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By Ronald B. Glazer Esq., Kaplin Stewart **Don't be bound by a non-binding agreement**

Let's get a "term sheet" or "letter of intent" right away. Slow down and beware. It may save time and legal fees initially, but you must understand the legal implications of a letter of intent, which is often prepared by a non-lawyer.

Is it your intention to be bound or have the other party be bound? Are you willing to risk being bound to an "agreement" which may not deal with all of the issues or may deal with issues inadequately? Is terminology such as "net lease" and "standard warranties" clearly understood to mean the same thing to everyone?

All parties should focus on economic and other issues. Even "legal" issues, will have economic implications. The letter of intent process helps determine if there is economic mutual agreement on the principal terms to warrant moving forward. However, generally, the parties do not want to be legally bound and attorneys will warn of the risks of being bound without flushing out all of the appropriate details.



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If you state in the letter of intent that it is not binding until execution of a full agreement, do not assume that there are no risks. The statute of frauds in most jurisdictions requires only a brief writing (i.e. notes on a napkin) indicating a meeting of the minds to make a deal. The law will imply non-basic deal terms (possibly in a manner adverse to your intentions). "Non-binding" letters of intent often ask the recipient to sign and return to indicate approval. Does this create a legally binding agreement?

Lawsuits on letters of intent are brought by the party who has been disappointed

or left holding the bag. Did the other party have the right to seek and find a

reports. Banking on the deal, a party may have let other opportunities pass. These

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better deal? Can the other party just walk away and refuse to negotiate or allow the first party to meet the terms of its new deal?

One possibility for the attorney is to pursue the theory that there is an implied covenant of good faith and fair dealing. The burden of proof is difficult to show that a party acted in bad faith in order to preclude the other party from realizing its expected benefits of the deal. Some courts have held that the letter of intent did not create an obligation to complete the transaction, but the letter created an agreement to negotiate in good faith to reach agreement.

Expenses may have been incurred by the disappointed party for legal work, appraisals and environmental

circumstances may give rise to claims based upon the law of promissory estoppel. Some courts will use this equitable legal doctrine in order to provide a remedy to reimburse unwarranted expenses and losses, even though there is no express written contract for the court to enforce.

The letter of intent should include a statement that neither party has any obligation to continue negotiations and either party may stop negotiations at any time for any reason or no reason. Avoid obligatory language which could lead a court to find a binding agreement.

Be careful after entering into the letter of intent. Actions and statements of the parties can be construed by a court as evidence of the intention to create a binding agreement. In one case,

a letter was enforced after one party issued a press release advising that "an agreement in principle" had been reached, where the letter was ambiguous and the other party acted on the belief that the deal would be done.

The parties may intend that some, but not all, of the provisions be binding, such as no publicity provisions, confidentiality, rights of access to properties and records, a no shop or exclusive provision, etc. The letter should clearly spell out what is intended to be binding and what is not binding.

As can be seen, a letter of intent can be helpful, but can have unintended legal consequences if not written carefully. Parties are well-advised to have an attorney prepare a form letter that contains language that will preserve the non-binding expectation of the parties. Finally, if the agreement requires board or other approval, specify that the approval is in the sole, subjective discretion of the approving parties.

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