by jurisdictions refusing to enforce agreements to negotiate in good faith are unavailing. Farnsworth, for instance, criticizes the argument that a court cannot fashion an appropriate remedy for a breach of the duty because of the inability to know what agreement would have resulted. Farnsworth, supra note 20, at 267. He says that the appropriate remedy for such a breach is not expectation damages, but rather damages caused by the injured party’s reliance on the agreement to negotiate. Id. If the disappointed party can prove reliance damages, such as a lost opportunity, then it can recover. Id. Though Farnsworth admits that the rationale that a court cannot determine the scope of the obligation of fair dealing is a more “substantial” reason for refusing to enforce an agreement to negotiate in good faith, he still ultimately rejects this rationale. Id. He points out that courts apply the concept of fair dealing to the performance of a contract (by using “good faith” and “best efforts” terminology), so there should be no more difficulty in applying it to the formation of a contract. Id.
67 Burbach Broad Co. of Del. v. Elkins Radio Corp, 278 F.3d at 409 n.6; see also Schwartz, supra note 47, at 675. (“Recently, in a major shift in doctrine, courts have relaxed the knife-edge character of the common law by which parties are either fully bound or not bound at all. Instead, a new default rule is emerging to govern cases in which the parties contemplate further negotiations.”)
68 Burbach Broad Co. of Del. v. Elkins Radio Corp, 278 F.3d at 409 n.6.
of the parties or will only enforce these agreements if they are expressly stated without any ambiguity.\textsuperscript{69}

Even in jurisdictions where contractual commitments to negotiate in good faith are enforceable, the remedies for these Good Faith Claims are circumscribed. The relief available to a disappointed party for a breach by the other party of the duty to negotiate in good faith is typically (a) an injunction or specific performance requiring the parties to continue the negotiations and/or (b) reliance damages.\textsuperscript{70} Generally, courts hold that a party cannot recover expectation or benefit-of-the-bargain damages because the agreement does not guarantee that the parties will ultimately conclude the final contract.\textsuperscript{71}

Specifically, once a court has determined that the intent of the parties was to bind themselves to a duty to negotiate in good faith, the parties are typically required to negotiate the open issues in good faith in an attempt to reach the ultimate objective.\textsuperscript{72} However, neither party has the ability to demand actual consummation of the transaction.\textsuperscript{73} In other words, the parties may ultimately reach an impasse in their negotiations due to good faith differences in the open issues and this may prevent consummation of the transaction.\textsuperscript{74} Even the parties losing interest in the deal and mutually abandoning negotiations will not violate this duty of good faith.\textsuperscript{75} But, the obligation does “bar a party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement.”\textsuperscript{76}

**B. Equitable Claims: Liability Under a Promissory Estoppel Theory**

In situations where no contract has been formed, and therefore a disappointed party does not have a viable Fully-Formed Contract Claim or even a Good Faith Claim, that party is not

\textsuperscript{69} See e.g., Giverny Gardens, Ltd. P’ship v. Columbia Hous. Partners Ltd. P’ship, 147 F. App’x 443, 449 (6th Cir. 2005) (In Kentucky, “agreements to bind parties to future negotiations in good faith are unenforceable agreements to agree.”); Barnes & Robinson Co., Inc. v. OneSource Facility Services, Inc., 195 S.W.3d 637, 643–44 (Tenn. Ct. App. 2006) (“Tennessee courts . . . have not recognized a duty to negotiate in good faith absent an express contractual agreement to do so. . . . When parties agree to prepare and execute a final written agreement, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. . . . The so-called contract to make a contract is not a contract at all.” (citations and punctuation omitted)); see also Farnsworth, supra note 20, at 267 (explaining that courts that refuse to enforce such agreements often characterize such agreements “pejoratively as an ‘agreement to agree’”).

\textsuperscript{70} Brodsky, supra note 52, at 20; Schwartz, supra note 47, at 664.

\textsuperscript{71} Attributing lost profits to the other party’s bad faith abandonment of negotiations is usually considered too speculative. Brodsky, supra note 52, at 20. But see Venture Associates Corp. v. Zenith Data Sys. Corp., 96 F.3d 275, 278 (7th Cir. 1996) (suggesting in dicta that additional damages might be available in some circumstances where the plaintiff can prove that the parties would have made a final contract had it not been for the defendant’s bad faith, provided the loss of benefit was a foreseeable consequence.)


\textsuperscript{73} Id.; see also Nick J. Vizy, LAW OF PURCHASING § 49:28 (West/Thompson 2011).

\textsuperscript{74} Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. at 498; see also A/S Apothekernes Laboratorium for Specialpræparater v. I.M.C. Chem. Group, Inc., 873 F.2d at 159 (“A letter of intent is no guarantee that the final contract will be concluded, even if the parties fulfill their good faith negotiations.”)

\textsuperscript{75} Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. at 498; see also Vizy, supra note 73, at § 49:28.

\textsuperscript{76} Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. at 498; see also Klein, supra note 51, at 9-10 (“The good faith duty…prevent[s] the parties from refusing to negotiate or offering only unreasonable proposals.”).
necessarily without a remedy; the equitable claim of promissory estoppel may be available.\footnote{77} Generally, a claim for promissory estoppel requires the plaintiff to show: (i) a clear and unambiguous promise by the defendant to close the transaction; (ii) reasonable and foreseeable reliance by the plaintiff on the promise; and (iii) an injury to the plaintiff resulting from the reliance.\footnote{78} Promissory estoppel claims are extremely fact-specific and are not susceptible to the application of generalized rules.\footnote{79} That said, some basic principals can be pulled from the cases about each of the basic elements of the claim.

With respect to the first element, a “clear and unambiguous” promise is one where the assertion is explicit and without any doubt or tentativeness.\footnote{80} A statement of opinion or future intent that does not involve a specific undertaking on the part of the promisor will not satisfy the first element.\footnote{81} According to the second element, the reliance must have been “reasonable.” Therefore, for instance, the defendant’s repeated expressions that he does not intend to be bound to an agreement until a final definitive written agreement is executed serve as evidence of the unreasonableness of the plaintiff’s subjective reliance.\footnote{82} Similarly, when the terms of the agreement are very vague and uncertain, reliance by the plaintiff will more likely be viewed as unreasonable than if the terms of the agreement were more definite.\footnote{83} Finally, with respect to the third element, some courts suggest that where the loss induced is negligible, no injustice would result from a refusal to enforce the promise and, as such, a promissory estoppel claim is not

\footnote{77} Descamps, supra note 57, at 12. The origins of the promissory estoppel claim were in gratuitous promises that lacked the consideration necessary to be considered a binding promise, and some of the early authorities limited the doctrine to such scenarios. 4 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:8 (4th ed. 1989). The doctrine has expanded dramatically, however, since the early Twentieth century. Id. Though some courts have declined to extend the doctrine into commercial settings, the doctrine is now typically more widely applicable to any relied-upon promise – whether gratuitous or commercial. Id.

\footnote{78} Descamps, supra note 57, at 12; see also R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 78 (2d Cir. 1984); Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 264 (2d Cir. 1984); Olympic Holding Co., L.L.C. v. ACE Ltd., 909 N.E.2d 93, 101 (Ohio 2009). Some jurisdictions have minor variations on this formulation. See, e.g., WILLISTON, supra note 77, at § 8:8 (elements are “a promise which foreseeably results in a substantial detrimental change in position where justice requires enforcement”); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (“A promise which the promisor reasonably expected to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise”); Budget Mkts., Inc. v. Centronics Corp., 927 F.2d 421, 427 (8th Cir. 1991) (plaintiff must establish (i) clear and definite agreement; (ii) it acted to its detriment in reasonable reliance on the agreement; and (iii) the equities support enforcement of the agreement); Fortress Sys., L.L.C. v. Bank of W., 559 F.3d 848, 852-53 (8th Cir. 2009) (a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement); Doll v. Grand Union Co., 925 F.2d 1363,1371 (11th Cir. 1991) (plaintiff must show that (i) the defendant made certain promises; (ii) the defendant should have expected the plaintiff would rely on such promises; and (iii) the plaintiff did in fact rely on such promises to his detriment).

\footnote{79} Doll v. Grand Union Co., 925 F.2d at 1372; WILLISTON, supra note 77, at § 8:7.

\footnote{80} Andersen Inv., LLC v. Factory Card Outlet of Am., Ltd., 630 F. Supp. 2d 1030, 1041 (S.D. Iowa 2009).

\footnote{81} WILLISTON, supra note 77, at § 8:7. However, a minority of courts suggest the promise need not be as definite as it would have to be in the case of a claim for a breach of contract. Id.

\footnote{82} Doll v. Grand Union Co., 925 F.2d at 1371; Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. 753, 775 (D.S.C. 1988). However, when reliance occurs before the drafting of a preliminary agreement that includes language imposing a writing requirement, it may not be unreasonable. Doll v. Grand Union Co., 925 F.2d at 1372.

\footnote{83} Doll v. Grand Union Co., 925 F.2d at 1372. The less clear or specific the promise, the more likely the court will find that the reliance was unreasonable. WILLISTON, supra note 77, at § 8:7.
made out. The loss suffered must therefore be substantial in an economic sense. Additionally, the loss must be related to the promise to satisfy the third element.

An Equitable Claim, like a Good Faith Claim, will not be as appealing to a plaintiff as a Fully-Formed Contract Claim because of the limited remedy available. While some courts allow full-scale enforcement of a promise asserted under a promissory estoppel claim, most courts – particularly in the commercial setting – will limit the remedy to restitution or to reliance damages. Since this theory is typically used when no contract or meeting of minds was ever formed, courts have reasoned the plaintiff should be precluded from offering evidence of expectancy damages. In other words, the plaintiff is not entitled to the benefit of his bargain since there was no bargain to begin with and the plaintiff’s recovery will likely be limited to those expenses the plaintiff incurred in relying on the alleged promise.

C. Fully-Formed Contract Claims: Liability Arising from Breach of Oral or Written Preliminary Agreement

As discussed above, when a plaintiff brings an Equitable Claim or a Good Faith Claim, the plaintiff may only be entitled to reliance damages and most likely will not be able to recover benefit-of-the-bargain or other compensatory damages that he might be awarded in a classic breach of contract claim. As such, a disappointed party interested in establishing additional damages will need to show that the parties were contractually obligated to the actual deal terms of the preliminary agreement (a Fully-Formed Contract Claim). Because of their potential for greater damages awards, Fully-Formed Contract Claims are the most appealing to plaintiffs and the most potentially devastating for defendants. This Part III.C discusses the law surrounding the enforcement of the terms of a preliminary agreement, whether that agreement is written or oral.

1. Basic Principles of Law

To establish a breach of contract, a plaintiff must prove (i) the existence of a contract, (ii) breach by the other party, and (iii) damages suffered. The element at issue for purposes of this article is the first – whether a contract existed in the first place. When there is a preliminary

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85 Id.
86 RESTATEmENT (SECOND) OF CONTRACTS § 90 cmt. d (1981) (“[F]ull-scale enforcement by normal remedies is often appropriate.”); WILLISTON, supra note 77, at § 8:7 (“[S]ome courts…have taken the position that expectation or ‘benefit of the bargain’ damages should be recoverable rather than limiting a promisee to reliance damages.”)
87 Id.
88 REStATEmENT (SECOND) OF CONTRACTS § 90 cmt. d (1981) (“[R]elief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee’s reliance rather than by the terms of the promise”); see also Clifford R. Gray, Inc. v. LeChase Const. Services, 857 N.Y.S.2d 347, 349-50 (N.Y. App. Div. 2008); Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. at 776.
89 See e.g., Clifford R. Gray, Inc. v. LeChase Const. Services, 857 N.Y.S.2d at 349-50.
90 Id.
First, if the parties intend not to be bound to each other prior to the execution of a definitive agreement, courts will give effect to that intent and the parties will not be bound, even if all of the issues of negotiation have already been resolved at this preliminary stage. If, on the other hand, the parties do intend to be bound by the terms of the preliminary agreement prior to the execution of a definitive agreement, the parties will be bound even if they contemplate replacing their earlier understanding with a definitive agreement at a later date. Also, parties intending to be bound prior to the execution of a definitive agreement will be bound even if there are certain issues that have not been resolved. Finally, a written LOI or other such document need not have been executed for these principles to come into play. Even in the absence of a written preliminary agreement, a plaintiff might argue that the parties, in the course of their early negotiations, had come to a meeting of the minds and entered into a binding oral contract. The same principles that apply when considering the binding nature of a preliminary written agreement also apply when considering the enforceability of a preliminary oral agreement.

The purpose of these principles is to give parties the freedom to contract as they please – to be bound to one another by an LOI or similar agreement after the preliminary negotiation stage or to maintain immunity from liability until a written definitive agreement is executed. Ultimately, as evidenced by the principles set out above, whether or not a preliminary agreement will be enforceable comes down to a question of the intent of the parties. Parties can show their intent by expressly stating in the LOI that they do or do not wish to be bound. Parties who do so successfully may avoid a court’s involvement in the negotiations. But if the intent of the parties is unclear from the preliminary agreement, or if subsequent events make the meaning of

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94 AMERICAN BAR ASS’N, supra note 21, at 109; see also Itik Corp. v. Chicago Aerial Indus., Inc., 248 A.2d 625, 629 (Del. 1968). Depending on the importance of the open issues left to be resolved, courts will either supply commercially reasonable terms for those open items or impose a contractual obligation on the parties to negotiate resolution of those issues in good faith. AMERICAN BAR ASS’N, supra note 21, at 109.

95 See e.g., Andersen Inv., LLC v. Factory Card Outlet of Am., Ltd., 630 F. Supp. 2d 1030, 1035 (S.D. Iowa 2009) (“Iowa law recognizes the validity of oral contracts, even in those cases in which the parties intended to later reduce their agreement to writing…In such circumstances the writing is merely an expression of a contract already made. On the other hand, the parties may intend that obligation should arise only upon the signing of a written instrument embodying the terms they have tentatively agreed to”); see also Steven R. Perles, P.C. v. Kagy, 473 F.3d 1244, 1249 (D.C. Cir. 2007); R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d at 69, 74; Winston v. Mediaware Entm’t Corp., 777 F.2d 78, 80-83 (2d Cir. 1985); RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981); WILLISTON, supra note 3, at § 3.2. The only additional consideration in the oral agreement context is whether or not an oral agreement is permissible under the applicable Statute of Frauds. Id.


the LOI ambiguous, or if there is no written preliminary agreement and oral terms are disputed, it will be up to a judge or jury to decide whether or not the parties meant to bind themselves contractually. How courts determine the intent of the parties is the subject of Part III.C.2 below.

2. Determining the Intent of the Parties

The Restatement (Second) of Contracts suggests a number of factors that a court should consider when determining whether a contract has been concluded and is enforceable. Those factors are the following: the extent to which there are open issues remaining, whether the contract is of a type usually put in writing, whether it needs a formal writing for its “full expression,” whether the agreement has few or many details, the size of the transaction from a monetary standpoint, whether a standard form contract is used in similar transactions, and whether there has been partial performance. As discussed in more detail in Part III.C.2.a below, a number of jurisdictions have adopted some variation on this factors test for determining the intent of the parties. Other jurisdictions, however, take a less formulaic approach, considering instead all of the facts and circumstances “without trying to fit the evidence into specific pigeonholes,” as discussed more fully in Part III.C.2.b below.

Regardless of the test applied, the end goal is to apply an objective, not subjective, theory of intent to determine whether there was a manifestation of a desire to be bound. Under an objective theory of intent, the party’s intention is deemed to be that meaning a reasonable man in the position of the other party would ascribe to the first party’s “manifestations of assent” or that meaning which the other party knew the first party ascribed to his manifestations of assent. A court applying an objective theory of intent should not consider the parties’ unexpressed, subjective intentions or understandings. Evidence of this objective intent can come from a number of sources, such as the words or deeds of the parties, as determined from oral testimony or by preliminary or draft agreements. When making the determination of intent, the court will consider the totality of circumstances.

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98 Restatement (Second) of Contracts § 27 cmt. c (1981).
99 Id.
100 Petition for Writ of Certiorari, supra note 19, at *19.
103 Williston, supra note 3, at § 3:5 (“Under this reasonable person standard, the law accords to individuals an intention that corresponds with the reasonable meaning of their words and conduct, and if their words and conduct manifest an intention to enter into a contract, their real but unexpressed intention is irrelevant. The courts’ inquiry, therefore is not into the parties’ actual, subjective intention, but rather into how the parties manifested their intention; not on whether there has been a subjective meeting of the minds but rather on whether the parties’ outward expression of assent is sufficient to show an apparent intention to enter into a contract.”); see also Bustamante v. Intuit, Inc., 45 Cal. Rptr. 3d 692, 698-99 (Cal. Ct. App. 2006); Adjudstrate Sys., Inc. v. GAB Bus. Services, Inc., 145 F.3d 543, 549 (2d Cir. 1998); Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 788 (Tex. App. 1987); Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. 753, 771 (D.S.C. 1988).
105 Restatement (First) of Contracts § 26 cmt. b (1932).
106 Williston, supra note 3, at § 3:5 (“[A]ll of the parties’ words, phrases, expressions and acts should be viewed in light of the circumstances that existed at that time, including the situation of the parties, both individually and
a. **Factors Test**

A number of jurisdictions that have considered the issue, New York being the most commercially notable,\(^{107}\) apply a multi-factor test to determine whether the parties intended to be bound to the terms of their preliminary written or oral agreement.\(^{108}\) A few of these jurisdictions apply a test identical to the multi-factor Restatement test,\(^{109}\) while others add additional factors,\(^{110}\) and still others consolidate some of the factors together, incorporating most but not necessarily all.\(^{111}\)

New York and others have adopted a four-factor variation on the Restatement test. Under New York law, to determine the intent of the parties, a court will consider: (i) whether a party expressly reserved the right to be bound only when a written agreement is signed; (ii) whether there was any partial performance by the disappointed party that the party disclaiming the contract accepted; (iii) whether all essential terms of the alleged contract had been agreed upon; and (iv) whether the complexity or magnitude of the transaction was such that a formal, executed writing would normally be expected.\(^{112}\) Jurisdictions sometimes include a fifth factor – the context of the negotiations.\(^{113}\) However, there is some conflicting case law suggesting that the context of the negotiations is a factor that should only be reviewed to determine if there was an agreement to negotiate in good faith (i.e., a Good Faith Claim), not to determine if there was an agreement to be bound to the actual terms of the preliminary agreement (i.e., a Fully-Formed Contract Claim).\(^{114}\)
It is not entirely clear how many factors must point in the same direction to be decisive on the issue of intent, though a number of courts have suggested that the first factor is the most important, as discussed in more detail below. The trier of fact is ultimately granted a significant amount of discretion in these cases because there is no real bright-line test and the application of the factors can be a malleable process.

i. Express Language

The first factor – whether the parties expressly reserved the right to be bound only in a signed definitive agreement – is generally thought to be the most important. In fact, if the language of the preliminary agreement is not ambiguous, this factor will often be controlling. For instance, in Feldman v. Allegheny International, Inc., the preliminary agreement at issue had language that stated the parties “understood that [the LOI] is not a binding agreement and the obligations and rights of the parties shall be set forth in the definitive agreement executed by the parties.” The plaintiff argued that the law allows for a presumption that formal execution is not always necessary to have a binding agreement. However, the court held that such a presumption is only effective in the face of silence. When there is not silence, but rather an unambiguous statement requiring formal execution, there is no contract without a formal executed document.

However, express language requiring a writing that is contained in a preliminary agreement or a draft definitive agreement will be given less effect when the alleged oral contract the plaintiff asserts is binding precedes the execution of the preliminary agreement or the subsequent circulation of draft definitive agreements. For instance, in United Int’l Holdings, Inc. v. Wharf (Holdings) Ltd., the court held that, even in the face of a preliminary agreement

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115 See e.g., Ciaramella v. Reader’s Digest Ass’n, Inc., 131 F.3d 320, 323 (2d Cir. 1997) (“No single factor is decisive, but each provides significant guidance.”).
116 See Part III.C.2.a.i infra.
117 Klein, supra note 51, at 15.
118 See e.g., Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. at 499; Adjustrite Sys., Inc. v. GAB Bus. Services, Inc., 145 F.3d 543, 549 (2d Cir. 1998). See also AMERICAN BAR ASS’N, supra note 21, at 109; Brodsky, supra note 52, at 18.
119 See, e.g., Barnes & Robinson Co., Inc. v. OneSource Facility Services, Inc., 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006) (holding that the court will only resort to rules of construction if the terms of an instrument are ambiguous and that since the language of the LOI clearly showed an intent to require a signed definitive agreement, the parties were not bound by the terms of the preliminary agreement); R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 75 (2d Cir. 1984) (“Courts are reluctant to discount such a clear signal as a party’s explicit statement that it reserves the right to be bound only when a written agreement is signed.”); Budget Mktg., Inc. v. Centronics Corp., 927 F.2d 421, 426 (8th Cir. 1991) (“Where the language of a contract is clear and unambiguous, the language itself prevails over the intent or interpretation of a party…While the court may find an implied term on a point not covered by the express terms of the agreement, there cannot be an implied contract on a point fully covered by an express contract and in direct conflict therewith.; see also WILLISTON, supra note 3, at § 14:11 (“Certainly the parties expressly provide that no obligation shall arise until the formal writing is executed, that expression of intent will be given effect.”). However, a “mere reference” in a LOI that a “formal agreement [is] to follow,” while it may be seen as some evidence that the parties did not intend to be bound by the preliminary agreement, it does not necessarily “conclusively show this.” Farnsworth, supra note 20, at 259.
120 850 F.2d 1217, 1221 (7th Cir. 1988).
121 Id. at 1222.
122 Id.
123 Id.
requiring a formal writing, the evidence presented supported an inference that an oral contract existed and was binding.\textsuperscript{124} But in that case, the alleged oral contract (formed in October 1992) came before the draft Memorandum of Understanding (exchanged by the parties in 1993) and before the later circulation of the definitive agreement, which contained the writing requirement.\textsuperscript{125}

Additionally, some courts show a willingness to override even express language of the LOI purporting to make it non-binding without execution of a definitive written agreement if the circumstances surrounding the negotiation suggest the parties may have subsequently changed their minds about their intent to be bound.\textsuperscript{126} For instance, oral communications and other actions by the parties will be given weight by some courts to such a degree that they overcome earlier seemingly express and unambiguous statements of intent not to be bound.\textsuperscript{127} The \textit{McDavid} case, discussed in detail in Part IV \textit{infra}, involves just such a scenario where oral communications and other actions overcame a preliminary agreement’s writing requirement.

Unlike the \textit{McDavid} court, other courts willing to override express language will do so only if the party asserting the existence of an enforceable agreement can satisfy a seemingly higher evidentiary burden. For instance, a court might require an “express waiver” of that writing requirement before it will override the language in the LOI or draft agreements. To be an express waiver, it must be clear and unambiguous, such as a written waiver expressly overriding the writing requirement.\textsuperscript{128} In \textit{Ciaramella v. Reader’s Digest Association}, for example, the parties had been negotiating a settlement agreement.\textsuperscript{129} The defendant authorized his lawyer to accept the agreement.\textsuperscript{130} The lawyer made several suggestions for revisions that were incorporated into a revised draft.\textsuperscript{131} After reviewing the draft, the lawyer asked for some additional changes and said “We have a deal.”\textsuperscript{132} Before the agreement could be executed, however, the defendant consulted another attorney, ultimately deciding the proposed agreement was not acceptable and refused to sign.\textsuperscript{133} The language of the proposed agreement included a

\textsuperscript{125} Id.
\textsuperscript{126} AMERICAN BAR ASS’N, supra note 21, at 109.
\textsuperscript{127} Id. at 109; \textit{see also} Lamle v. Mattel, Inc., 394 F.3d 1355, 1360 (Fed Cir 2005) (holding that parties “may abrogate a prior written agreement with a subsequent oral one, if they so mutually intend. . . . The question as to whether [the abrogation is effective] depends on the intention of the parties to be determined by the surrounding facts and circumstances.”)
\textsuperscript{128} For instance, in \textit{Southern Colorado MRI, Ltd. v. MED-Alliance, Inc.}, the parties had signed an LOI that explicitly stated it was not an offer and that the rights and obligations of the parties would be defined in a later purchase agreement. 166 F.3d 1094, 1097 (10th Cir. 1999). The parties exchanged drafts of the definitive written agreement and the board of the buyer approved the transaction. \textit{Id.} The buyer sent a letter revising the purchase price and referred to the revision as its “offer.” \textit{Id.} In a subsequent written correspondence, the seller responded that it would “formally accept” the offer. \textit{Id.} The court held that that this offer and acceptance served as a clear and unambiguous written waiver of the LOI’s requirement of a definitive written agreement. \textit{Id.} at 1099-1100. But not all courts require the waiver to be in writing. \textit{See Lamle v. Mattel, Inc.}, 394 F.3d at 1360 (“Under California law it is well settled that the intent to abrogate an earlier written agreement can be inferred from the fact of a later oral agreement.”)
\textsuperscript{129} 131 F.3d 320, 321 (2d Cir. 1997).
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
number of terms that suggested the agreement would not become effective until signed.\textsuperscript{134} The court held that the communication that “We have a deal” was not an explicit waiver of the signature requirement and, therefore, there was no binding contract.\textsuperscript{135}

Even when an agreement does not contain “express language” requiring a formal written agreement before the parties will be contractually obligated, courts have sometimes found other, less direct language to be indicative of a similar intent not to be bound.\textsuperscript{136} For instance, titling a preliminary agreement a “proposal” and stating that a party “desires” to purchase assets have been found to be indicative of intent not to be bound.\textsuperscript{137} However, such language frequently creates an ambiguity and a dispute of fact. For instance, in \textit{IRV Merchandising Corp. v. Jay Ward Productions}, the preliminary agreement stated that the parties needed their lawyers’ “go ahead per a contract to be signed” before proceeding further, indicating an intent not to be bound prior to the signed contract.\textsuperscript{138} However, the preliminary agreement also stated that the contractual relationship between the parties was created as of the date of the preliminary agreement, indicating an intent to be bound as of that date by the terms of the preliminary agreement.\textsuperscript{139} This created an ambiguity that made it such that the court was unable to resolve the issue at the summary judgment stage.\textsuperscript{140}

Finally, in addition to looking at the actual language in a preliminary written agreement, courts will look at other language as well to satisfy this first factor. In fact, in the oral contract context, there will be no language of a preliminary written agreement, yet this factor still can apply. For instance, the court might look to the language of a press release issued by both parties about the proposed transaction.\textsuperscript{141} Or, as in \textit{Ciaramella}, courts might also look to language in the drafts of the definitive written agreement that was never signed.\textsuperscript{142} Those drafts might indicate that the agreement will not be effective until executed and delivered, suggesting no

\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} at 325. The 2nd Circuit came to a similar conclusion in \textit{R.G. Group, Inc. v. Horn & Hardart Company}, 751 F.2d 69 (2d Cir. 1984). In that case, the parties had exchanged multiple drafts of a definitive written agreement over a period of months of negotiations. \textit{Id.} at 76. The proposed agreement had a provision that it would be binding “when duly executed.” \textit{Id.} The agreement, however, was never signed. \textit{Id.} The plaintiff pointed to a statement made by the defendant on a telephone conference where he said the parties had “a handshake agreement” as evidence that the deal was binding. \textit{Id.} However, the court held that this statement was not an explicit waiver of the requirement that the contract be in writing, especially given the fact that, over the months of negotiation, no one had ever suggested removing the writing requirement from the drafts. \textit{Id.} See also \textit{Abrams v. Unity Mut. Life Ins. Co.}, 70 F. Supp. 2d 846, 851 (N.D. Ill. 1999) aff’d, 237 F.3d 862 (7th Cir. 2001) (concluding that a handshake agreement during the negotiations was insufficient to demonstrate an explicit waiver of the parties’ stated intent to only be bound by a signed writing.)
\textsuperscript{136} \textit{Adjustrite Sys., Inc. v. GAB Bus. Services, Inc.}, 145 F.3d 543, 550 n.7 (2d Cir. 1998); Brodsky, \textit{supra} note 52, at 18.
\textsuperscript{137} \textit{Adjustrite Sys., Inc. v. GAB Bus. Services, Inc.}, 145 F.3d at 549; see also \textit{Barnes & Robinson Co., Inc. v. OneSource Facility Services, Inc.}, 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006) (language of LOI stating that parties were to “consider” a “proposed purchase” or a “contemplated transaction” would be indicative of an intent not to be bound until a later definitive agreement).
\textsuperscript{139} \textit{Id.} at 172-73.
\textsuperscript{140} \textit{Id.} at 172-73.
\textsuperscript{141} \textit{Texaco, Inc. v. Pennzoil Co.}, 729 S.W.2d 768, 789-90 (Tex. App. 1987); \textit{Reprosystem, B.V. v. SCM Corp.}, 727 F.2d 257, 262 (2d Cir. 1984).
\textsuperscript{142} 131 F.3d 320, 321 (2d Cir. 1997).
intent to be bound prior to execution. Similarly, a court might view a merger clause or signature lines in draft agreements as evidence of intent not to be bound orally. For instance, in *Continental Laboratories, Inc. v. Scott Paper Company*, the court noted that the inclusion of a merger clause stating that “this Agreement and the Exhibits hereto reflect the complete agreement of the parties and there are no other agreements or understandings applicable hereto” was indicative of an intent not to be bound without the agreement actually being executed.

**ii. Partial Performance**

The second factor in the four-factor test is whether or not the parties have engaged in partial performance. Partial performance consists of one party conferring something of value on the other party that the other party accepts. Partial performance can serve as a signal that one party believes there is a contract and the party who accepts performance signals, by its act of acceptance, that it also understands there to be a binding commitment. On the other hand, acts of performance by one party, unless they are received as such by the other party, do not provide clear evidence of a binding agreement. The issue that frequently arises is whether the acts taken by one party serve as partial performance or are merely “preparatory” in anticipation of the agreement. Because of this uncertainty, it seems rarely the case that a court’s decision will turn on the issue of partial performance and this factor is sometimes all but ignored. For instance, a court might discount even substantial partial performance if the other factors more clearly indicated an intent not to be bound to one another.

**iii. Open Issues**

The third factor courts will analyze is whether all of the terms have been agreed upon or whether there are still material open issues. Even if the parties intend to enter into an agreement, if essential terms are omitted or too indefinite, there will be no legally enforceable contract. Although it is not the case that all of the terms need to be fixed before a contract will be

143 *See, e.g., Reprosystem, B.V. v. SCM Corp.*, 727 F.2d at 262 (supporting its holding that there was no intent to be bound until the formal agreement was signed with the language in the draft agreements that said it would be a “valid and binding agreement” only once it was “executed and delivered”).

144 *Brodsky, supra* note 52, at 19.


147 *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75-76 (2d Cir. 1984).

148 *WILLISTON*, supra note 3, at § 4:11.

149 *Klein, supra* note 51, at 15 (“A party may make some partial performance of a preliminary agreement merely to further the likelihood of consummation of a transaction.”); *see also* Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. 753, 773 (D.S.C. 1988) (holding that submission of and acceptance of franchise application was merely preparatory to obtaining the necessary approvals to be a franchisee and not indicative of a binding agreement prior to execution of the formal franchise agreement).

150 *Brodsky, supra* note 52, at 19; *but see* Balta v. Ayco Co., LP, 626 F. Supp. 2d 347, 364 (W.D.N.Y. 2009) (Summary judgment for defendant denied because, despite considerable evidence the defendant only intended to be bound in writing, there were still triable issues of fact relating to partial performance – specifically evidence that one party billed the other for services and the recipient paid the bill.) However, where evidence of partial performance is overwhelming, it can be a determinative factor. *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d at 75-76.

binding, some courts suggest that the failure to spell out customary terms evidences a lack of intent to be bound. Therefore, the issue that is frequently litigated is whether or not the parties have mutually agreed on sufficient terms for the agreement to be enforced. As a general matter, the terms must be definite enough for the court to ascertain the scope of the parties’ obligations, but the degree of certainty required varies with the transaction involved.

Often there will be conflicting testimony about the significance of open issues and the fact finder will have to decide the implications of these contradictions on the parties’ intent. One context in which this issue arises is when the parties are exchanging drafts of a definitive agreement but the definitive agreement is never signed and one party tries to enforce that agreement against the other. In this context, a defendant might argue that the fact that revised drafts were still being exchanged after the point at which the plaintiff argues an enforceable contract was in place is inconsistent with an intent to be bound. Some courts tasked with analyzing such a scenario might deem the revisions to be minor or to involve unimportant issues and therefore may determine the contract is enforceable based on the terms set out in a draft of the definitive agreement. But other courts recognize that, in these instances, the changes must have been deemed important enough to the parties that they had not yet agreed to sign the agreement, and for a judge or jury to determine that, at some point in time, the changes had become so minor that the contract was binding, despite the parties’ unwillingness to have it executed, would deprive the parties of their right to enter “only the exact contract they desired.”

iv. Type of Contract Usually Committed to Writing

The fourth factor courts will look at in determining the parties’ intent to be bound is whether the contract at issue is the type of agreement that is customarily committed to writing.

152 V’Soske v. Barwick, 404 F.2d 495 at 500. So long as a court is convinced the parties intended the agreement to be binding, and so long as the essential terms of the agreement are set out, a court will be willing to supply missing terms or give meaning to indefinite terms using any criteria available in the agreement itself for establishing the open terms, using accepted business practices, or using a prior or subsequent course of dealing between the parties to the dispute. Kessler, supra note 57, at 413.

153 Farnsworth, supra note 20, at 260.

154 Bustamante v. Intuit, Inc., 45 Cal. Rptr. 3d 692, 699 (Cal. Ct. App. 2006); Schwartz, supra note 47, at 664. (“[A]n enforceable contract requires promises that are sufficiently certain and definite that a court can ascertain the parties’ intentions with a reasonable degree of certainty.”) Some essential terms for an LOI to be binding would be price, structure, and the assets or properties involved. Williamson, supra note 21, at 25 n.3.

155 Kessler, supra note 57, at 414. For instance, if a contract with standard terms was contemplated, a court will likely be more willing to fill in missing or indefinite terms. Id. Open terms will also be less of an issue when determining whether the parties intended to be bound to an obligation to negotiate in good faith than when determining whether the parties intended to be bound to the actual terms of the agreement. Klein, supra note 51, at 12.


158 Bear Sterns Inv. Products, Inc., v. Hitachi Auto. Products (USA), Inc., 401 B.R. 598, 621 (S.D.N.Y. 2009); see also Cont’l Laboratories, Inc. v. Scott Paper Co., 759 F. Supp. 538, 541 (S.D. Iowa 1990) (viewing the exchange of a later revised draft of the definitive agreement after a telephone call where an oral contract was purportedly made as evidence that there was no binding agreement at the time of the call).
A finding that the agreement is a type of contract usually in writing weighs in favor of an intent not to be bound by an informal preliminary written or oral agreement.  

Courts look at a number of facts to help determine whether the particular contract would normally be in writing. For instance, courts will look at the amount of the transaction. The larger the amount of money at stake, the more likely a court is to find that this factor weighs in favor of an intent not to be bound. Additionally, courts will look at the complexity of the transaction and the length of the contract. The more complex the transaction or the longer the period of time over which performance is to extend, the more likely a court would find that this is the type of agreement that is typically in writing. Moreover, when parties are engaged in settlement negotiations, courts may be more likely to find that any agreement resulting from such negotiations is typically in writing. Finally, when the applicable statute of frauds requires that the type of agreement be in writing, an oral contract about the subject matter will not be enforceable.

v. Context of Negotiations

As discussed above, some jurisdictions add the context of negotiations as a fifth factor. Courts look at a number of different things when considering the context of negotiations. Often courts’ analysis of the fifth factor shows considerable overlap with the analysis of other factors in the test. For instance, a court considering the context of negotiations might look at the course of dealing between the parties. Parties who have shown throughout the negotiation process that they are interested in observing contractual formalities may be more likely to be regarded as

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159 Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d at 795.
160 Brodsky, supra note 52, at 20.
161 See, e.g., R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984) (initial investment required of $2 million and plaintiff alleging lost income and profits of at least $80 million – no binding contract); Adjustrite Sys., Inc. v. GAB Bus. Services, Inc., 145 F.3d 543, 551 (2d Cir. 1998) (million dollar acquisition – no binding contract); Winston v. Mediafare Entm’t Corp., 777 F.2d 78, 83 (2d Cir. 1985) ($62,500 was “not a trifling amount” and payment was to be made over several years based on a percentage of earnings – no binding contract); Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 263 (2d Cir. 1984) ($4 million sale of six companies – no binding contract). But just because this factor weighs in favor of a finding of no intent to be bound does not mean that it will be determinative on the issue. For instance, in Texaco, Inc., v. Pennzoil, Co., the court admitted that it was unlikely that, in a transaction worth over $5 billion, the parties would not have expected a detailed written agreement and agreed that this factor supported the position that a signed agreement would ordinarily be expected in a similar situation. 729 S.W.2d 768 at 786, 795. However, the court held that it could not, as a matter of law, hold that this factor was alone determinative of the parties’ intent. Id. at 795. There was sufficient evidence to support an inference by the jury that the parties intended to be bound by the preliminary agreement. Id.
162 Adjustrite Sys., Inc. v. GAB Bus. Services, Inc., 145 F.3d at 551 (assets being purchased were rights to software and a license to use a database, with five-year periods of employment contemplated – no binding agreement); Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. 753, 773 (D.S.C. 1988) (franchise agreement to last 20 years and included numerous details regarding capital structure for franchisees, development of real estate, store construction, and trade secrets, among others – no binding agreement); Reprosystem, B.V. v. SCM Corp., 727 F.2d at 262-63 (completing transaction required approvals of foreign governments, sales of securities and assets, transfer of almost 100,000 employees, and a number of additional details – no binding agreement).
163 See, e.g., Winston v. Mediafare Entm’t Corp., 777 F.2d at 83 (where the parties are adversaries and the purpose of the agreement is to forestall litigation, typically agreement would be in writing – no binding agreement).
164 See, e.g., In re Read-Rite Corp., CV-06004173 SC, 2007 WL 2318901 at *4 (N.D. Cal. Aug. 13, 2007) aff’d, 393 F. App’x 535 (9th Cir. 2010) (involving a contract subject to the requirement in the New York statute of frauds that any agreement that cannot be performed within one year be in writing).
165 Klein, supra note 51, at 11.
requiring a final written agreement before they will be bound. Similarly, the court might ask whether the relevant business community attributes binding force to the type of preliminary agreement at issue and might look at the complexity and scope of the proposed agreement. The court might also address the language of the preliminary agreement and find that a condition precedent to performance – such as the requirement of third party approvals, which would not likely be secured without a formal executed contract – indicates an intent not to be bound prior to satisfaction of that condition. However, these facts seem identical to facts that would be used to analyze the first and fourth factors discussed above. Further complicating the application of this factor is the fact that, while some courts may not expressly analyze the context of negotiations as a separate factor, they may do so informally.

b. Jurisdictions Not Applying Factors Test

A number of jurisdictions do not expressly apply either the Restatement factors test or the more streamlined four or five factors test. Such courts take a more holistic approach, considering all of the facts and circumstances without trying to fit the evidence into specific factors or elements. It is not clear whether this failure to apply the factors test, however, has a substantive effect on the outcome of the cases. An argument could be made that it makes no real difference. That is because courts from these jurisdictions, though they do not expressly apply a factors test, still analyze the same types of facts that are involved in the analysis of the factors test. This plays out in a number of the cases, but, for illustration purposes, I describe two in more detail below.

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166 Id.
167 Id.
169 See, e.g., Spencer Trask Software and Info. Services, LLC v. RPost Int’l Ltd., though the court did not expressly state it was looking at the “context of the negotiations,” it nonetheless appeared to do so when it addressed certain facts. 383 F. Supp. 2d 428, 446 (S.D.N.Y. 2003). For instance, the court noted the fact that the defendant had admitted there was an “agreement on terms” and the fact that the two parties shook hands on the oral agreement made in a meeting as an indication of the parties’ intent to be bound, though the court did not ultimately find these facts to be conclusive on the issue of intent. Id. at 443. Similarly, in Blanton Enterprises, Inc. v. Burger King Corporation, the court set out the four-factor test but went on to look at facts that suggested the context of the negotiations were important. 680 F. Supp. 753, 772 (D.S.C. 1988). For example, the court addressed oral statements of the defendant franchisor such as “the franchise is yours” and “it’s official.” Id. at 776. The court found these statements to be outweighed by other facts and circumstances such as the fact that it was a hard and fast policy of the franchisor to only award franchises if proper processes had been followed, which included execution of two formal agreements. Id. at 772, 776. Therefore, the court held there was no binding agreement. Id. at 776.
171 Response to Petition for Writ of Certiorari, Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2010 Ga. S. Ct. Briefs Lexis 97, at *19; see also Itek Corp. v. Chicago Aerial Indus., Inc., 248 A.2d at 629 (“In making [the determination of intent], the trier of fact . . . must look at the circumstances surrounding the negotiations and the actions of the principals at the time and subsequently. . . . From all of these, the intention of the parties to be bound or not be bound must be ascertained’’); Weigel Broad. Co. v. TV-49, Inc., 466 F. Supp. 2d at 1016 (“Courts look to all of the circumstances surrounding the negotiations, including the actions of the principals both during and after, to determine what the parties intended’’).
In *Weigel Broadcasting Co., v. TV-49, Inc.*, for instance, the court did not apply the factors test but instead stated the rule more broadly as requiring the court to look at “all of the circumstances surrounding the negotiations, including the actions of the principals both during and after” the negotiations to determine the intent of the parties.\(^\text{172}\) Despite not expressly applying the factors test, however, the court went on to emphasize the express language of the preliminary agreement,\(^\text{173}\) much as a court applying the first factor of the factors test would. The court also found that, while the LOI contained some of the terms of the proposed agreement, it did not cover a majority of the terms one would expect to find in such a large transaction.\(^\text{174}\) Consideration of this fact reflects a concern for both the third factor of the test – the extent of open issues – and the fourth factor – whether it is typical of this type of agreement to be in writing. Finally, the court seemed to consider, without expressly stating it, the context of the negotiations when it analyzed emails exchanged between counsel during the negotiation of the definitive agreement that was never signed, which repeatedly referred to the LOI as non-binding.\(^\text{175}\)

Similarly, in *Perles v. Kagy*, in analyzing whether a binding employment agreement existed, the court did not apply the factors test, but did consider the fact that the parties did not agree on two essential elements of the contract – how long the employee would work and what work she would be required to do.\(^\text{176}\) Consideration of this fact is similar to what might be considered under the factor analyzing the third factor – open issues. The court also looked at the conduct of the parties after the alleged oral contract became effective, pointing out that neither of the parties’ behavior suggested either one thought there was a binding agreement.\(^\text{177}\) This analysis is reminiscent of the analysis engaged in by courts looking at the second factor – partial performance – and the fifth factor – the context of negotiations. Finally, the court noted that the alleged oral contract was for a potentially very large amount of money, indicating that the parties likely did not intend to be bound without a written agreement.\(^\text{178}\) This is almost identical to the types of facts courts analyze when looking at the fourth factor – whether it is typical of the particular type of transaction at issue to be in writing.

Since, as discussed above, there is no bright-line test for determining the intent of the parties, even in those jurisdictions that use the factors test, it is plausible that the outcomes of cases in jurisdictions where the factors test is not applied are ultimately no different than outcomes of cases in jurisdictions where a factors test is used. But, there is a place for the opposite argument as well. For instance, as discussed above, it is generally believed in jurisdictions that apply the factors test that the first factor – the language of the preliminary agreement itself – is the most important.\(^\text{179}\) If jurisdictions not applying the factors test tend to give less weight to the first factor, then it is possible that divergent outcomes would result.

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\(^{172}\) *Weigel Broad. Co. v. TV-49, Inc.*, 466 F. Supp. 2d at 1016.

\(^{173}\) The agreement stated it was non-binding and contemplated a future formal Stock Purchase Agreement. *Id.*

\(^{174}\) *Id.*

\(^{175}\) *Id.* at 1017.


\(^{177}\) For instance, the plaintiff specifically did not reduce her understanding of the oral agreement to writing to present to the defendant because she was concerned that the defendant would not agree to sign it. *Id.* at 1250.

\(^{178}\) *Id.* at 1251.

\(^{179}\) See supra note 118 and accompanying text.
c. Who Decides?

When it comes to the issue of intent of the parties to be bound, a threshold question that arises is who gets to decide – a judge or a jury. As a general matter, the issue of whether the parties intended to be bound by a preliminary agreement is thought to be a question of fact that should be resolved at trial. However, in certain circumstances, a court will find that the question of whether parties have entered into a binding contract is a question of law for the court to decide.

Judgment as a matter of law is thought to be appropriate where the issue of intent to be bound can be conclusively determined based on the record before the court – i.e., where there is no genuine issue of material fact. This question is often not straightforward, however, and inconsistent results are not uncommon. For instance, some courts suggest there is a strong presumption against finding a binding obligation in preliminary agreements that contain open terms, call for future approvals, and expressly anticipate a future definitive transaction agreement. These courts find that this presumption is sufficient to warrant the entry of summary judgment against the party asserting the existence of a contract. But other courts refuse to grant summary judgment, even in light of this presumption, where the plaintiff asserts evidence that the court determines would warrant a jury finding of intent to be bound. Additionally, summary judgment may be granted when there is a written preliminary agreement that unambiguously asserts an intent not to be bound without a definitive written agreement. As already discussed in Part III.C.2.a.i. supra, however, courts may refuse to grant summary judgment where there has been some subsequent “waiver” of the unambiguous writing.

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180 Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 789 (Tex. App. 1987) (“The issue of when the parties intended to be bound is a fact question to be decided from the parties’ acts and communications.”); Andersen Inv., LLC v. Factory Card Outlet of Am., Ltd., 630 F. Supp. 2d 1030, 1035 (S.D. Iowa 2009); Spencer Trask Software & Info. Services LLC v. RPost Int’l Ltd., 383 F. Supp. 2d 428, 439 (S.D.N.Y. 2003) (“[I]n cases where the intent to be bound is not conclusively determinable based on the facts alleged in the complaint and the documents incorporated by reference, ‘the issue of whether and when the parties intended to be bound is a factual issue that should [be] submitted to the jury.’”); see GLEN BANKS, NEW YORK CONTRACT LAW: NEW YORK PRACTICE SERIES VOL. 28 § 3:29 (Thompson/West 2006).

181 Banks, supra note 180, at § 3:29.

182 Andersen Inv, LLC v. Factory Card Outlet of Am., Ltd., 630 F. Supp. 2d at 1035 (“While the determination of whether an oral contract existed is ordinarily a question of fact, summary judgment is appropriate if a party has not offered sufficient evidence to support the existence of a contract.”); Schaller Tel. Co. v. GoldenSky Sys., Inc., 298 F.3d 736, 744 (8th Cir. 2002); see also Banks, supra note 180, at § 3:29.

183 Banks, supra note 180, at § 3:29.

184 Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d at 796 (“Where a question of the parties’ intent is determinable by written agreement, the question is one of law for the court…however, the parties’ intent here is not conclusively discernible from their writings alone; therefore extrinsic evidence of relevant events is properly considered on the question of intent.”); Budget Mktg., Inc. v. Centronics Corp., 927 F.2d 421, 426 (8th Cir. 1991) (holding that since the language of the LOI was clear, its interpretation was a matter of law for the court).

185 Banks, supra note 180, at § 3:29.

requirement, but such courts do not consistently define what types of facts are enough to constitute such a waiver. These inconsistencies are addressed in more detail in the proposed framework for analysis I set forth in Part V.B infra.

IV. **McDavid v. TBS: A CAUTIONARY TALE FOR DEAL MAKERS**

A recent case out of Georgia highlighted many of the above-discussed legal issues – a breach of oral contract claim, the interpretation of a preliminary LOI, and a promissory estoppel claim. The case, *Turner Broadcasting System, Inc. v. McDavid*, made national news largely due to (i) its historical impact – the $281 million jury verdict was the largest compensatory verdict in Georgia history; (ii) the fact that the assets being sold were two sports teams – the National Basketball Association’s Atlanta Hawks and the National Hockey League’s Atlanta Thrashers; and (iii) the seemingly scandalous facts – after reneging on the deal with the proposed buyer at the eleventh hour, TBS quickly sold the teams to a group headed by Ted Turner’s son-in-law on practically the same terms. Additionally, the case drew the attention of a high-profile attorney: Theodore Olson, the former Solicitor General, was brought in to represent TBS on appeal.

The case highlights some of the difficulties involved in interpreting parties’ intent after-the-fact and the potential for alarming damages awards when such matters are left to a jury to decide. In addition to serving as a cautionary tale for transactional deal lawyers, it provides a useful tool to analyze the deficiencies in the framework used by some courts to analyze claims for breach of preliminary agreements. In this Part IV, I begin by describing the case – the facts, the parties’ arguments, and the Court of Appeals’ opinion. In Part V.A., I briefly present advice for practitioners representing clients in preliminary negotiations in light of the murkiness caused by cases like *McDavid*. In Part V.B., I present a framework for courts to analyze claims for breach of preliminary agreements.

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187 See supra notes 126-35 and accompanying text.


189 Petition for Writ of Certiorari, supra note 19, at *8.

190 Ted Turner, the founder of TBS, was one of two members of the TBS board to vote against the sale to McDavid, expressing concern that the price was too low. Brief of Appellee, Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2009 Ga. App. Ct. Briefs LEXIS 901, at *2 (“Ted Turner voted against the deal, [because it] was set at a ‘fire sale’ price.”). Two votes against the transaction were not enough to prevent the approval of the deal by the board. As such, the implication was that Ted Turner, unhappy the company was being sold for so little, may have used his influence to get the new buyer – a company in which his son-in-law was a principal – to the table on the same favorable terms McDavid had negotiated. See John Manasso, *McDavid Wins $281 in Case Against Turner, ATLANTA BUSINESS CHRONICLE*, December 9, 2008 (available at http://www.bizjournals.com/atlanta/stories/2008/12/08/daily39.html?page=3. ) In opening arguments, “[McDavid’s lawyer] contended Ted Turner played a key role in sending the teams to his son-in-law’s group over McDavid once he saw the deal McDavid was getting.” *Id.*

191 Though Ted Olson’s name does not appear as counsel of record in the Court of Appeals opinion, he is listed as counsel on the party’s briefing to both the Court of Appeals and the Supreme Court.
A. The Facts

This case involves prolonged negotiations, and an alleged oral contract, for the proposed purchase of two major sports teams – the Hawks and the Thrashers – and certain operating rights to Phillips Arena (the “Assets”). After negotiations broke down, David McDavid, the putative buyer, brought suit against TBS, the putative seller. At trial, the jury found for McDavid on his oral contract-of-sale claim, and awarded him $281 million in damages. The Court of Appeals of Georgia affirmed the jury verdict, and TBS ultimately withdrew its petition for writ of certiorari to the Georgia Supreme Court.

In October 2002, TBS publicly announced its desire to sell the Assets as part of a deleveraging program. In November 2002, McDavid expressed interest in buying the Assets and entered negotiations with TBS. On April 30, 2003, the parties executed a LOI, outlining the proposed terms of the sale and establishing a 45-day exclusivity period. The LOI provided that no binding agreement would arise unless the parties had “negotiated, executed and delivered to each other Definitive Agreements.”

On June 14, 2003, by its express terms, the LOI expired and the definitive agreements had yet to be finalized much less executed, though the parties were continuing to negotiate. TBS’s principal negotiator responded to McDavid’s inquiry about extending the LOI by reassuring him it was not necessary because they were close to a deal. The parties continued to negotiate throughout June.

The parties scheduled a meeting for mid-July to resolve all of the outstanding issues and finalize the deal. At the meeting, TBS raised a tax-loss allocation issue, which the parties failed to resolve. McDavid left the meeting frustrated, while his advisors continued negotiating to work to resolve the remaining open issue. On a July 30 conference call between the parties, McDavid’s advisors told TBS that McDavid would agree to the tax issue if TBS agreed that this would resolve all issues and the parties could finalize the agreement. After asking around the room if there were any other issues on TBS’s end, TBS’s CEO, Phil Kent,

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192 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 873.
193 The jury also awarded McDavid $35 million on his promissory estoppel claim. The court entered judgment for the $281 million since it was the larger of the duplicative awards. Petition for Writ of Certiorari, supra note 19, at *8.
195 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 876.
196 Id.
197 Id.
198 Id. at 879.
199 Id. at 876.
200 Id.
201 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 876.
203 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 876.
204 Id.
agreed and announced on the call “We have a deal.” Internal communications at TBS confirmed that TBS believed that negotiations were complete when TBS’s principal negotiator reported to TBS’s parent (Time Warner) that they had worked out a deal.

The parties exchanged multiple drafts of a definitive agreement after the meeting. During this process, the parties’ counsel identified additional “open issues” for the written agreements. Around August 1, 2003, TBS drafted an internal memo to its employees with a draft of a public announcement of the deal that noted TBS had reached final agreement with McDavid for the sale of the Hawks and Thrashers. Later in August 2003, TBS consulted with McDavid on team management decisions, including the hiring of a general manager and head coach for the Hawks and the hiring of trainers, assistants, and scouts.

Around August 16, 2003, TBS’s principal negotiator proposed a simplified restructure for the transaction, assuring him that the restructure would “not change the deal” and that the “deal was done.” McDavid ultimately agreed to the restructuring, and the attorneys circulated revised drafts. On August 19, 2003, the board of Time Warner approved the sale. The next day, Ted Turner’s son-in-law, Rutherford Seydel, and the son of a member of the Hawks’ board of directors, Micheal Gearon, Jr., approached TBS about purchasing the Assets on behalf of their corporation, Atlanta Spirit. While TBS continued to exchange drafts of the purchase agreement with McDavid’s people, it also began negotiations with the Atlanta Spirit.

According to TBS, the parties continued to negotiate and propose changes to terms of the draft purchase agreement and exchanged revised drafts on August 1, 12, 18, 19, and 25, and September 10 and 11. They exchanged open issues lists on August 11 and 21 and September 5, 8, and 9. Each draft agreement provided it would be effective only when signed by both parties. Around September 12, McDavid and TBS verbally reached a final agreement on each of the open items and TBS’s principal negotiator announced that the deal was done and they should meet for a press conference and closing the following week. Later that day, and in direct contradiction to the purported deal with McDavid, TBS signed an agreement for the sale of the Assets to the Atlanta Spirit. On September 15, as McDavid was preparing to travel to

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205 Id.
206 Brief of Appellant, supra note 202, at *9.
207 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 876.
208 Id.
209 Id.; Brief of Appellant, supra note 202, at *12.
210 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 876.
211 Id.
212 Id. TBS characterized this restructure a bit differently, as the parties having “substantially altered the proposed deal’s financial structure.” TBS asserted there was continued disagreement over some of the terms such as the level of capitalization of the parent entity that would own the Assets. Petition for Writ of Certiorari, supra note 19, at *6-7.
213 Ted Turner was one of the two board members who opposed the deal. Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 876.
214 Id. at 877.
215 Id.
216 Petition for Writ of Certiorari, supra note 19, at *6.
217 Id.
218 Id.
219 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 877.
220 Id.
Atlanta for the closing and the press conference, he received a phone call informing him that Turner had sold the Assets to the Atlanta Spirit.\textsuperscript{221}

\textbf{B. The Parties’ Arguments}

1. \textit{TBS’s Arguments}

At all relevant stages of the litigation, TBS maintained its position that the parties had clearly expressed their intent in the preliminary negotiations not to be bound unless there was a signed written definitive agreement.\textsuperscript{222} Because no final agreement was signed, there was no deal. In support of this position, TBS pointed to the enormous value of the transaction, the complexity of the proposed deal, and the fact that the transaction could not be finalized without league approval (which required a signed written agreement) as evidence that no rational parties would have agreed to a deal without a signed written agreement.\textsuperscript{223}

TBS asserted on appeal that the trial court had incorrectly allowed the case to go to the jury, which was improperly swayed by alleged oral statements made by TBS officers.\textsuperscript{224} It was TBS’s position that in circumstances such as this case – where the only fact in dispute was whether TBS representatives made statements like “we have a deal” during the talks – common law jurisdictions reject oral contract claims as a matter of law.\textsuperscript{225} Such statements are insufficient to overcome both parties’ express manifestations of intent in a preliminary LOI to be bound only by a definitive written agreement.\textsuperscript{226} TBS argued that if, when looking at objective indicia of the parties’ intent, the uncontroverted facts show a party’s intent not to be bound, the court must hold there is no contract as a matter of law.\textsuperscript{227} Only when there is a dispute over the evidence of the parties’ intent must a jury resolve the factual dispute.\textsuperscript{228} TBS argued that the fact-finder must only be allowed to consider \textit{objective} manifestations of intent, and not unilateral understandings and beliefs taken from internal communications at TBS that were never communicated to the other side.\textsuperscript{229} But TBS asserted that, even accepting McDavid’s evidence as true here, the parties were not contractually bound to one another.\textsuperscript{230}

In making its arguments, TBS walked through the four factors of the test derived from the Restatement and described in Part III.C.2.a. \textit{supra}. TBS recognized that Georgia courts had not

\begin{flushleft}
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} Petition for Writ of Certiorari, \textit{supra} note 19, at *1-2.
\textsuperscript{223} \textit{Id.} at *1-3.
\textsuperscript{224} \textit{Id.} at *3.
\textsuperscript{225} \textit{Id.} at *3-4.
\textsuperscript{226} \textit{Id.} at *1-2, 10.
\textsuperscript{227} \textit{Id.} at *11-12.
\textsuperscript{229} \textit{Id.} at *3. For instance, evidence was submitted at trial that TBS’s principal negotiator admitted to “gaming” McDavid and said he suspected “infamy” for all of the people at TBS involved. Brief of Appellee, \textit{supra} note 190, at *13. Additionally, email correspondence between TBS’s CEO and the principal negotiator was submitted showing the two joking about having treated McDavid, a Texan, poorly. Specifically, the email said: “I’m sorry you’ll miss the Spirit press conference! I told them you had bought 20,000 lbs of fine Texas steaks we’ll grill up at the home opener of the Hawks.” Appellee’s Reply Brief, Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2009 Ga. App. Ct. Briefs LEXIS 1509, at *8.
\textsuperscript{230} Reply Brief of Petitioner, \textit{supra} note 228, at *2.
\end{flushleft}
yet applied the factors test to the issue of whether the parties intended to be bound but suggested that the factors should be considered and doing so would be consistent with Georgia law.\textsuperscript{231} TBS asserted that each of the factors in the test pointed the same way and required holding, as a matter of law, that no contract had been formed.\textsuperscript{232}

Specifically, applying the first factor – the express statements of the parties – TBS pointed to the language of the April 30 LOI to show that the parties did not intend to be bound in the absence of a writing.\textsuperscript{233} Even though the LOI had expired at the time of the alleged oral contract, this merely meant that the liabilities and obligations of the parties under the LOI expired.\textsuperscript{234} The statement that the parties would not be bound without a written agreement, TBS argued, was not a liability or obligation. Rather, it was a statement of fact – an “affirmative expression” – of the parties’ mutual intent, which was still accurate despite the expiration of the exclusivity period.\textsuperscript{235} Furthermore, according to TBS, there was never any express waiver of this explicit statement of the parties’ mutual intent not to be bound.\textsuperscript{236} In fact, there were facts and circumstances that supported this initial indication of the parties’ intent not to be bound.\textsuperscript{237} The draft agreements, for instance, all stated that the agreement would only become effective when each party had signed.\textsuperscript{238} The effective date on the drafts was never filled in, indicating the parties did not think they were yet bound.\textsuperscript{239} TBS also argued that the provision in the drafts requiring that any modifications of the agreement be in writing and signed would not make sense if the parties did not intend the original agreement to be in writing and signed.\textsuperscript{240}

Other evidence, aside from the written communications, supported TBS’s argument as well. For instance, TBS pointed to a statement made by McDavid to the local news media in mid-July that he thought a deal was getting close, but that he did not think he would consider the deal done until “everyone has signed the line.”\textsuperscript{241} Additionally, TBS used the fact that NBA and NHL league approval would be required to consummate the transaction as evidence of the parties’ intent not to be bound by oral agreement because such approval could not be gained without a written signed agreement.\textsuperscript{242}


\textsuperscript{232} Petition for Writ of Certiorari, \textit{supra} note 19, at *15. TBS distinguished the facts of this case from those relied on by McDavid’s camp. For instance, TBS stated that the cases relied on did not involve unambiguous pre-formation statements of intent not to be bound orally as there was here in the LOI. Supplemental Brief of Petitioner, \textit{supra} note 231, at *18. While some of the cases relied on by McDavid involved an alleged statement of intent not to be bound orally, in those cases such statement was made only after the alleged oral agreement (rather than before), thereby rendering the statement ineffective to void the already existing contract.

\textsuperscript{233} Id.

\textsuperscript{234} Id.

\textsuperscript{235} Id.

\textsuperscript{236} Id. at *19.

\textsuperscript{237} Id.

\textsuperscript{238} Id.

\textsuperscript{239} Id. at *19.

\textsuperscript{240} Id. at *20.

\textsuperscript{241} Id. at *4, 18.

\textsuperscript{242} Id. at *21.
TBS also argued that the other factors in the test all indicated an intent not to be bound without a formal writing. For instance, TBS explained that this is exactly the type of large, complex transaction that is typically expected to be put in writing by pointing out that each draft was over 80 pages in length, there were five side agreements, and the purchase price was over $200 million. Additionally, TBS pointed out that there were still a number of open issues to be resolved, evidenced by the fact that the parties continued exchanging drafts and open issues lists for weeks after the July 30 telephone conference where the alleged oral agreement was reached. Finally, TBS also refuted McDavid’s claim that there was any partial performance by pointing out that no consideration had changed hands. Though McDavid used the fact that he was allowed to participate in personnel matters as evidence of partial performance, TBS refuted this by asserting this began in June, prior to the time that McDavid even alleged a contract had been formed and thus could not be viewed as part performance.

2. McDavid’s Arguments

McDavid, on the other hand, took the position that the parties’ agreement to be bound only in writing, contained in the LOI, terminated when the LOI expired and TBS’s subsequent actions repeatedly affirmed that the parties had an oral agreement. McDavid relied on Georgia authority suggesting that the circumstances surrounding the making of a contract, like correspondence and discussions, were relevant in deciding if there was mutual assent to be bound. And where such evidence exists, according to McDavid, the question of whether a contract existed is an issue for the jury to decide.

McDavid argued that Georgia courts do not use the factors test and therefore it should not be applied in McDavid’s case. McDavid also asserted, however, that whether the factors test is or is not applied is irrelevant. McDavid suggested that Georgia does the same thing as jurisdictions that use the factors test to determine whether the evidence of intent is in conflict. But Georgia courts do so through a more direct route – they simply ask whether there are factual disputes as to the parties’ intent without trying to fit them into specific elements.

McDavid went on to show that, even if the factors test were applied, he would still prevail. For instance, with respect to the express reservation of a right to be bound, McDavid pointed out that TBS chose not to extend the requirement that any agreement be in writing after expiration of...
the LOI, though the LOI did provide a survival clause for the confidentiality provisions. 254 Testimony of TBS’s general counsel supported McDavid’s assertion that the parties easily could have drafted the LOI such that the provisions about not being bound to an oral contract would extend beyond the termination of the LOI or that the parties could have extended the entire LOI at the time of expiration. 255 In fact, McDavid noted, TBS’s LOI with the Atlanta Spirit had a writing requirement that never expired, indicating that TBS knew how to draft such an agreement had that been its intent. 256 Because the LOI expired, McDavid’s position was that there need not be any additional waiver to negate the writing requirement. 257 Moreover, McDavid argued that the language in the drafts of the definitive agreement saying that the agreement must be signed to be effective was not controlling evidence of intent because those agreements were never signed. 258 McDavid also used the language in the drafts to his advantage by suggesting that language of the merger clause – stating that the executed drafts would “supersede all prior agreements [and] understandings, both written and oral” – suggests that in fact earlier oral agreements would have been possible. 259

McDavid argued there was also evidence of partial performance, stating that TBS would not have allowed McDavid to participate in decision-making regarding team personnel without a binding agreement – TBS even allowed McDavid to be in direct contact with players and coaches and a candidate for the general manager position for the Hawks after July 30. 260 With respect to whether there were still a number of open issues at the time of the alleged oral contract, McDavid argued that any issues that were still open at that time were immaterial. 261 Finally, McDavid asserted that the fact that league approval was required to complete the transaction, and the fact that such approval would require a written document, should not be determinative. According to McDavid’s authorities, TBS would have to prove that the leagues would have rejected the deal to avoid liability and it had failed to do so. 262 In fact, McDavid argued, the record was replete with evidence that the leagues would have approved the deal had TBS not backed out. 263

C. The Decision of the Court of Appeals

After the jury returned a verdict in favor of McDavid in the amount of $281 million, the Court of Appeals of Georgia ultimately rejected TBS’s arguments and affirmed the jury verdict in favor of McDavid. 264 The Court’s opinion began with a recognition that, in Georgia, oral

254 Brief of Appellee, supra note 190, at *28. The LOI stated that “[e]xcept as provided in the Confidentiality Agreement, and except for the provisions set forth in [the paragraph of the LOI governing certain confidentiality terms] of this letter, upon the expiration of the term[s] of this letter, neither party shall have any further liability or obligation whatsoever hereunder[.]” Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 879 n.8.
255 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 879.
256 Brief of Appellee, supra note 190, at *28.
257 Id. at *27.
258 Id. at *27 (citing General Hosps. of Humana, Inc. v. Jenkins, 188 Ga. App. 825 (1988).)
259 Id. at *21.
260 Id. at *29; Brief of Appellee, supra note 190, at *10.
261 He claimed that the issues lists that the parties exchanged after July 30 reflected minor details the lawyers were working out but that the business people had made a deal and argued that issues lists are routine in large transactions and entirely consistent with the existence of an agreement. Brief of Appellee, supra note 190, at *30.
262 Id. at *40.
263 Id. at *34.
264 Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d at 888.
contracts falling outside the purview of the Statute of Frauds may be binding and enforceable and that neither party claims that the oral agreement at issue was subject to the Statute of Frauds requirements.\textsuperscript{265} Also, as a preliminary matter, the Court stated the basic rule that, when determining whether there was an intent to be bound, the trial court was obliged to apply an objective theory of intent, looking at the meaning a reasonable man in the position of the disappointed party would ascribe to the other party’s manifestations of assent.\textsuperscript{266} The Court noted that the circumstances surrounding the making of the contract – for instance, correspondence and discussions – are relevant to the inquiry and where there is such evidence, and it is disputed, the question of whether the parties intended to be bound is generally a question for the jury.\textsuperscript{267} The Court held that, in this case, the matter was one for the jury to decide.\textsuperscript{268}

The Court held that the jury was authorized to conclude, based on the evidence, that the writing requirement in the LOI had expired and had no effect.\textsuperscript{269} The Court stated that, according to Georgia precedent, it was not bound to apply the common-law factors test to the inquiry.\textsuperscript{270} Despite this declaration, the Court, much like other courts not applying the factors test, went on to analyze facts that touch on a number of the factors. For instance, the Court looked at the express language of intent in the LOI and found it was certainly the case that the terms of the LOI reflected an intent not to be bound absent signed agreements,\textsuperscript{271} and said it was undisputed that the parties intended to ultimately sign written documents that memorialized the terms of their oral agreement.\textsuperscript{272} However, the fact that TBS failed to provide a survival provision for this term in the LOI combined with the fact that the LOI had expired could be seen by a reasonable jury as contradicting TBS’s claim that it still had no intent to be bound by an oral agreement after the expiration of the LOI.\textsuperscript{273} The Court held that this conflict was enough to support the jury verdict.

According to the Court, the jury’s conclusion that the parties intended to be bound was further supported by the evidence of the words and actions of the parties at and after the July 30 conference call at which an alleged oral agreement was formed. The Court pointed to statements by TBS’s CEO (“we have a deal”) and its principal negotiator (“deal is done”), internal communications at TBS about a press conference to announce the deal, and the fact that McDavid was allowed to participate in management decisions, all as further evidence from which the jury was entitled to conclude the parties intended to be bound.\textsuperscript{274} Additionally, though there were conflicts in the testimony about whether there were material open issues after the time of the alleged oral contract formation, the evidence supported the jury’s finding that the parties had reached agreement on all material terms by the September 12 announcement by TBS that the

\textsuperscript{265} Id. at 877, 877 n.4.
\textsuperscript{266} Id. at 878.
\textsuperscript{267} Id.
\textsuperscript{268} Id. The court stated that while circumstances indicating the parties’ intent to prepare a future writing is strong evidence they did not intend to be bound by a preliminary agreement, contrary evidence bearing on this issue presents a question for the jury. Id. at 880.
\textsuperscript{269} Id. at 879.
\textsuperscript{270} Id. at 883.
\textsuperscript{271} Id. at 879.
\textsuperscript{272} Id. at 880.
\textsuperscript{273} Id. at 879.
\textsuperscript{274} Id. at 878-79.
deal was “done.”275 And finally, while the leagues’ requirement of a writing in order to obtain league approval served as some evidence of the parties’ intent not to be bound, it need not be dispositive of the issue.276

The Court went on to state that, even if it were to adopt the factors test suggested by TBS, the conclusion would be the same.277 The Court did not go through each of the factors individually, but rather made the sweeping statement that there was evidence in the case that “both supported and refuted the existence of a binding oral agreement,” which demanded resolution by a jury.278 However, the Court did specifically address the fourth factor – whether this was the type of agreement typically committed to writing.279 In so doing, the Court relied on the fact that the Georgia Statute of Frauds did not require this type of contract to be in writing.280 The Court used the concept of expressio unius – the canon of statutory construction that says the express mention of one thing implies the exclusion of another – to suggest that it was not the intent of the legislature to require this type of agreement be in writing.281 The Court indicated that since the Statute of Frauds did not require this type of agreement to be in writing, then it was not the type of agreement that would typically be in writing for purposes of establishing the factors test.282 The Court did not explain why the legislature’s decisions in enacting the Statute of Frauds informed the inquiry of whether businesses typically put certain agreements in writing.

V. RECOMMENDATIONS

In Part V.B below, I recommend an approach to analyzing the intent of the parties in breach of contract claims that would better approximate the intent of the parties at the time of their preliminary contract negotiations than did the court in McDavid and similar cases, particularly those courts not applying the factors test. However, because this area of the law is fraught with complexity,283 and in recognition of the fact that, in some jurisdictions, parties may continue to be at risk of being bound to contracts before they intended to be, in Part V.A, I first suggest some advice to practitioners on how to avoid the unintended consequence of their clients incurring liability for breach of contract after entering into a mostly non-binding LOI but prior to execution of a definitive written agreement.

A. Hindsight is 20/20: Advice for Practitioners in the Wake of McDavid-like Cases

First, there are a number of drafting considerations to keep in mind when putting together the preliminary agreement that relate specifically to this issue of the parties’ intent. When drafting the LOI, practitioners should make sure that the language expressly disclaims any obligation to negotiate the deal and states clearly that there is no deal until definitive written agreements are signed.284 To the extent the LOI has both binding and non-binding provisions, it should clearly

275 Id. at 883.
276 Id. at 881.
277 Id. at 883.
278 Id.
279 Id. at 884.
281 Id.
282 Id.
283 In fact, Alan Farnsworth has said “[i]t would be difficult to find a less predictable area of contract law.” Farnsworth, supra note 20, at 259-260.
284 Waryjas, supra note 24, at 339.
distinguish between the two and the language of the writing requirement should be identified as a
binding provision.\textsuperscript{285} Separating the binding and non-binding provisions into two separate
articles in the agreement can be useful in this regard\textsuperscript{286} as can using conditional language in the
non-binding sections, such as “the proposed transaction would provide…” and “the parties
desire…” instead of words of agreement such as “the seller shall…” or “the buyer will…” that
suggest existence of a contract.\textsuperscript{287}

Additionally, parties should carefully consider how they draft termination provisions in an
LOI. To the extent the LOI is non-binding, it does not need a termination provision. In fact, in
that case a termination provision might actually seem inconsistent with an intent not to be
bound.\textsuperscript{288} However, often the LOI will contain binding provisions as well. If the parties want to
make sure that binding provisions – like an exclusivity provision – terminate at some point in the
future, the LOI should make it clear exactly which provisions terminate and when termination
occurs.\textsuperscript{289} Any provisions of the LOI that survive termination should be clearly identified, and,
to avoid a \textit{McDavid}-like outcome, the writing requirement should be identified as one of the
provisions that will survive termination.

In addition to carefully drafting the LOI, we are reminded by \textit{McDavid} that clients should be
counseled regarding their words and actions during the negotiation process. They need to
understand they should avoid making statements like “we have a deal” or other similar
comments that can be viewed as evidence of their intent to be bound.\textsuperscript{290} Even internal
communications, such as emails between the in-house lawyers and their business counterparts,
can be subject to discovery. Though the interpretation of the intent of the parties is supposed to
be based on objective, not subjective, intent, we know all too well from cases like \textit{McDavid} that
evidence of internal communications can make their way to a jury. As such, clients should be
cautions against putting statements in writing that would suggest an intent to be bound or
otherwise paint the client in a bad light with respect to how they have treated the other party in
the negotiations.

Though the law may be somewhat unpredictable and there is no way to have complete
certainty that a party will not be unwittingly bound to a preliminary agreement, through careful
drafting and counseling, practitioners can at least help their clients position themselves as well as
possible to withstand an allegation of an unintended binding commitment prior to execution of a
definitive transaction agreement, if in fact their intent was not to be bound by preliminary
negotiations.

\textsuperscript{285} Id.
\textsuperscript{286} \textsc{american bar ass'n, supra} note 21, at 110.
\textsuperscript{287} See \textit{supra} notes 136-140 and accompanying text.
\textsuperscript{288} Ludewig, \textit{supra} note 63, at 59; Quake Const., Inc. v. Am. Airlines, Inc., 565 N.E.2d 990, 997 (Ill. 1990) (“[T]he
cancellation clause exhibited the parties’ intent to be bound by the letter because no need would exist to provide for
the cancellation of the letter unless the letter had some binding effect”).
\textsuperscript{289} Waryjas, \textit{supra} note 24, at 341.
\textsuperscript{290} \textsc{american bar ass’n, supra} note 21, at 109.
B. A Workable Framework for Courts to Analyze Similar Cases

1. The Framework

The lack of clarity in this murky area of the law has led to inconsistent results across jurisdictions and makes it difficult for parties to know how to proceed in preliminary negotiations without unwittingly incurring contractual liability. Laypersons sitting on juries are understandably swayed by negative facts – behavior that they perceive to be “unfair” dealing, but that, in the realities of the business world, is not out of line with the expectations of the contracting parties.291 Swayed by this perception, jurors may be more willing to submit verdicts for large damages awards, such as the $281 million jury verdict in McDavid, that well exceed the expectations of the alleged injured parties.292 To avoid inconsistent results and honor the expectations of parties in preliminary negotiations, in this Part V.B, I make recommendations for how courts should analyze the question of the parties’ intent to be bound, particularly in the scenario where there is a preliminary written agreement.

First, jurisdictions should follow the lead of New York and other common law jurisdictions that explicitly apply the factors test. As discussed in Part III.C.2.b. supra, an argument can be made that failure to apply the factors test is not determinative of the issue of intent since even courts that do not apply the test typically analyze facts that relate to some or all of the factors. However, expressly using the factors test would have the advantage of providing more certainty in the law. When a jurisdiction does not apply the factors test but instead merely looks at a collection of facts it deems relevant on an ad hoc basis, contracting parties have less guidance for how to model their behavior during negotiations. By knowing on the front end, for instance, that payment of certain amounts might be viewed as partial performance – which would weigh in favor of a finding of intent to be bound – if the parties’ intent is otherwise, they can counteract the inference that might otherwise be drawn from this “partial performance” through other words and deeds indicating their intent not to be bound despite evidence to the contrary. Or if the parties know that the type of transaction they are engaged in is ordinarily one that, in the relevant business community, would be in writing, but they intend to be bound orally, they can make sure their intent is otherwise made clear, perhaps through email or other written correspondence indicating such an intent despite the type of transaction.

Admittedly, the application of the factors test alone will not transform this area of the law completely. In order for the factors test to promote clarity, it must be applied consistently. Using lessons learned from cases like McDavid, I suggest below some ways to achieve more consistent application, with a focus on the first and fourth factors of the test.

291 See Michael B. Metzger, The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?, 36 VAND. L. REV. 1383, 1387-88 (1983) (“Left to their own devices, jurors may favor underdogs by relying upon alleged oral terms, thereby deciding the case in a manner calculated to avoid a perceived injustice. Jurors also may lack the sophistication needed to deal effectively with complex commercial transactions involving numerous alleged oral and written contract terms.”)
292 Catherine J. Dargan, Confidentiality Agreements, Standstill Agreements, Letters of Intent and Exclusivity Agreements, in DRAFTING AND NEGOTIATING CORPORATE AGREEMENTS 2011, at 90 (PLI Corp. Law & Practice, Course Handbook Ser. No. 34774, 2012) (“The Turner case may have been decided differently if the parties had a bench, rather than a jury, trial.”)
As discussed in Part III.C.2.a. above, jurisdictions applying the factors test typically agree that the first factor – whether the parties expressly reserved the right to be bound only when a written agreement is signed – is the most important.293 This is particularly important when there is a written preliminary agreement with a clearly stated writing requirement. As discussed in Part III.C.2.c. above, judgment as a matter of law regarding the issue of the parties’ intent is appropriate where the issue of intent can be conclusively determined based on the record before the court.294 When there is a preliminary written agreement that clearly and unambiguously asserts an intent not to be bound, and there has been no express waiver of that language, courts should find this sufficient to warrant entry of summary judgment against the party asserting the existence of a contract.295 If all jurisdictions adopt the factors test and agree to place the most weight on the first factor, particularly in cases where there is a preliminary written agreement rather than just oral negotiations, fewer cases will be submitted for jury determinations of intent. Given the fact discussed above that jurors may be overly sympathetic to the disappointed party, leading to potentially unreasonable damages awards, this result seems appropriate. Additionally, it will impart more certainty in the law by more clearly defining which cases will be determined as a matter of law and which will be considered appropriate for determination by the fact-finder and will promote consistency in different courts.

If this recommendation is adopted, in cases where there is a preliminary agreement with an unambiguous expression of intent not to be bound except in writing, the only question a court would need to resolve would be whether in fact there has been an “express waiver” of that intent. As described in Part III.C.2.a.i. above, courts generally hold that a waiver must be clear and unambiguous.296 However, there is not agreement over what it means to be “clear and unambiguous.” For instance, in Lamle v. Mattel, Inc., the United States Court of Appeals for the Federal Circuit, applying California law, held that it is “well settled” under California law that “the intent to abrogate an earlier written agreement can be inferred from the fact of a later oral agreement.”297 But other courts have found evidence of subsequent oral agreements to be incapable of overcoming language even in unexecuted draft agreements suggesting the parties will not be bound until execution.298 In other words, in some jurisdictions, oral arguments may not be enough to serve as a waiver even in the absence of a signed preliminary agreement requiring a writing, suggesting a much higher burden on the disappointed party.299

I would propose, at least in the cases where there is a written preliminary agreement requiring a writing, that to be a “clear and unambiguous” express waiver, the waiver, while it can be informal, must be in writing. Words frequently uttered by parties in the course of negotiations such as “we have a deal” or “the deal is done” should not be enough to allow submission of the

293 See supra note 118 and accompanying text.
294 See supra note 182 and accompanying text.
295 This conclusion is not without precedent. See supra notes 128-135 and accompanying text for a description of cases with holdings supporting this position. These cases involved unexecuted drafts of definitive agreements that included a writing requirement instead of the McDavid-like scenario where there is a preliminary LOI with the writing requirement. The same analysis applies, however, and the requirement of an express waiver of the intent not to be bound is arguably even more crucial in the face of a preliminary written agreement than when the evidence of intent comes merely from unexecuted draft agreements.
296 See supra note 128 and accompanying text.
297 394 F.3d 1355, 1360 (Fed. Cir. 2005).
298 See, e.g., Ciaramella v. Reader’s Digest Ass’n, Inc., 131 F.3d 320, 325 (2d Cir. 1997).
299 Id.
issue to a jury where there is express language in a LOI to the contrary. This is particularly important for honoring the intent of the parties where there is additional evidence supporting the intent expressed in the LOI – for instance, when the draft definitive agreements also reflect the same intent not to be bound through the inclusion of a merger clause, signature lines, and a statement that the agreement will only be binding when executed. This, again, would lead to certainty in the law and would allow parties to tailor their negotiations accordingly based on their mutually understood intent.

Additionally, I take the position that an LOI containing a writing requirement that has expired should still be considered objective evidence of the parties’ intent, capable of determining the issue on summary judgment. Lapse of an LOI should not be considered an “express waiver” of the language demonstrating the parties’ intent not to be bound orally. Typically parties who include termination provisions in their LOI do so mainly to establish the end of certain binding provisions, like the end of an exclusivity period or due diligence period. Therefore, the lapse of the LOI is typically intended to indicate nothing other than, for instance, that the seller is free to solicit other buyers and not deal exclusively with the other party to the LOI and is no longer required to provide the buyer unfettered access to his books, records, and personnel. As such, it is most likely a matter of oversight when parties inadvertently allow the “no oral contracts” provision to expire. As TBS’s counsel pointed out, the expiration of the LOI indicates that the parties’ binding rights and obligations have expired. Since the provisions regarding no oral agreements is not a right or obligation discharged by the expiration of the LOI, it should still be treated as an affirmative expression of the parties’ mutual intent.

The premise behind this recommendation – that an expired LOI is still a good objective indicator of the parties’ intent – is not without precedent. For instance, in Manon v. Corporate Solutions, LLC, the parties had entered an initial LOI reflecting the results of their preliminary negotiations. The LOI had a clause in it that stated the LOI was not intended, with a few exceptions, to “create legally binding obligations” on the parties and none of the parties would be “legally bound until the execution and delivery of a mutually agreeable definitive purchase agreement.” The LOI expired but the parties continued to negotiate and draft a definitive purchase agreement. The agreement was finalized and the parties began talking about a closing date, but unbeknownst to the plaintiff, the defendant was negotiating on the side with a third party. The day after finalizing the transaction document, the defendant told the plaintiff it was going to do the deal with a third party instead. When the plaintiff sued for breach of oral contract, the United States District Court for the Eastern District of Michigan was called upon to determine the intent of the parties. The Court placed a great deal of weight on the express language of the LOI – even though it recognized that the LOI had expired – and, at summary judgment, ultimately concluded that “the undisputed evidence demonstrates that the

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300 See, e.g., AMERICAN BAR ASS’N, supra note 21, at 111-116 (providing a sample LOI).
301 Petition for Writ of Certiorari, supra note 19, at *17-18.
302 Id.
304 Id.
305 Id. at *6.
306 Id. at *3.
307 Id.
parties continued to operate under a belief that a written and executed” definitive agreement was necessary for the parties to be contractually obligated to one another.\textsuperscript{308}

Moreover, even an expired LOI is better objective evidence of intent than internal communications of one party not shared with the other side. Therefore, when the \textit{McDavid} court, for instance, looked at internal communications between members of the TBS team – and more importantly, when the jury was allowed to hear this inflammatory evidence – the court was looking merely at the subjective intent of one party, not at outward manifestations of intent that the other contracting party could see. Evidence of subjective intent is supposed to be immaterial to the question of whether the parties are bound.\textsuperscript{309} Rather, it is the manifestations of intent shared \textit{between} the parties – such as a LOI – that should be instructive.

Turning to the courts’ application of the fourth factor of the test – whether the type of agreement is typically in writing – a state’s Statute of Frauds should not be deterministic of the issue, as it seemed to be with the \textit{McDavid} court. As described above, the \textit{McDavid} court found that, since the Georgia Statute of Frauds did not require the particular type of contract to be in writing, then it was not typical for such a contract to be in writing and the fourth prong thus supported a finding that there was an intent to be bound without a written contract.\textsuperscript{310} The Georgia Statute of Frauds is not unusual in the fact that it does not have a requirement that contracts over a certain dollar amount be in writing. In fact, no state currently has a dollar requirement in its basic statute of frauds.\textsuperscript{311} Despite this fact, it is possible that some transactions for the purchase or sale of a business might still get caught up by the Statute of Frauds in

\textsuperscript{308} \textit{Id.} at *6.

\textsuperscript{309} \textit{See, e.g.,} Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 788 (Tex. App. 1987). Even the rule asserted by the Georgia Court of Appeals in the \textit{McDavid} case is consistent with this approach. Turner Broadcasting System, Inc. v. McDavid, 693 S.E.2d 873, 878 (Ga. App. 2010) (“In determining whether there was a mutual assent, courts apply an \textit{objective} theory of intent whereby one party’s intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the \textit{first party’s manifestations of assent}, or that meaning which the other contracting party knew the first party ascribed to his manifestations of assent.” (emphasis added)).

\textsuperscript{310} \textit{See supra} text accompanying notes 279-282.

Georgia or elsewhere. For instance, if a transaction involves the sale of real property, it may trigger a Statute of Frauds issue. Typically, however, a sale of business will not constitute a “sale of goods” for purposes of a state’s UCC, although in some jurisdictions, under certain circumstances, it might. In Georgia and a majority of other states, a transaction like the

312 Most of the statutes set forth in note 311 supra include a requirement that a contract for the sale of land or concerning any interest in land must be in writing. See, e.g., Ga. Code Ann. § 15-5-30; Del. Code Ann. tit. 6, § 2714; Cal. Civ. Code s. 1624; N.Y. Gen. Oblig. 5-703.

313 Again, most of the statutes set forth in note 311 supra include a requirement that a contract that cannot be performed within one year be in writing. See, e.g., Ga. Code Ann. § 15-5-30; Del. Code Ann. tit. 6, § 2714; Cal. Civ. Code § 1624; N.Y. Gen. Oblig. 5-703.


315 MBH, Inc. v. John Otte Oil & Propane, Inc., 727 N.W.2d 238, 246 (Neb. App. 2007) (“Our research reveals that many courts have concluded in their decisions that the U.C.C. does not apply to mixed sales contracts for the sale of ongoing businesses… Our research also reveals several decisions holding that the U.C.C. was applicable to sales of ongoing businesses.”) Some jurisdictions will apply a “predominant purpose” test to the transaction to determine whether the UCC is applicable. See, e.g., Midwest Mfg. Holding, LLC v. Donnelly Corp., 975 F. Supp. 1061, 1067 (1997). Under the test, courts will look at whether the predominant purpose of the transaction was the sale of an entire business or was the sale of goods. If the contract predominantly involves the sale of goods, the entire contract will be subject to the UCC, and therefore will have to be in writing to be enforceable if it is for greater than $500. Id. Some courts will look at the value of the assets involved in a transaction to determine the predominant purpose of the transaction. Compare Fink v. DeClassis, 745 F. Supp. 509, 516 (1990) (holding that since only a relatively small percentage of the total purchase price consisted of goods, the transaction was not a sale of goods) with Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 13-14 (1st Cir 1987) (holding that because approximately 98% of the total purchase price was for inventory and equipment, the sales agreement was primarily one for goods and therefore subject to the UCC). Other courts, however, place emphasis on quantitative terms and look at what the most
one at issue in *McDavid* – one without a sale of real property and that will not endure beyond one year – will not trigger a Statute of Frauds requirement.

Because it will frequently be the case that large business combinations do not trigger the applicable Statute of Frauds, to make the fourth factor decided by whether the relevant Statute of Frauds does or does not require a writing essentially guts the factor and renders it impotent. It is certainly the case that, if the Statute of Frauds does require a writing for a particular transaction, that a court should conclude that the fourth factor is met, at least when the issue is one of whether an oral contract has been formed, as opposed to whether a preliminary written agreement is binding.\(^{316}\) However, to say that just because it is not *required* to be in writing automatically means it is not *typically* in writing is nonsensical.\(^{317}\) Instead of looking at the Statute of Frauds, courts should look at the size and complexity of the transaction, whether the particular type of contract is usually in writing and ever not in writing in the relevant industry, and the length of the relationship in question.\(^{318}\)

2. **Policies Supporting the Framework**

This article certainly does not suggest that oral or written preliminary agreements – written or oral – should never be binding. Preliminary binding agreements serve a valuable function, particularly for standardized transactions, such as loans.\(^{319}\) “They allow parties to make plans in reliance on the agreement before spending large amounts of money negotiating every detail of the transaction before knowing whether a contract will ultimately result.”\(^{320}\) Protecting the right of parties to contract informally, so that one cannot objectively manifest his intent to be bound and then renge without consequence, may in fact encourage business activity in the marketplace.\(^{321}\)

As such, oral and preliminary agreements certainly should be enforced, but only in appropriate circumstances where it is clearly the intent of the parties to be bound.\(^{322}\) Parties

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2. Of course, in the oral contract context, this becomes a moot point because if the Statute of Frauds requires writing, the court need not analyze the intent of the parties – there will be no oral contract if it is not permitted by the Statute of Frauds. But, sometimes a written preliminary agreement will satisfy the requirements of the Statute of Frauds, so, in that instance, the intent of the parties would still be an issue and the fourth factor would be relevant to the inquiry of whether it is typical for that type of transaction to be agreed upon on a *preliminary* writing as opposed to something more formal.
3. This position is not without precedent. See, e.g., Spencer Trask Software & Info. Services LLC v. RPost Int’l Ltd., 383 F. Supp. 2d 428, 445 (S.D.N.Y. 2003) ("Just because sales of securities are exempted from the Statute of Frauds . . . does not support their argument that it was not a type of contract that normally would have been committed to writing. It is not likely that those sufficiently common oral contracts for the sale of securities were intended to encompass such a complex transaction.")
4. See *supra* notes 160-163 and accompanying text. “Circumstances which have been suggested as being helpful in determining the intention of the parties are whether the contract is one usually put in writing: whether there are few or many details; whether the amount involved is large or small; whether it requires a formal writing for a full expression of the covenants and premises; and whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations.” W.T. Grant Co. v. Jaeger, 224 Ill. App. 538, 546 (1922).
6. *Id.; see also* Brodsky, *supra* note 52, at 17.
should not be trapped in surprise contractual obligations that they never intended. In fact, it is a fundamental tenet of contract law that merely participating in negotiations does not create binding obligations, even if all of the terms of the negotiation are seemingly finalized. Particularly in the context of large, complex commercial transactions, parties often have important reasons for not wanting to be bound until they have a definitive written agreement. For instance, the act of putting pen to paper and actually reducing the terms of the negotiations to writing will often reveal gaps or points of disagreement, misunderstandings, or ambiguity. Parties may hesitate to enter negotiations if they feel they have no control over whether and when tentative proposals become binding.

Additionally, allowing courts to look at internal communications between players on the same side of the transaction as evidence of intent may have a chilling effect. Businesses do not want isolated remarks of individual employees working on a deal to incur liability towards a party disappointed by a failed negotiation.

Moreover, parties who are concerned about entering costly negotiations without any security that such negotiations will ultimately culminate in a transaction have a number of protections at their fingertips. First, parties can secure some certainty by including a binding exclusivity provision, like a no-shop or no-talk, in their preliminary agreement. This at least gives them the security that, for some agreed-upon period of time, their counterpart will not enter into negotiations with a third party without incurring contractual liability. Additionally, a concerned party can demand inclusion as a binding provision in an LOI a break-up fee or a reverse break-up fee, allowing the party to at least recover its costs (or more) in the event the transaction falls through due to no fault of his own. Finally, the marketplace itself serves as a check on bad behavior. Companies who routinely treat their counterparts poorly and back out of deals at the eleventh hour when it seems commercially unreasonable (even if not illegal) to do so quickly gain a negative reputation in the marketplace that can have a detrimental effect on the bottom line. And even when a disappointed party has not protected itself contractually and the marketplace check has broken down such that the party feels it has been mistreated, the disappointed party still has intact its remedies at law and in equity. Even a disappointed party unable to succeed on a Fully Formed Contract Claim still may be able to support an Equitable Claim or a Good Faith Claim (discussed in Parts III A and B supra) and, as a result, may be entitled to reliance damages.

323 Id.
325 Ciaramella v. Reader’s Digest Ass’n, Inc., 131 F.3d 320, 323 (2d Cir. 1997).
326 Petition for Writ of Certiorari, supra note 19, at *29.
327 Waryjas, supra note 24, at 336.
328 AMERICAN BAR ASS’N, supra note 21, at 113 (The “break-up fee provision may be viewed by many as aggressively pro-buyer, in that the buyer may be entitled to a break-up fee even if the Company honors the exclusive dealing provisions and only locates a buyer for its assets after the Company and the buyer were unable to reach an agreement during the . . . exclusive period.”).
329 V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 HARV. L. REV. 1477, 1499 (1996) (“Both society and the legal system impose sanctions. The most powerful sanction that society can impose on a corporation is lost reputation or stigma.”). See also JOHN M. T. BALMER & STEPHEN A. GREYER, REVEALING THE CORPORATION: PERSPECTIVES ON IDENTITY, IMAGE, REPUTATION, CORPORATE BRANDING, AND CORPORATE-LEVEL MARKETING 230 (Psychology Press 2003) ("Reputations constitute subjective, collective assessments of the trustworthiness and reliability of firms . . . [They] summarize assessments of past performance by diverse evaluators who assess a firm’s ability and potential to satisfy diverse criteria.").
C. CONCLUSION

Trying to determine whether or not parties intended to be bound by preliminary oral or written agreements presents a challenge for courts. Indeed, it may be impossible to craft a bright-line test for determining the intent of parties after negotiations break down without the execution of a definitive written agreement. While there is inevitably going to be some uncertainty in this area of the law, it is possible to achieve a more workable framework that would lead to increased predictability in the law. Jurisdictions that allow uncertainty to prevail in this area of contract law risk companies avoiding such uncertainty in favor of those states where courts provide more assurance that a party will not be trapped in a surprise contractual obligation it never intended. The ability of parties to avoid oral contracts when such agreements are not intended is particularly important for large commercial transactions, where contracts typically involve more terms, complexities, and money.

In sum, though parties should be free to bind themselves to preliminary oral or written agreements, not every allegation of such an agreement should be sent to a jury. A disappointed party should not be able to latch on to statements made by individuals on the other side of the negotiation as evidence of a deal and submit such a claim to a jury in the face of a preliminary written agreement that demonstrates the parties’ intent only to be bound upon execution of a definitive written agreement.

To increase certainty in this area of the law and best honor the expectations of the contracting parties, jurisdictions should adopt a multi-factor test, similar to that used by courts in New York. This test can provide a more helpful roadmap to determining the parties’ intent. Though the multi-factor test is not a bright-line rule and the analysis may still prove somewhat malleable, parties in such jurisdictions at least have a guide to help fashion their behavior. Engaging in an ad hoc analysis of the facts and circumstances of a particular case, without using the multi-factor test, leaves parties in the dark about what weight will be given to various expressions of intent. Without this guidance, parties will not have much assurance whether they were bound to an agreement or simply negotiating, which may have a chilling effect in the marketplace.

In addition to applying the multi-factor test, courts should recognize that the first factor – express language of intent in a preliminary agreement – is the most important. If there is a preliminary written agreement with an unambiguous expression of intent not to be bound except with a formal writing, courts should be willing to determine the parties’ intent on summary judgment, unless there has been a clear and unambiguous express waiver of that intent in writing, even if that preliminary agreement has expired.

Moreover, in applying the multi-factor test, courts should not allow the consideration of evidence of intent not shared with the other party, such as one-sided internal communications. Such subjective evidence of intent violates the basic principal that the intent of the parties should only be determined by objective, outward manifestations of intent, not their unexpressed intentions. For claims that do get resolved by juries, these internal communications can be prejudicial and, though irrelevant to the determination of intent, may understandably be considered by the jury as evidence of bad behavior.

Finally, courts should recognize that the fourth factor – whether it is typical of the type of transaction to be in writing – should be analyzed separately from the applicable Statute of
Frauds. To say that the Statute of Frauds does not require a certain type of contract to be in writing and, therefore, it is not typical of it to be in writing, makes little sense and would essentially render the fourth factor meaningless for a large portion of commercial transactions.

This article certainly does not suggest that parties should be encouraged to deceive one another in negotiations by feigning interest in ultimately reaching a deal while never actually intending to sign a contract and otherwise treating each other badly. However, a number of checks and balances already exist to provide parties with protection from such bad-faith dealing through the negotiation process and preserve their reasonable expectations. First, parties can provide themselves with contractual protection in the form of exclusivity agreements, confidentiality provisions, and break-up (and reverse break-up) fees. Second, the marketplace provides a free check on bad behavior for parties concerned about incurring a bad reputation that might ultimately affect their bottom line and their ability to do deals in the future. Finally, even in the absence of a binding agreement, a disappointed party is not without recourse; it can assert a promissory estoppel claim to recover reliance damages, such as amounts spent on legal fees and other costs incurred in reliance on the other party’s perceived promise.