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Letters Of Intent: There Ought To Be A Law, A Uniform Law!

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Letters of Intent: There Ought To Be A Law, A Uniform Law!

*Ronald Benton Brown and Joseph M. Grohman**

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.”¹

I. Introduction

The last day for signing National Letters of Intent (“NLI”) approaches. It reveals which college the high school student-athlete has decided to attend. Signing of a National Letter of Intent, is, quite naturally, a matter of great excitement for the student because it indicates which college this high school student has decided to attend. When star athletes sign an NLI, it is also a matter of great excitement for sports fans and alumni. Thus, the last day on which these letters can be signed² has, for major sports, become an annual event greeted with great excitement after weeks of anticipation. What could be more upbeat than a student getting to go to college and play sports, particularly when the student is going to get a scholarship? It’s all good, right? Maybe not.

The National Letter of Intent website³ provides more information about the effect of a student signing a National Letter of Intent. First, it reveals that the National Collegiate Athletic Association manages the daily operation of the National Letter of Intent program and a group called the Collegiate Commissioners Association [the “CCA”] oversees the program. The NLI is voluntary in that no student-athlete

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¹Lewis Carroll, *Through the Looking Glass*, ch. 6. Humpty Dumpty.

²These dates differ based on the sport, e.g., 2015–16, Basketball is May 18, 2016 for Division I and August 1, 2016 for Division II., April 1, 2016 for Football and August 1 for Soccer and Men’s Water.

³<http://www.nationalletter.org>.

or parent is required to sign and no institution is required to join. Moreover, the NLI applies only to students who will be entering a four-year institution [i.e., a college] for the first time. The parties who will be signing these letters of intent are the high school kids.

The website reveals that a NLI is a binding agreement between the prospective student-athlete and the member institution. By binding agreement, of course it means a contract. Under the terms of that contract, the student athlete is bound to attend the institution for one academic year and the institution is bound to provide financial aid for that academic year. However, the student and the institution are not the only ones bound by this NLI. Once the NLI has been signed, other member institutions are obligated to cease recruiting that student-athlete. That cuts off the possibility that the student might be offered a better deal by another member institution, essentially all the colleges engaged in big-time sports.

Under the terms of this contract, a student who does not attend the institution named in the NLI for one full academic year, but enrolls in another NLI member institution, may not compete in intercollegiate athletics until having completed one full academic year at the second institution. The student will suffer the loss of one season of eligibility to play intercollegiate athletics. That loss of scholarship opportunity may interfere with the student completing a college education. It may also interfere with the student being able to make it to professional athletics based on having honed his or her athletic skills at college. Keeping in mind that this addresses youngsters attending college for the first time, possibly being away from home for the first time, that provision may seem Draconian. Difficulties adjusting to the freshman year of college often derail students, even those who do not have the added pressures and obligations of participating in big time sports.

The NLI starts to sound even more one-sided when one reads the following contract provision on the NLI website: "I understand I have signed this NLI with the institution and not for a particular sport or coach. If the coach leaves the institution or the sports program (e.g., not retained, resigns), I remain bound by the provisions of this NLI. I understand it is not uncommon for a coach to leave his or her coaching

position.” Once again, this is focused on college freshmen. Many decide that they have picked the wrong place even if nothing has changed between the time of the campus visit and their arrival as a freshman. An unhappy freshman who find himself with a different coach from the one by whom he was recruited and on whom the freshman relied in making the decision about which college to attend. An unfortunate high school student may, after signing the letter of intent, be surprised to discover that the coach will not be the one who recruited him or her, but rather the very coach he or she would never have signed up with. Too bad kid! A contract is a contract!

Of course that is a one-sided view. The wisdom or fairness of these terms is not at issue here. The point is not to pass judgment on the institutions and organizations involved in the use of the National Letter of Intent. The focus is on the term “letter of intent.” Why was that term used when what is involved is a contract? Clearly, the term “letter of intent” was carefully chosen by a high-powered legal team for what they considered to be an important purpose. But what was that?

The term, “letter of intent,” is commonly understood to mean “a preliminary agreement.” Most people, on hearing of a “letter of intent,” think that it is a tool used in the process of eventually getting to a binding contract. Thus, a letter of intent appears not to be something to fear; it is something benign. Perhaps, in the NLI context, that image may lead a prospective student, or the student’s parents, to downplay or ignore the warnings found on the NLI website or in the documents, if indeed they read those warnings and understand them.

Consider how a more truthful label might affect this situation. Imagine the document was labeled at the top as “Contract” or “Binding Agreement” or even “Employment Contract.” Would students be more wary about signing a document on “National Student-Athlete Employment Contract Day”? In all probability, they would still be thrilled to sign anyway. People sign contracts all the time without bothering to read them or contemplating what could go wrong, but possibly would take the warnings on the web site more seriously than they would on signing a Letter of Intent. Perhaps labeling the document as an “Indenture” might pro-

duce a different reaction. The only context in which students have probably heard that term is in an American History course that described how in colonial times many people arrived in this country as indentured servants, a class that left them only marginally better off than slaves but had the advantage of an expiration date, if only the indentured servant lived long enough. Think of the emotional baggage that goes with the term indenture! Think of the event being known as National Student-Athlete Indentured Servant Day. How would that be perceived? Some already argue that it is an appropriately negative term to indicate the way student-athletes are treated by their educational institutions.⁴ But athletes wanting to play college sports are unlikely to hesitate in signing letters of intent when that is the only route to that goal.

Thus, it seems unlikely that avoiding these off-putting terms like contract or indenture by using “letter of intent” was intended merely to soft-pedal things to the student-athletes, particularly as the students are explicitly warned about the consequences of signing by the NLI website. So why bother with the misleading label. Could it be that the term, letter of intent, is used to allow the public to see only what it wants to see? The public wants to see college athletics as a good thing: good for the student-athletes, good for the other athletes, good for the alums, good for the fans, good for the colleges and good for the economy. The benign label, “letter of intent” allows the public to avoid facing the reality that these are contracts, and perhaps unfair ones.

This particular use of the term “letter of intent” leads one to wonder about the general use of that term today. If “letter of intent” is being used to allow people to see what they would like to believe in this situation rather than what it really means, what is happening in other situations? Are letters of intent being used today to manipulate the unwary or even trap those who thought they had exercised reasonable caution? Letters of intent make frequent appearances in business and legal literature and in cases; and apparently

⁴See, Nocera and Strauss, *Indentured: The Inside Story of the Rebellion Against the NCAA* (Penguin 2016?).

phenomenon="United States phenomenon."⁵ A review of the legal literature, found listed in the Bibliography, reveals an emphasis on trying to draft letters of intent to turn out to be what the drafter wants rather than something else. However, the danger to a party is not merely losing litigation, but it starts with the threat that a party might be drawn into litigation. That threat of litigation alone may be enough to bully a party into taking action, even if not actually required to do so.

Many an unhappy party has discovered that a letter of intent was like the Mirror of Erised,⁶ dangerous because it led the viewer to see what he desired rather than reality. The first reaction might then be that letters of intent should be eliminated. However, letters of intent are too ingrained in our culture to ever be eliminated, and they can be an invaluable negotiation tool if the danger can be removed. That cannot be accomplished by even the most skillful drafting. The suggestion made here is that state legislatures should enact a simple statute providing that letters of intent are not contracts and cannot be considered as evidence that a contract has been created. The appropriate vehicle to get this action out of state legislatures is to have a Uniform Letters of Intent Act promulgated by the National Conference of Commissioners on Uniform State Laws. What that Uniform Act should look like is provided in the conclusion of this article.

II. What is a Letter of Intent?

"Letter of intent" is an odd term. The best place to start would be to break this term into its components, letter and

⁵See *e.g.*, the recent announcement of a Canadian business, Luxor, announcing the signing of letters of intent to acquire businesses in both the United States and Canada. According to the announcement, the letters of intent are nonbinding except to the extent that they provide the parties will negotiate exclusively with one another for the provided time and provide certain things that the parties must do to consummate the deal. <http://globenewswire.com/news-release/2015/11/05/784070/10155343/en/After-Months-of-Planning-Luxor-Enters-Into-Letters-of-Intent-to-Acquire-Two-Wood-Framing-Businesses-in-Canada-and-the-US.html>

⁶The Mirror of Erised, Professor Dumbledore explained to Harry, shows what people desire rather than reflecting reality. Harry Potter and the Sorcerer's Stone (N.Y. Scholastic Inc. 1999) Chapter 8.

intent. “Letter” is defined as by Black’s Law Dictionary⁷ as: “1. A written communication that is usually enclosed in an envelope, sealed, stamped, and delivered (esp., an official written communication) <an opinion letter>. 2. (*usu. pl.*) A written instrument containing or affirming a grant of some power or right <letters testamentary>. 3. Strict or literal meaning <the letter of the law>. Black’s Law Dictionary⁸ goes on to define intent as: “1. the state of mind accompanying an act, esp. a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it.” Adding letter and intent together, it seems that a letter of intent should be a written communication that expresses the mental resolution or determination to do an act. The range of acts the party is resolved or determined to do is not limited by this definition. Nor is the number of parties limited. Thus a letter of intent could be executed unilaterally by only one party, or it might be executed by more parties to express their mutual intent. Because the Anglo-American system of jurisprudence places so much importance on intent, it would seem that a letter expressing intent could have profound significance. If, for example, the letter exhibits an intent to create a binding obligation, it might satisfy one requirement for contract formation. A letter of intent, if agreed to by both parties, might be a contract. That is, indeed, a broad reading of the term and seems consistent with the way the letter of intent is being used by colleges with student-athletes in the NLI context.

However, Black’s Law Dictionary⁹ goes on to define “letter of intent” much more narrowly. It provides that a letter of intent is:

A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing preliminary to a contract. A **letter of intent** is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by a letter of intent, and courts ordinarily do not enforce one; but courts occasionally find that a commitment has been made.—Abbr. LOI.—

⁷Black’s Law Dictionary (Westlaw. © 2014 Thomson Reuters. 10th ed. 2014).

⁸*Id.*

⁹*Id.*

Also termed *memorandum of intent*; *memorandum of understanding*; *term sheet*; *commitment letter*. Cf. *precontract* under contract. “[T]he parties may have agreed to postpone the creation of the contract to some future date, which may never arise. The ‘subject to contract’ cases are one example of this. Another is the ‘letter of intent.’ This is a very commonly employed commercial device by which one party indicates to another that he is very likely to place a contract with him. A typical situation would involve a contractor who is proposing to tender for a large building contract and who would need to subcontract, for example, the plumbing and electrical work. He would need to obtain estimates from the subcontractors on which his own tender would, in part, be based but he would not wish to enter into a firm contract with them unless and until his tender was successful. Often he would send a ‘letter of intent’ to his chosen subcontractors to tell them of their selection. More often than not such letters are so worded as not to create any obligation on either side but in some cases they may contain an invitation to commence preliminary work which at least creates an obligation to pay for that work.” M.P. Furmston, Cheshire, Fifoot and Furmston’s Law of Contract 58 (16th. Ed., 2013).

The role of a dictionary is to provide the commonly understood meaning of terms, so it is reasonable to conclude that the common understanding of the term is what the august Black’s Law Dictionary says it is. Moreover, another reliable dictionary provides the following definition which is consistent with Black’s: “a letter indicating that the writer has the serious intention of doing something, such as signing a contract in the circumstances specified. It does not constitute either a promise or a contract.”¹⁰ As a real estate expert explained about letters of intent, “First, it is understood in the trade [real estate] that it is not their purpose to create binding authority.”¹¹ This seems consistent with what current law students are taught, if they are taught anything at all, about letters of intent, i.e., that they are preliminary

¹⁰Collins English Dictionary — Complete & Unabridged 2012 Digital Edition © William Collins Sons & Co. Ltd. 1979, 1986 © HarperCollins Publishers 1998, 2000, 2003, 2005, 2006, 2007, 2009, 2012.

¹¹Sidney G. Saltz, *From Handshake to Closing: The Role of the Commercial Real Estate Lawyer* (2d ed. 2010 American Bar Association) at 8.

agreements.¹²

Another real estate expert, Professor George Lefcoe,¹³ notes that:

As the first step in formalizing a complex commercial transaction, buyers and sellers often begin by negotiating letters of intent. A letter of intent describes the parties' tentative resolution of the main deal points, leaving many details for a later formal agreement to follow If they are able to work out the big deal points through are-contract letter of intent, or sign off on a term sheet embodying the main deal points, the parties take comfort in knowing that no insurmountable differences divide them. A letter of intent can also embody an agreement to negotiate in good faith and could include such details as whether and how often each party is obligated to meet with the other.¹⁴

Therefore, Professor Lefcoe concluded, “[a]ttorneys drafting letters of intent worry about one of the parties trying to enforce a partial understanding against the other as if they had reached a complete meeting of the minds.”¹⁵ Successfully drafting against inadvertently creating an obligation by executing a letter of intent must always be considered, if another real estate expert is correct in asserting, “At the very least, a letter of intent may create an obligation to negotiate in good faith, unless that is expressly negated in the document.”¹⁶

Thus, it is not surprising to find a court using the term “letter of intent” to explain why something is not a contract. In *Kohandarvish v. Khatibi*,¹⁷ a handwritten document was labeled “Contract” at the top and included the address of the

¹²See, e.g., Burnham, Scott C., Letters of Intent and Other Formal Preliminary Agreements (Center for Computer-Assisted Legal Instruction) available at <http://www.cali.org>.

¹³Florine and Ervin Yoder Professor of Real Estate Law, University of Southern California Law School.

¹⁴George Lefcoe, Real Estate Transactions, Finance, and Development (LexisNexis, 6th ed. 2009), at 65.

¹⁵*Id.*

¹⁶Saltz, Sidney G., From Handshake to Closing: The Role of the Commercial Real Estate Lawyer (2d ed. 2010 American Bar Association) at 8.

¹⁷*Kohandarcish v. Khatibi*, 2002 WL 1573738 (Cal. App. 2d Dist. 2002), unpublished/noncitable, (July 17, 2002).

land to be sold, the price, the down payment, the payment of the balance, that the land would be sold in “as is” condition, and the names of the buyer and seller, and the signatures of the buyer and seller; but it provided, “[a]ll terms and conditions will be prepared by attorney and signed by parties.” This led the trial judge to conclude, “[t]his ‘contract’ constitutes merely a letter of intent and not an enforceable written agreement.” Thus, the court used the term “letter of intent” to indicate the document was merely a preliminary agreement.

To put this narrower meaning of a letter of intent into a more commonly understood context, it would seem to be an appropriate description of a response to an invitation that included the term “R.S.V.P.” Those initials indicate the issuer would like a response about whether the recipient agrees to come to the event, i.e., what are the recipient’s intentions? Does the recipient intend to attend the event or not? Is the recipient expected to enter into a contract to attend? Certainly not! No one expects the issuer to use the response as a basis for bringing an action in court to force the respondent to attend or to recover damages for nonattendance. Rather, the obligation to respond is social as is the obligation to attend if the response indicated that this was the recipient’s intent. Failure to honor one of those social commitments is certainly a social faux pas that might result in social consequences, e.g., not getting invited again,¹⁸ but not a breach of contract.

However, things are not as simple as those definitions suggest. As one judge explained, after referring to the dictionary definition, “‘Letter of intent’ is not a legal term of art.”¹⁹ Thus, the question is left open as to what a particular letter of intent might be. If a judge finds a particular letter of intent reveals the parties had the mutual intent to create a binding obligation and that obligation was supported by

¹⁸Advice: Invitation Etiquette, The Emily Post Institute emilypost.com/advice;invitation-etiquette/. Website last visited 5/31/2016.

¹⁹The term is seen in real estate development documents, securities underwriting, and sales of corporate assets, among other areas. Generally, ‘letter of intent’ refers to a writing documenting the preliminary understandings of parties who intend in the future to enter into a contract. *Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309, 315 (9th Cir. 1996), citing *inter alia*, *Black’s Law Dictionary* at 814 (5th ed. 1979).

consideration or a consideration substitute such as promissory estoppel, then it would be considered a contract.²⁰ For most lawyers, this makes evaluating a letter of intent to determine if it is a contract seem like a bad flash-back to their first-year law school exam in contracts. If that contracts exam is a bad memory for lawyers, it may be a worse experience for the non-lawyer, particularly where significant assets are riding on the outcome and those assets may be eroded simply by the process of having the court determine what the letter of intent is. Adding to the confusion, there are a number of terms that are sometimes treated as synonyms for the term letter of intent. These include: agreement in principal, commitment, commitment letter, letter agreement, memorandum of agreement, memorandum of intent, memorandum of understanding, preliminary agreement and term sheet. However, getting into the discussion of the exact meanings of those terms or their uses is beyond the scope of this discussion.

As used today, the term “letter of intent” is inherently ambiguous.²¹ Letters of intent are frequently, in litigation, discovered to have created binding obligations. “Simply because a document is captioned “letter of intent” does not preclude a court from finding that the document evidences a contract. Courts recognize that “[o]ne of the most difficult areas of contract law concerns the enforceability of letters of intent and other preliminary agreements.”²² “The question is difficult because it is one of intention.”²³ A manifestation of assent sufficient to conclude a contract is not prevented from doing so because the parties manifest an intention to

²⁰See: Restatement (Second) of Contracts chapters 3 and 4.

²¹See Homburger, Thomas C., and Schueller, James R., Letters of Intent-A Trap for the Unwary, 37 Real Property, Probate & Trust J. 3, 509 (Fall, 2002).

²²Murray, John Edward, Jr., Murray on Contracts (Lexis Nexis 5th ed., 2011), quoting Judge Posner in *Venture Associates Corp. v. Zenith Data Systems Corp.*, 96 F.3d 275, 276 (7th Cir. 1996), citing in fn. 31, *Garner v. Boyd*, 330 F. Supp. 222 (N.D. Tex. 1970), *aff'd per curiam*, 447 F.2d 1373 (5th Cir. 1971), “which held that a document was evidence of a contract notwithstanding its caption as of “letter of intent.”

²³Murray, John Edward Jr., Murray on Contracts (Lexis Nexis 5th ed., 2011).

memorialize their already made agreement in writing.²⁴ At this point, it should be helpful to look at some examples of the current use of letters of intent.

III. **Some Examples of Letters of Intent**

Ordinarily, a letter of intent is thought to be a preliminary agreement and that its purpose is to lead to a contract. However, in some cases it is accepted as being a contract. For example, *Fleisher Engineering & Construction Co. v. Winston Bros. Co.*²⁵ involved two letters of intent. Housing was to be built for the United States Navy. The Navy Department sent a letter of intent to the general contractor authorizing it to begin work on the project. Pursuant to that authority, the general contractor sent a letter of intent to the subcontractor authorizing it to begin work immediately. The letters of intent contemplated the execution of formal contracts on standard Navy Department forms but provided that the letters of intent would “constitute an agreement until the execution of the definitive subcontract or termination hereof.”²⁶ When the ending of the war eliminated the federal government’s need for the housing, the government did not dispute that it was bound by a contract which needed to be terminated. As the court pointed out, “[i]n the case at bar, the offer and acceptance of the letter of intent from the defendants to plaintiff constitute a binding contract.”²⁷ The case only dealt with the question of the quantity of housing for which the subcontractor had to be paid.

“The key appears to be not what the document in question is titled but to what extent the language in the letter of intent reflects the parties’ intent to be, or not, legally bound by it,” explained the court in *Newharbor Partners, Inc. v.*

²⁴Saltz, Sidney G., *From Handshake to Closing: The Role of the Commercial Real Estate Lawyer* (2d ed 2010 American Bar Association) at 10 [DOUBLE CHECK THIS CITE; IT MAY BE WRONG], citing Restatement (Second) of Contracts § 27 (1981); *Pictures Corp. v. De Toth*, 87 Cal. App. 2d 620, 197 P.2d 580, 585 (1948).

²⁵*Fleisher Engineering & Const. Co. v. Winston Bros. Co.*, 230 Minn. 554, 42 N.W.2d 396 (1950).

²⁶*Id.*, 230 Minn. at 556, NW.2d at 397.

²⁷*Id.*, 230 Minn. at 557, NW.2d at 397.

*F.D. Rich Co., Inc.*²⁸ Newharbor was in the process of creating a mixed-use real estate development and had paid \$850,000 for an option to buy an 82-acre tract of land. Rich, and its subsidiary, entered into negotiations with Newharbor to become partners in the development. They signed a letter of intent and put down a \$100,000 deposit in order to keep Newharbor from continuing to negotiate with a competitor. However, when it came time to work out the joint venture terms, the parties hit an impasse over Rich's proposed financing scheme and Rich's attorney terminated the relationship. Newharbor sued Rich on the theory that Rich had violated a duty of good faith asserted to arise from language in the paragraph that provided "nothing herein except the provisions of (4) above [relating to the disposition of the deposit] will be deemed to create any legally binding obligations. . . ." ²⁹ but which proceeded to state, "[t]he purpose of this letter is simply to set forth the basis on which the parties shall proceed in good faith towards the execution of a mutually acceptable definitive and appropriate partnership agreement."³⁰ The district court had denied Rich's motion for summary judgement that the paragraph prevented it from being held liable, but later granted a directed verdict in Rich's favor and the Court of Appeals. There was no evidence that the parties intended to create any obligation except as to provision (4) which dealt with the deposit. As to the deposit, Rhode Island law, which applied, independently imposed a duty of good faith on the parties to a contract and, the court concluded, the termination of the negotiations had been caused by Rich's bad faith. Thus, he could not recover his security deposit.

*J.B. Enterprises International, L.L.C. v. Sid and Marty Krofft Pictures Corporation*³¹ involved the sale of the stock in the seller's group of companies to the buyer. After negotiations, the parties executed a "Letter of Intent" which provided the price, the payment schedule and the structure

²⁸Newharbor Partners, Inc. v. F.D. Rich Co., Inc., 961 F.2d 294 (1st Cir. 1992).

²⁹*Id.*, at 297.

³⁰*Id.*

³¹J.B. Enterprises Intern., L.L.C. v. Sid and Marty Krofft Pictures Corp., 2003 WL 21037837 (C.D. Cal. 2003).

of the purchase, but it also provided that there would be a 30 day due diligence period after which the parties would enter into a stock purchase contract. In addition, the Letter provided for a loan of \$500,000 from the buyer to the seller which was to be credited towards the purchase price if the sale was consummated, but otherwise was to be repaid. The loan was made and buyer executed a promissory note for its repayment. The buyer began to exercise control over the seller's companies and the loan was made to the seller, but the parties never executed the purchase contract and the buyer eventually called off the sale. When the buyer sued on the promissory note to recover the loan, the seller sued to enforce the letter of intent claiming it was a contract of sale. The court found that the letter of intent was not a contract because it contemplated the parties would negotiate the sales contract at the end of the due diligence period. The seller also sought to enforce the sale on the theory of promissory estoppel. This also failed because the letter of intent lacked a "clear and unambiguous offer to complete the stock purchase because it contemplated that the parties would negotiate the Purchase Agreement." Furthermore, the seller could not have reasonably relied upon it given its terms. Given the terms of the letter of intent, the outcome is not surprising, but that fact did not insulate the buyer from being dragged into expensive and time-consuming litigation.

Consider the letter of intent in *Feldman v. Allegheny International, Inc.*³² Allegheny had purchased a corporation and wanted to sell that corporation's subsidiaries. There were two potential buyers. One of them, Feldman, "gained the upper hand"³³ by signing a letter of intent with Allegheny. It provided that Allegheny would not hold discussions or negotiate with anyone else while it was pursuing the sale with Feldman. The letter of intent specified a minimum cash payment, but no other details of the sale. It also provided that it was "understood that this is not a binding agreement and that the obligations and rights of the parties shall be set forth in the definitive agreement executed by the parties."³⁴ Allegheny and Feldman did negotiate the terms of the sale

³²Feldman v. Allegheny Intern., Inc., 850 F.2d 1217 (7th Cir. 1988).

³³*Id.*, at 1219.

³⁴*Id.*, at 1219.

and discussed different drafts, but without reaching agreement about the terms of the sale. Not thinking that it was bound by the letter of intent, Allegheny met with a competing bidder two months later. Feldman had a different view of the effect of the letter of intent and sued Allegheny for breach of contract.

Feldman claimed that the letter of intent did create a contract of sale with Allegheny and, even if it did not, it did create a contract which bound Allegheny to negotiate only with Feldman. Moreover, Feldman claimed that a third party that began talks with Allegheny about buying the subsidiaries was liable for tortious interference with a contract or with economic advantage. The court began its analysis with: “We start with the letter of intent. Under any view of the facts, the letter of intent was the first (and as will be seen, the only possible) contract between these adversaries. It outlined Feldman’s offer to the extent possible at such a preliminary stage, and bound Allegheny to exclusive negotiation with Feldman while the sale was being pursued.”³⁵ The court found that this made sense in a complex business transaction because arriving at terms would be difficult and require a significant expenditure of time, effort, research and finances. Because a potential buyer would probably be unwilling to bear these costs without some assurance that the effort would lead to a sale, a letter of intent would seem to be a reasonable step because, “the buyer secures the seller’s undivided attention as long as progress continues in ironing out the points of the transaction. Neither party has committed himself to the exchange. Both have agreed to work toward it. While success is not certain, it is more likely and the fear of wasted or duplicative effort is reduced.”³⁶

The court observed, “[o]f course, the parties are entitled to shape the letter of intent as they please to fit their need.” In this case, the letter of intent stated that the parties “understood that this 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.” Each party had agreed that no step of the negotiations should be interpreted by the other as a binding contract until a defini-

³⁵*Id.*, at 1220–1221.

³⁶*Id.*, at 1221.

tive agreement had been reached and formally executed. “The clause eliminated confusion about when a binding contract would arise. Neither party needed to fear that the other would mistake an almost complete draft for a binding contract and try to foreclose the chance to change one’s mind or negotiate further.” However, that is exactly what occurred. After negotiations broke off, Feldman claimed that they had a contract of sale based on the letter of intent.

The court pointed out that, “The Illinois law of contract has long recognized that the parties may agree that reduction to writing and formal execution of a contract will be necessary to create binding relations.” and that “[t]he underlying axiom is that parties may contract about their own negotiations.” In this case, the court also pointed out that because this contract provided, *inter alia*, for the sale of real estate, a writing was required by the Statute of Frauds. Feldman tried to satisfy this requirement by introducing a draft of a contract. This failed because, the court concluded, the draft failed to identify Allegheny as one of the parties and lacked any mark that would satisfy the signature requirement. “Having neither set a price, nor a mechanism to calculate a price, the draft cannot constitute a contract; there has been no meeting of the minds.”³⁷

The court also rejected Feldman’s second theory, i.e., that by signing of the letter, Allegheny became burdened a duty to negotiate in good faith which it had violated.

Good faith’ is no guide. In a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market. And in the context of this case, no legal rule bounds the run of business interest. So one cannot characterize self-interest as bad faith. 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. That is reflected in the fact that the letter explicitly provides for the possibility of stalemate. By its terms, Feldman’s right to exclusive negotiation lasts only ‘while the proposed acquisition is being pursued.’ Both parties were free to end the arrangement and move on if they felt that

³⁷*Id.*, at 1224.

discussions were progressing too slowly or they had reached a stalemate and believed they had better prospects elsewhere.³⁸

The letter of intent did not require Allegheny to negotiate exclusively with the Feldman for any particular time, only as long as their negotiations continued. Either party could unilaterally terminate the negotiations. Consequently, there was no evidence of lack of good faith at the time Allegheny talked to the third party.

Feldman also brought a tort action against its competitor in the negotiations for this purchase. Claiming tortious interference with a contract and tortious interference with a prospective economic advantage, the plaintiff was required to prove: (1) the plaintiff had an enforceable contract; (2) of which the defendant knew; and (3) defendant induced the third party to breach that contract; (4) successfully; (5) resulting in damages.³⁹ Similarly, the elements for tortious interference with prospective economic advantage were: “(1) plaintiff’s reasonable expectation of entering into a business relationship; (2) known of by the defendant; (3) who intentionally interferes, preventing realization of that expectation.”⁴⁰ “Both theories stem from some obligation upon which the plaintiff may reasonably rely and to satisfy that requirement the plaintiff relied on the letter of intent. The court did not rule categorically that such claims could not be based on a letter of intent.” Instead, it points out that this “letter of intent was no guarantee that an agreement would be reached. Consequently, complaints about the Moore group’s competitive overtures winning it the Food Group companies are ended by the Illinois competitor’s privilege. Legitimate competitive efforts, such as indicating interest in and making offers to acquire a company, are not tortious interferences with business.”⁴¹ Thus, it is reasonable to extrapolate, the letter of intent might be a basis for a claim of tortious interference if it contains an exclusivity provision, the third party is aware of that provision, and the third party induces the violation of that provision.

While, in this case, the letter of intent was not found to be

³⁸*Id.*, at 1223.

³⁹*Id.*, at 1224.

⁴⁰*Id.*

⁴¹*Id.*, at 1224.

a contract of sale or a contract to negotiate in good faith, those conclusions were based on the particular facts of the case. There was no finding that such claims could not be based on a letter of intent. Similarly, in this case the court did not find that the crucial elements of tortious interference with a contract or a prospective economic advantage were satisfied by the letter of intent, but the court did not find that a letter of intent could not be the basis for similar claims in other cases. Moreover, Allegheny escaped liability on these claims only after long, arduous and expensive litigation. For Allegheny, signing the letter of intent, even though drafted so as to insulate it from liability, proved to be a costly mistake.

Another example worth consideration is *Main Street Baseball, LLC v. Binghamton Mets Baseball Club, Inc.*,⁴² in which a company wanted to buy a minor league baseball team. The purchase was brokered by an investment banking firm that focused on the sports industry. After discussions, the buyer and seller reached an agreement and “[a]s is customary in the industry, a Letter of Intent (‘LOI’) was drafted by attorneys to memorialize the terms.”⁴³ The letter of intent was nine pages long and included a sixty-day period “no-shopping period” during which the seller could not negotiate with any other potential buyer. It also provided for the negotiation and subsequent execution of the formal purchase and sale contract. Subsequently, the attorneys for the parties exchanged drafts of the purchase and sale contract. Buyer contended that seller’s proposed changes to the purchase and sale contract altered the material terms agreed to in the Letter of Intent and, therefore, was “in direct contravention of the LOI.”⁴⁴ The parties’ disputes included whether the indemnification provided for in the Letter of Intent had a deductible or a cap. When the sixty-day no-shopping period expired without the execution of a contract, the seller announced it would continue working with the buyer but would also consider other offers. A short time later, the seller accepted another offer. The buyer, claiming that

⁴²*Main Street Baseball, LLC v. Binghamton Mets Baseball Club, Inc.*, 103 F. Supp. 3d 244 (N.D. N.Y. 2015).

⁴³*Id.*, at 251.

⁴⁴*Id.*

the Letter of Intent was a binding contract for the purchase and sale of the team, sought injunctive relief. The seller argued that the Letter of Intent was not binding and, even if it was, it had expired when the shopping period ended. Despite those arguments, the court granted a preliminary injunction against the sale.

Despite the fact that letters of intent were customary in this industry and this letter of intent was nine pages long, the parties obviously had different ideas about what the letter of intent was. Under the terms of the letter of intent, \$100,000 was put into escrow and the buyer seems to have thought that the letter of intent sealed the deal leaving only minor non-essential details to be resolved and the reduction of that contract, including those non-essential terms, to a signed writing. Thus, the buyer thought the letter of intent was a contract for the sale which included the obligation to resolve non-essential terms (probably in good faith), to produce a written document of those terms, and to execute that written. In contrast, the seller seems to have thought that the letter of intent merely obligated it to give the buyer an exclusive sixty-day period in which to complete negotiation of a deal before seller would welcome competitors to try win the prize. Thus, while both Buyer and Seller would agree that the letter of intent was a contract, they disagreed as to its terms. Despite the fact that both parties were represented and the letter of intent was nine pages long, apparently there was nothing about the letter of intent that successfully warned either party that it might not be getting what it expected.

Getting the contract of sale into writing proved difficult because the parties could not agree as to certain terms although there is some dispute as to what caused that and whose fault it was. When the sixty-day period expired, seller notified buyer that the exclusivity period had expired and it would deal with other parties and, subsequently, it signed a letter of intent with another suitor. The buyer then brought this suit for specific performance of its letter of intent and to enjoin the sale to the other party.

The court pointed out that in the Federal Second Circuit there are two types of “preliminary commitments.” Type I involves binding contracts in which the parties have agreed upon the essential terms but leave the non-essential terms

and the execution of a formal contract to the future. Type II involves agreements in which all the essential terms have not yet been agreed-upon, but the parties have bound themselves to negotiate in good faith to reach agreement. The court concludes that this letter of intent must fall into one of these two categories. “The relevant inquiry is whether the agreement expressly states that the parties will not be bound in the absence of a further, definitive written instrument. There does not appear to be such a reservation here.”⁴⁵ Moreover, there is no “talismanic scorecard” to rely upon in determining which type it is; it depends on determining what the parties intended.⁴⁶ In reviewing the facts, the court concluded that enjoining the sale was required because, in part, the matter was time-sensitive but allowed continued negotiation with other parties. Sufficiently serious questions existed as to what obligations arose due to the letter of intent so that the parties had to go back to the trial court for further litigation.

In *Quake Construction, Inc., v. American Airlines, Inc.*,⁴⁷ the construction company submitted a bid on a construction project. The landowner, in response, sent a letter of intent that provided that the construction contract had been awarded to the contract. After a meeting, a few changes were agreed upon and the landowner indicated it would prepare a written contract for signatures. Relying upon that, the construction company assembled the necessary subcontractors and otherwise prepared to begin work. A pre-construction meeting was held by the landowner at which the construction company was introduced as the general contractor, but a short time later the construction company was informed that its involvement with the project had been terminated. The construction company sued, alleging breach of contract and promissory estoppel. The trial court granted the motion to dismiss and the construction company appealed. The initial question was whether the letter of intent was a contract. The appellate court decided it might

⁴⁵*Id.*, at 256, citing *Vacold LLC v. Cerami*, 545 F.3d 114, 124–125, Fed. Sec. L. Rep. (CCH) P 94871 (2d Cir. 2008).

⁴⁶*Id.*

⁴⁷*Quake Const., Inc. v. American Airlines, Inc.*, 181 Ill. App. 3d 908, 130 Ill. Dec. 534, 537 N.E.2d 863 (1st Dist. 1989), decision *aff'd*, 141 Ill. 2d 281, 152 Ill. Dec. 308, 565 N.E.2d 990 (1990).

be a contract so the motion to dismiss should not have been granted on that claim.

Why was there doubt as to whether the letter of intent was a contract? Whether a contract was formed depended on the parties' intent. The factors were divided. To start with, the logic that the letter of intent was a contract must have been predicated on the unspoken theory that the bid was an offer and the letter of intent was an acceptance. It is axiomatic that to create a contract by offer and acceptance, that process must have produced mutual assent to create a binding obligation. The landowner pointed out that the letter of intent provided that the letter of intent could be cancelled if the parties could not agree on a fully executed contract. Thus, the landowner argued, contract formation was subject to a condition precedent, *i.e.*, the execution of a formal contract. However, the letter of intent authorized the work and required the construction company to provide proof of insurance. Moreover, the language allowing the letter of intent to be cancelled indicated the parties thought there was something in force, *i.e.*, a contract, that would continue in force unless cancelled. Thus, the appellate court concluded, the letter of intent was ambiguous as to whether it was a contract. Moreover, the construction company claimed that the landowner had waived the condition precedent by saying the construction company had the contract and needed to get to work immediately. It is noteworthy that a spirited dissent reached a contrary conclusion and would have ruled that the language was sufficient to prevent the contract from coming into existence until the formal document was executed.

The outcome on the promissory estoppel claim was similar. To recover on a claim of promissory estoppel, the plaintiff would have to prove: "1) an unambiguous promise is made by a party; 2) the party to whom the promise is made relies upon it; 3) the reliance is expected and foreseeable by the party making the promise; and 4) the party to whom the promise is made in fact relies upon it to his or her injury."⁴⁸ It seems odd that the court, having just decided that the letter of intent was ambiguous, found that element number 1, an unambiguous promise, might be satisfied, but that's what the court does. It decides whether the elements have been

⁴⁸*Id.*, at 867.

satisfied is a question of fact that should survive the motion to dismiss. Needless to say, even if the landowner eventually prevails based on what it probably thought to be careful defensive drafting, it will still have wasted a significant amount of time and money.

In *2004 McDonald Ave. Realty, LLC, v. 2004 McDonald Avenue Corp.*,⁴⁹ the court concluded that only part of the letter of intent was enforceable as a contract while the rest was not. The plaintiff had entered into negotiations to lease a building from the defendant. They signed a letter of intent which listed the basic terms, conditions and contingencies of the proposed lease. The letter of intent provided that “[t]his letter of intent is not a binding agreement except to the extent specifically stated below.”⁵⁰ Despite that, the plaintiff claimed it was a lease contract. The binding terms included that plaintiff pay a deposit and promise to indemnify the defendant for any claims, damages or costs incurred by defendant caused by the plaintiff having access to the building to conduct its inspections. It also provided that the defendant-landlord would negotiate in good faith. The letter of intent also provided that the lease would have five five-year renewal options at a 10% rent increase, including during the option years. The negotiations eventually failed, at least in part, because the defendant-landlord attempted to re-open negotiations about the amount of the rent increase during the option years and the parties could not come to an agreement on that point. The plaintiff filed suit on the theory that the defendant-landlord had breached the letter of intent. However, the court found only those terms expressly stated to be binding, e.g., the indemnity agreement, were binding. Apparently, it considered the agreement to negotiate in good faith to be binding too, but found no proof that the defendant had breached that obligation. The rest of the letter of intent was merely a preliminary agreement to try to reach agreement and, therefore, not a contract.

The Supreme Judicial Court of Maine reached a similar conclusion in a case that began when a brother and sister

⁴⁹2004 McDonald Ave. Realty, LLC v. 2004 McDonald Ave. Corp., 25 Misc. 3d 1204(A), 901 N.Y.S.2d 911 (Sup 2007), aff’d, 50 A.D.3d 1021, 858 N.Y.S.2d 203 (2d Dep’t 2008).

⁵⁰*Id.*

flew to Florida to help their ailing parents return to Maine.⁵¹ While in Florida, they discovered that the father's will greatly favored the sister over the brother. The brother, apparently without professional assistance or advice, wrote out a letter of intent which provided for a substantially different distribution of his assets and both brother and sister signed it. The sister testified that she viewed the letter of intent, also apparently without professional assistance or advice, as merely a proposal of her brother's ideas and that she tried to get the input of other family members before making a binding agreement. The brother saw things differently and sued to enforce the letter of intent as a contract. The Supreme Judicial Court of Maine pointed out that the party who seeks to enforce a contract has the burden of proving the existence of the contract. It affirmed the trial court's ruling that the brother had failed to sustain this burden because the letter of intent, by its terms, anticipated further action in that the parties intended to take unspecified steps to achieve an equitable distribution of their father's estate. Moreover, the brother did not prove that the sister's signing the letter of intent had induced the brother to forebear from exercising any legal right, so promissory estoppel did not apply in his favor.

In contrast, a letter of intent was enforced in *Falls Garden Condominium Association, Inc., v. Falls Homeowners Association, Inc.*,⁵² where two warring associations used a letter of intent as a tool to settle their litigation. The condominium association claimed that it had obtained ownership by adverse possession or an easement by prescription from the homeowners association. As the trial date approached, settlement efforts continued leading to counsel for the parties executing a letter of intent. However, when further problems arose between the parties, the defendant homeowners association filed a motion to enforce the letter of intent. The plaintiff condominium association then disavowed the letter of intent. The letter of intent had provided: that the plaintiff condominium association would lease 24 parking spaces at \$20.00 per month for 99 years and that the lease would

⁵¹Butler v. Hardy, 576 A.2d 202 (Me. 1990).

⁵²Falls Garden Condominium Ass'n, Inc. v. Falls Homeowners Ass'n, Inc., 441 Md. 290, 107 A.3d 1183 (2015).

contain the customary provisions; also, that the parties would enter into a Settlement Agreement with specified undertakings. The letter of intent also provided that the Settlement Agreement and the lease were contingent upon the board of directors of the plaintiff condominium association approving the lease. The trial court reviewed the facts and came to the conclusion that the parties had intended to be bound and, therefore, had entered into a contract. That decision was affirmed by the Court of Special Appeals because “a reasonable observer would conclude the parties intended to be bound.”⁵³ The Court of Appeals of Maryland granted certiorari and then affirmed relying upon precedent that “a letter of intent can constitute a valid enforceable contract. We noted that the mere fact that letter of intent explicitly contemplates further agreements does not make it unenforceable, because ‘some letters of intent are signed with the belief that they are letters of commitment and, assuming this belief is shared by the parties, the letter is a memorial of a contract.’”⁵⁴

The opinion in *Los Rios Community College District v. Superior Court*,⁵⁵ focused on whether an employee of the Community College District should be forced to answer questions at a deposition, but it reveals how the District used a letter of intent and how that might have backfired. The Community College District was able to negotiate a purchase agreement on its own and signed a letter of intent, but needed the approval of the Community College’s Board in order to enter into the contract. The Community College’s Board did not approve entering into a contract with the terms of the letter of intent. Instead, the District commenced this eminent domain proceeding to take the land. The Board’s plan apparently was to use the letter of intent

⁵³Falls Garden Condominium Ass’n, Inc. v. Falls Homeowners Ass’n, Inc., 215 Md. App. 115, 132, 79 A.3d 950, 959 (2013), cert. granted, 437 Md. 422, 86 A.3d 1274 (2014) and judgment vacated, 441 Md. 290, 107 A.3d 1183 (2015).

⁵⁴Falls Garden Condominium Ass’n, Inc. v. Falls Homeowners Ass’n, Inc., 441 Md. 290, 300, 107 A.3d 1183, 1188–1189 (2015), quoting from Cochran v. Norkunas, 398 Md. 1, 13, 919 A.2d 700, 709 (2007)

⁵⁵*Los Rios Community College Dist. v. Superior Court*, 2011 WL 2164553 (Cal. App. 3d Dist. 2011), unpublished/noncitable (not officially published).

produced by the negotiation process act as an option, i.e., an offer which it could either accept or reject, having as a fallback position that if it rejected the terms, it could always forcibly take the land. In contrast, the landowner thought that the letter of intent was a contract for the sale of the land to the District and, because the District already had a contract to buy the land it had no basis for an action to take the land by eminent domain.

Williams v. City of Grand Rapids,⁵⁶ reveals an entirely different use of a letter of intent. It is difficult to imagine why the document was labeled a letter of intent, except that it made the document sound official and formal. The case involved a civil rights action brought by a person arrested for criminal trespass. He alleged that he had been waiting in line to get into a bar but, when it started raining, he simply went and sat in his car. Police officers, acting pursuant to a general “Letter of Intent” they had obtained from the bar, as they had from other businesses, arrested him there. This “Letter of Intent” expressed the business’s intent to prosecute trespassers and purported to authorize the police to investigate and prosecute any person on the business’s property. The judge concluded that the letter of intent “gave the officers a right to investigate people such as Plaintiff who were sitting in a parked car in the lot of the establishment for a prolonged period of time.” When investigating, the police found marijuana which justified the arrest. Therefore, the civil rights action was dismissed.

In *Channel Home Centers v. Grossman*,⁵⁷ Grossman and his associates were in the process of trying to take over a mall which had fallen on hard times. They contacted Channel with the hope that Channel would become an anchor tenant at the mall. After discussing possible lease terms, Channel’s Director of Real Estate indicated a desire to lease the site. Then Grossman requested that Channel sign a letter of intent that Grossman would be able to show when trying to secure financing and other tenants. Channel prepared and signed a letter of intent that included a provision that

⁵⁶*Williams v. City of Grand Rapids*, 2014 WL 5506820 (W.D. Mich. 2014).

⁵⁷*Channel Home Centers, Div. of Grace Retail Corp. v. Grossman*, 795 F.2d 291 (3d Cir. 1986).

Grossman would withdraw the store from the rental market. Grossman signed the letter of intent and returned it to Channel. Channel then turned over the drafting of the lease to the legal department of its parent company, W.R. Grace & Company. The draft of the lease was not acceptable to Grossman and a series of negotiations over the terms ensued. Meanwhile, Grossman had been contacted by another potential tenant who was anxious to lease the premises on terms more attractive to Grossman, so Grossman notified Channel that the negotiations were terminated because more than thirty days had expired. The letter of intent did not contain a thirty-day limit. The district court, applying Pennsylvania law, concluded that the letter of intent was not binding as a contract due to the lack of consideration and violation of the statute of frauds which applied to long-term leases of real estate. The Third Circuit disagreed. Although it did not find a lease had been created, it found that the evidence showed the parties intended to be bound to negotiate in good faith and, in exchange for Channel's promise to do that, Grossman had promised to take the premises off the leasing market and deal exclusively with Channel in regard to leasing that space. The letter of intent was also a benefit to Grossman in that it gave Grossman leverage in dealing with other potential tenants and potential lenders. The lack of a specific time limit need not prove fatal because that only resulted in the obligation being for a reasonable time.

One reason that real estate brokers may like to have the buyer and seller use letters of intent is that they may be used to establish that the broker has earned the commission by producing a buyer who is ready, willing and able to buy or lease the premises, although the commission may not be earned until the lease or sales contract is signed or the sale closed.⁵⁸ The point is that even though the letter of intent may not be binding between the buyer and seller, signing it may have the effect of making the seller liable for the broker's commission under the listing agreement.

"The problem arises when the brokers take the terms that have been discussed, ether orally or by RFP [Request for Proposal] or offer and acceptance, reduce them to writing in a let-

⁵⁸Saltz, Sidney G., *From Handshake to Closing: The Role of the Commercial Real Estate Lawyer* (2d ed. 2010 American Bar Association) at 8.

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ter of intent, and ask the parties to sign them. Remember that, at this point in time, it is most likely that neither party has consulted its attorney . . . I do not believe that any amount of language that states that a letter of intent is not binding could have kept these letters of intent [very detailed] from being enforced as agreements between the parties (except, perhaps, conditions such as approval by a party's governing board . . .).⁵⁹

“There are alternatives to letters of intent that are far less dangerous. For example, I recommend a term sheet. . . . It is always wise to provide that it is not a binding agreement.”⁶⁰ But the fact that the letter of intent is not binding does not eliminate the possibility that the signing the letter of intent may make the seller liable for the broker's commission as was seen in *Realty Investors of USA INC., v. Bhaidaswala*.⁶¹ In that case, the listing agreement provided that the broker had earned the commission upon procuring a buyer willing to buy the property at the terms specified; it did not require that the sale be completed. That the buyer procured was willing to buy the property at the terms specified might be proved by the letter of intent.

Another example of a letter of intent backfiring on a party is *United States v. Elsberry*.⁶² This case involved prosecution for making false statements in violation of federal statute and mail fraud. The defendant's wholly-owned company operated programs for the disadvantaged under contracts with the New York City Board of Education utilizing, at least in part, federal funds. The defendant's company would submit invoices based on expenses and, when these were approved, the defendant's company would be paid. Some invoices showed the defendant's company had paid higher salaries than had actually been paid. Defendant explained that the company was short on cash and that the shortages in the payments would eventually be made up. To bolster this claim, he showed the comptroller's agent letters of intent

⁵⁹*Id.*, at 8–9.

⁶⁰*Id.*, at 10.

⁶¹*Realty Investors of USA Inc. v. Bhaidaswala*, 254 A.D.2d 603, 679 N.Y.S.2d 179 (3d Dep't 1998); a similar conclusion was reached in *East Kendall Investments, Inc. v. Bankers Real Estate Partners*, 742 So. 2d 302 (Fla. 3d DCA 1999).

⁶²*U.S. v. Elsberry*, 602 F.2d 1054 (2d Cir. 1979).

that purported to prove the company was obligated to pay the higher salary. Later, evidence showed that some employees never received the higher salary, were unaware that they might be entitled to the higher salary, and were unaware that those letters of intent existed. The letters of intent that had been shown to the government were then used as proof that the defendant had submitted false statements.

Adding to the confusion, the term “letter of intent” has also been used by legislatures and administrative agencies, but generally not as indicating it is a contract. For example, in *Health Care and Retirement Corporation of America v. Department of Health and Rehabilitative Services*,⁶³ the petitioner wanted to construct nursing homes in various counties in Florida and, by statute,⁶⁴ needed approval in the form of a certificate of need from the state agency that regulated nursing homes. Petitioner’s first step was to file a letter of intent regarding each county with the Department stating its intent to seek the needed approvals. However, the second step required by the statute was the filing of letters of intent with the local health councils. Petitioner failed to do this, resulting in the rejection of its applications. Moreover, that meant missing that review cycle, as fixing the problem would, at a minimum, result in significant delay. Its excuse was that local health councils had not yet been formed in the fall of 1982 when work was begun on the applications. However, the local health councils had been formed when petitioner began filing the applications the following year. The state agency determined that only purpose for filing a letter of intent with a local health council was merely to notify it that an application was going to be submitted to the statewide agency and would be forwarded to the local health council for review within thirty days. Although the agency found the letter of intent to be “at best an insignificant step,” it was a step mandated by the legislature so the petitioner’s application could not be considered without it. Thus, in this situation, a letter of intent is merely a notice to alert certain government agencies that they might be called upon to take

⁶³*Health Care and Retirement Corp. of America v. Department of Health and Rehabilitative Services*, 516 So. 2d 292 (Fla. 1st DCA 1987).

⁶⁴Florida Statutes § 408.039.

action in the near future. It was not a preliminary agreement, an offer or a contract, and has no potential to become one.

The use of “letter of intent” has statutory or regulatory uses in other states. For example, in Mississippi, a person proposing to open a charter school submits a “letter of intent” to the Charter School Authorizer Board to indicate that a proposal for a charter school will be forthcoming.⁶⁵ In Nebraska, an applicant group that seeks to change the way a particular health profession is regulated must file a letter of intent, which the statute seems to equate to an application.⁶⁶ In Hawaii, a person planning a health care construction project must submit a letter of intent detailing the project to the state health care regulatory agency.⁶⁷ In the District of Columbia, the process of considering a proposal for use of federal funds is begun with the submission of a letter of intent to apply for the federal assistance.⁶⁸

Multiple examples can be found in California. For example, a county that is seeking state money for a new children’s system of car programs may submit a letter of intent rather than an application for the funds.⁶⁹ Certain insurance companies cannot issue earthquake or transfer liability to the state commission until they have filed letters of intent that include the binding contractual obligation to be bound to participate with the authority.⁷⁰ A person planning to subdivide a parcel of land is required to file a letter of intent to alert the planning commission, so the planning commission will be able to inform the subdivide about factors that may be pertinent to the preparation of the subdivision map, e.g., physical conditions and policies.⁷¹ Nonprofit organizations that plans to conduct certain games of chance must submit a letter of intent to submit an application for

⁶⁵Miss. Admin. Code 10-402:2.6.

⁶⁶Neb. Rev. St. § 71-6223.

⁶⁷Hawaii Rev. Stat. § 323D-52.

⁶⁸D.D. Mun. Regs. Tit. 29, § 413.

⁶⁹Cal. Welf. & Inst. Code § 5857.

⁷⁰Ann. Cal. Ins. Code § 10089.14.

⁷¹Kingsburg, California Code of Ordinances Sec. 16.16.010.

licensure.⁷² School districts and agencies that plan to set up certain reimbursement systems must file a letter of intent to do so with the Department of Finance.⁷³ School districts seeking state planning grants for restructuring education must file a letter of intent to submit a proposal.⁷⁴ To obtain state help in obtaining a federal grant for housing of persons with disabilities, the local agency must file a letter of intent.⁷⁵ To obtain state support under a state program to leverage private capital to increase funding available to preserve at-risk housing requires that the providers of the private capital submit letters of intent.⁷⁶ The one-year time limit in imposing discipline on a public safety officer is satisfied if the agency issues a letter of intent to impose discipline within the one year even though it does not actually impose the discipline within one year.⁷⁷

IV. CONCLUSION

In an earlier era, a letter of intent might simply have been called a proclamation. By issuing a letter of intent, someone was proclaiming what he or she intended to do. Someone might use a letter of intent to proclaim just about anything. For example, a response to an invitation with an RSVP would reveal whether the responder intended to attend the event or not. It would have been unthinkable to try to hold a person liable for responding “yes” to such an invitation but failing to attend. It would merely be a social *faux pas*.

However, today letters of intent are like Rorschach tests. Different people looking at a letter of intent often see different things. When that leads to a dispute, what the court sees in the letter of intent controls and the party that did not guess right will suffer the consequences of guessing wrong. Even a party who guessed right may have suffered significant harm based on the other party’s using litigation, or even just the threat of litigation, to get concessions. Even an expert in the law cannot be certain what a particular letter

⁷²Cal. Penal Code § 326.3.

⁷³Cal. Gov’t Code § 17557.1.

⁷⁴Cal. Educ. Code § 58914.

⁷⁵Cal. Health and Safety Code § 50686.5.

⁷⁶Cal. Health & Safety Code § 50604.

⁷⁷Cal. Gov’t Code § 3304.

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of intent is until there is binding judicial authority on that particular letter of intent. Identical language might produce different results. Thus, today a letter of intent might turn out to be:

1. Merely an expression of interest to get another person's attention.
2. An expression of interest in response to something.
3. An agreement to negotiate.
4. An offer to enter into a contract.
5. An acceptance.
6. Nonbinding ground rules of negotiation.
7. Binding ground rules of negotiation. Encouragement to the parties to keep negotiation, i.e., to make them feel like they're making progress.
8. A record of an agreement that is to be reduced to a formal writing when the remaining issues have been worked out.
9. A record of an agreement that is to be reduced to a formal writing in the future because all the terms have been worked out.
10. A contract not to negotiate further on a particular point because agreement has been reached as to that (i.e., to take a particular issue off the table)
11. A contract to work in good faith towards a particular goal.
12. A contract to deal exclusively with a particular party (e.g., to take a property off the market) for a particular time.
13. A contract to complete a particular transaction (e.g., sale or merger).
14. An option contract, i.e., as a contract to hold open an offer to enter into another contract.
15. Evidence that the party or parties had a particular intent that was either or neither criminal or/nor tortuous.
16. A basis for claiming estoppel because it induced reasonable good faith detrimental reliance.
17. A document to show other people to induce them to buy or lease something.
18. A document to show to other people in order to get them to provide financing.

19. A basis for administrative action.

While letters of intent have become an integral part of complex transactions and the negotiation process, the value of letters of intent has been diminished by the danger that a particular letter might turn out not to be what a party expected but one of the other choices above. The solution is to eliminate that danger by making it impossible for a letter of intent to become a binding agreement of any kind or being used as evidence that the parties have become bound by the letter of intent. This would create a safe haven in the negotiation process, so the parties could feel free to work out terms without danger that they would become bound by them before knowingly entering into a contract. The appropriate vehicle for making that happen would be a statute in each state or territory, and the fastest, most reliable route to get the states to do that would be via a Uniform Act proposed by the National Conference of Commissioners on Uniform State Laws. Thus, it is proposed that the National Conference of Commissioners of Uniform State Laws adopt a Uniform Letters of Intent Act consisting entirely of the following:

Proposed Uniform Letters of Intent Act

§ 1-101. Letters of Intent Defined for the Purposes of this Act.

Any document entitled “Letter of Intent” or asserting anywhere in the body that it is a letter of intent shall be considered a letter of intent for the purposes of this act.

§ 1-102. Effect of a Letter of Intent.

A letter of intent is not a contract regardless of the words used in it that may otherwise be interpreted as creating a contract.

§ 1-103. Use of a Letter of Intent in Evidence Prohibited.

A letter of intent may not be introduced into evidence to prove that the parties have entered into a contract at the time of creating or executing the letter of intent or by any subsequent action and, if introduced into evidence, may not be considered by the court as evidence that the parties have entered into a contract.

§ 1-104. Use of the Term Letter of Intent as Evidence of Fraud.

The use of the term “letter of intent,” or any similar term, to describe a contract, or what the party at any time asserts is a contract, shall be *prima facie* evidence of both civil and criminal fraud.

§ 1-105. Damages.

A person who uses the term “letter of intent” as the title to a document or uses the term “letter of intent” within the document to describe it and asserts that the document is a contract or creates a contract shall be held liable for both consequential and punitive damages.

§ 1-106. Attorney’s Fees and Litigation Costs.

A person who attempts to enforce any obligation allegedly arising from a letter of intent shall be held liable for the attorney’s fees and litigation costs of any person caused to litigate the validity of that allegation.

Until this simple cure is adopted, what should have been successful transactions will be fraught with the possibilities of confusion, waste and disappointment of expectations if letters of intent are involved. Even worse, “letter of intent” may be used as a tool to mislead or manipulate parties and others. If something is a contract, it should be called a contract, not hidden under a vague term. For example, if the NCAA and its member colleges are binding student-athletes to contracts, they should not be allowed to conceal that from the public by calling what they are signing “Letters of Intent.” If what they are doing cannot survive the public knowing that the students are actually being bound to contracts, then the system obviously needs to be changed. Comedian Bobcat Goldwait has famously told of sophisticates who urge him to try eating exotic foods. “Go on, try weasel, try squirrel; it tastes like chicken, it tastes just like chicken! If it tastes like chicken, why don’t you gimme some damn

chicken?”⁷⁸ Likewise, parties who mean a contract should say “contract,” not “letter of intent.” And if they do use the term, “letter of intent,” then they should not be able to assert that the document really is a contract like they can under the current regime. Until this cure becomes law, when presented with a letter of intent, one should very carefully question whether it is chicken or weasel.

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