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***1512** LETTERS OF INTENT

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A letter of intent, memorandum of understanding, or other "preliminary" document often precedes a transaction. In most situations, these documents are not intended to bind either party to finally complete the contemplated transaction and are used for a variety of purposes.

Such purposes can include maintaining confidentiality and exclusivity to preclude one or both parties from dealing with others during the pendency of final negotiations and due diligence. Many times the parties will insist on such a preliminary document after an agreement in principle has been reached to justify, in part, the time and expense involved in drafting the transaction documents and in performing due diligence activities. Of course, too much assurance may have the effect of creating a binding agreement. According to one authority, "[b]ecause of their susceptibility to unexpected interpretations. Letters of intent have been characterized by at least one practitioner as 'an invention of the devil.' [FN1]

THE ENFORCEABILITY OF CONTRACTS IN GENERAL

It is well-established that Michigan and other jurisdictions follow the modern trend in law that favors carrying out the parties' intentions through enforcement of contracts and disfavors, holding them unenforceable because of uncertainty. [FN2] Therefore, Michigan courts, like other jurisdictions, do not permit parties to be released from agreements if the material terms can be ascertained with reasonable certainty from the language used, in the light of all the surrounding circumstances, including extrinsic evidence, conduct of the parties, and gap-fillers. [FN3]

Courts have held [citing to the Restatement (Second) of Contracts § 204] that when parties to a contract have not agreed about a term that is essential to the determination of their rights and duties, the court will supply one that is reasonable in the circumstances. [FN4] It is also well established that a contract's material terms need only be "reasonably definite or certain" and, that because courts are loathe to find contracts void for indefiniteness, omitted terms will be supplied by the courts if an objective standard for their determination is expressed in the contract. [FN5]

THE ENFORCEABILITY OF LETTERS OF INTENT

As a general matter, courts often express reluctance about the binding nature of "letters of intent." In a case decided in July 2000, a federal district court in Maryland stated:

[l]etters of intent and negotiations ordinarily do not constitute binding contracts and will not be enforced by the courts, in part because the financial community does not regard a [letter of intent] as a binding agreement, but rather, an expression of tentative intentions of the parties. [FN6]

Further, the Ninth Circuit Court of Appeals noted in a 1996 decision:

[T]he purpose and function of a preliminary letter of intent is not to bind the parties to their ultimate contractual objective. Instead, it is only to provide the initial framework from which the parties might later negotiate a final ... agreement, if the deal works out. [FN7]

The court added that

calling a document [a] "letter of intent" implies, unless circumstances suggest otherwise, that the parties intended it to be a nonbinding expression in contemplation of a future contract, as opposed to its being a binding contract. [FN8]

However, the court conceded that a letter of intent may constitute a binding agreement if the parties so intend and the document comports with the requisites of contract law. [FN9]

In Opdyke Inv v Norris Grain Co, the Michigan Supreme Court found that the parties to a "letter of intent" may have intended to effect a binding "agreement to agree." [FN10] Justice James Ryan explained that "a contract to make a subsequent contract is not per se unenforceable; in fact it may be just as valid as any other contract." [FN11]

In Opdyke, the plaintiff sued the defendants for breach of a contract to jointly develop an arena for the Detroit Red Wings. ***1513** Instead of developing "Olympia II" in Pontiac, Michigan, as the plaintiffs expected, the defendants constructed the Joe Louis Arena, thus excluding the plaintiffs' participation in an extremely lucrative partnership. Before signing the letter of intent, the parties agreed in part on their future obligations and left the exact terms to be fleshed out later. In reversing a lower court's dismissal, the court ruled that such an agreement could be enforced:

We must not jump too readily to the conclusion that a contract has not been made from the fact of apparent incompleteness. People do business in a very informal fashion, using abbreviated and elliptical language. A transaction is complete when the parties mean it to be compelete. [FN12]

DETERMINING INTENT

In Opdyke, the court noted that leaving "certain matters to be negotiated in the future is some evidence that the [letter of intent] was not intended to be a binding contract." [FN13] Also, any tentative language in the letter would bear on the question of whether a "letter contains mere expectations or intentions rather than contractual promises and undertakings." [FN14] However, if the parties intended to execute a binding agreement, "[t]he fact that additional contracts may have been contemplated and mentioned in the letter does not invalidate any agreement actually reached." [FN15] As a factual matter, the final determination of the question of the parties' intent to be bound is generally a matter for the jury. [FN16]

In the context of determining whether the parties intended to be bound by an oral agreement in the absence of a written memorialization, the Michigan Supreme Court identified several factors:

Whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. [FN17]

The Court added that "[i]f a written draft is proposed, suggested or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract." [FN18]

Applying New York law, the Second Circuit Court has devised a framework to determine whether the contracting parties in fact intended to execute a binding preliminary agreement. [FN19] According to this analysis, there are two types of binding preliminary agreements, a "fully binding preliminary agreement" and a "binding preliminary commitment." "[A] fully binding preliminary agreement ... is created when the parties agree on all the points that require negotiation but agree to memorialize their agreement in a more formal document." [FN20]

This preliminary agreement constitutes a binding agreement which can be enforced regardless of whether the parties actually create any "formal document." [FN21] A "binding preliminary commitment" describes an agreement in which "[t]he parties accept a mutual commitment to negotiate in good faith in an effort to reach final agreement."

[FN22]

In order to determine whether the parties intended to be bound by a preliminary agreement of the first type, four factors are examined: "(1) the language of the agreement; (2) the existence of open terms; (3) whether there has been partial performance; and (4) the necessity of putting the agreement in final form, as indicated by the customs for such transactions." [FN23] The determination of whether the parties intended to be bound to a mutual commitment to negotiate in good faith requires a consideration of the above four factors, plus an examination of "the context of the negotiations resulting in the preliminary agreement." [FN24]

INTENT MANIFESTED THROUGH THE LANGUAGE OF THE AGREEMENT

Whether one is applying the Second Circuit's analysis or other precedent, explicit language avoiding any binding contractual relation will usually determine the issue. The Second Circuit refers to this factor as "the most important." [FN25] In Arcadian Phosphates, Inc v Arcadian Corp, the parties had been conducting extensive negotiations regarding the sale of a fertilizer business to a joint venture. [FN26] As a result of these negotiations, the parties signed two memoranda. The first outlined certain "areas of agreement" regarding the sale, such as deadlines for future action and an option for the seller to purchase an interest in the joint venture. The second memorandum ***1514** incorporated the first and "specified the purchase price, the timing and amounts of the payments, the fixed assets to be purchased, and a closing date," although some items were left open for future agreement, such as the inclusion of "additional equity participants in the joint venture." [FN27]

Further, this second memorandum "was termed an 'agreement' though it was made subject to approval by the [parties' respective] boards." [FN28] It was alleged that both boards approved the memorandum. After, "[t]he parties ... confirmed by Telex their respective approvals and took steps to consummate the transaction." [FN29]

The buyers contended that these steps
included the establishment of ... offices at [the seller's] headquarters; [[the seller's] obtaining lender's consents after informing them of the "agreed upon" sale with a "signed agreement"; [and] introduction of [the buyers] as "new owners." [FN30]

Later, the seller proposed different terms when market conditions made the sale unattractive. The buyers sued for breach of contract based on the second memorandum.

The Second Circuit Court of Appeals found, based solely on the language of the agreement, that summary judgment was appropriate on the issue of the parties' intent to be bound. The second memorandum/agreement
provided that if negotiations for the sale failed, the [seller] would repay any capital expenditures agreed to thereafter and made by [the buyers] and if negotiations failed through no fault of [the buyers, the seller] would refund [the buyers'] deposit. [FN31]

Further, the "memorandum ... stated that the service and supply agreement will be negotiated and agreed to by December 31, 1986 and [a] binding sales agreement will be completed by December 31, 1986." [FN32] According to the court, based on the above language, the buyers "should not have believed that [[the seller] intended to be bound." [FN33]

A recent Ninth Circuit case applying California law, Rennick v O.P.T.I.O.N. Care Inc, held that summary judgment on a breach of contract claim was appropriate based on the language of a letter of intent. [FN34] The parties in Rennick had been negotiating for the sale of an exclusive franchise of home intravenous therapy services, such as chemotherapy, nutrient infusions, and pain management infusions. After a meeting, the buyers circulated a draft letter of intent. The seller added language, which stated that "this letter of intent is of no binding effect on any party hereto." [FN35] The seller later declined to proceed with the transaction. The other party brought suit for breach of contract claiming that "such language in the letter of intent as '[seller] shall grant to buyer ...,' and '[seller] shall provide ...,' shows that mandatory obligations were meant to be imposed." [FN36]

The court "wonder[ed] how such an argument [could] be made with a straight face, in light of the [previous] language" explicitly denying liability. [FN37] The court further noted that

the rights of private parties to enter into contracts also embraces their rights not to, and there is no contract where the objective manifestations of intent demonstrate that the parties chose not to bind themselves until a subsequent agreement is made. [FN38]

Language that does not unambiguously and expressly deny the binding nature of a letter of intent may result in contractual liability. In Arnold Palmer Golf Co v Fuqua Industries, Inc, [FN39] the Sixth Circuit Court of Appeals found that the language of a memorandum of intent stating that the parties' respective attorneys "will proceed as promptly as possible to prepare an agreement acceptable to (the parties) ..." did not establish, as a matter of law, that no contract existed. The court found "that this paragraph may be read as merely to impose an obligation upon the parties to memorialize their agreement." [FN40] The court acknowledged that "the provision is also susceptible to an interpretation that the parties did not intend to be bound." [FN41] However, given the facts and circumstances, including extrinsic evidence, summary judgement on this issue was not proper.

Likewise, in Heritage Broadcasting v Wilson Com, the parties entered into a letter of intent, which provided:

The obligation of the Purchaser to acquire the Assets shall be subject to the further condition that the Purchaser and the Seller shall enter into a definitive agreement relating to the sale and purchase of the Assets ... within a period of 45 days from the date of this letter. [FN42]

After 45 days, the seller decided not to enter into a definitive agreement, claiming that any obligations existing under the letter of intent had expired. The buyer sued for specific performance. The trial court found, among other things, that the obligation to enter into a binding contract did not necessarily expire after 45 days since

there [was] no express provision in the letter of intent stating that it expired within forty five days unless a definitive agreement was reached, and nothing compelled a conclusion that such a definitive agreement was mandatory within forty-five days. [FN43]

After losing a bench trial, the seller appealed claiming

that there was no "meeting of the minds" as to the legal import and operative effect of the letter of intent after expiration of the forty five- day exclusive dealing period, and that therefore no binding agreement was formed on this issue. [FN44]

The seller contended that all obligations were discharged after 45 days while the buyer claimed that obligations persisted.

The Court of Appeals upheld the trial judge. The court noted that

[a] meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [FN45]

The court found that

[t]he evidence ... shows only that [seller] may have subjectively entertained a different interpretation of the letter's effect upon expiration of the forty-five-day period ... [and] ... this is insufficient to show that a meeting of the minds did not occur. [FN46]

A REVIEW OF OTHER MICHIGAN PRECEDENT

In Powell v Beck [FN47] the defendant, through counsel, offered to buy his partner's interest in a business to settle a lawsuit between the partners for a stated sum of money. In the course of negotiations, the defense counsel suggested terms in a letter to the plaintiff's counsel and concluded by stating: ***1515** "If [plaintiff] is interested in negotiating a settlement of the present lawsuit on this basis, we will be very pleased to go into the matter further with you." The plaintiff, also through counsel, accepted the offer and sent defense counsel a deposit. The defendant declined to proceed, and the issue at trial was whether the parties had entered into a contract. The Michigan Supreme Court held that the defense counsel's letter was not an offer but "only an invitation to negotiate further." Id. at 630.

[T]he last sentence of his letter ... expressly invites negotiation on the basis stated; it expressly contemplates further dealings between the parties before settlement is reached. Even if we were to assume that what preceded was sufficient, under the circumstances, to constitute a valid offer, the last sentence manifests an intent that it be not so considered until further negotiations occur.

The Court also noted that the terms stated in defense counsel's letter could not be deemed an offer, the acceptance of which would bind the parties in contract, because the letter failed to cover any of the important details of the transaction:

We deal here with the sale or purchase of interests in a going business, not of staples or stock. The complexities of such transactions in the business community as it exists today, and as it has for many years, does not permit us to apply general principles of contract law without consideration of the facts of business life. Wholly apart from the qualifying language of the last sentence, we hold that, as a matter of law, defendant's counsel's letter was **so indefinite and uncertain with respect to details essential to** an agreement **that it did not constitute a legally sufficient offer to buy or** sell an interest in a going business. [FN48]

In Hansen v Catsman, [FN49] the parties agreed that defendant would construct a building and then lease it to plaintiff. The agreement indicated that the parties "contemplated" this arrangement. The building was to be constructed "in accordance with plans and specifications and design not as yet formalized." [FN50] The parties agreed that they would enter into a lease, "provided that said plans, specifications, and design are acceptable to both parties." Id. On the other hand, if they were unacceptable to either party "for any reasonable reason," then there would be no lease.

The parties took several steps under this agreement, including rezoning the property, retaining an architect, and soliciting bids. However, the defendant canceled the agreement when the plaintiff was unable to obtain financing. When the plaintiff sued for breach of contract, the trial court directed a verdict for the defendant on the grounds that no contract existed.

In affirming, the Michigan Supreme Court stated:

It was well recognized that it is possible for parties to make an enforceable contract binding them to prepare and execute a subsequent agreement. In such case, where agreement is expressed on all essential terms, the instrument is considered a contract, and is considered a mere memorial of the agreement already reached. It is further noted, however, that "**If the** document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called 'contract to make a contract' is not a contract at all**."**

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An agreement was held unenforceable in Socony-Vacuum Oil Co, Inc, v Waldo, 289 Mich 316. The Court at pages 323, 324, cited 12 Am Jur, Contracts, § 24, p 521: "**To be enforceable, a contract to enter into a future contract** must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations**."**

Regarding the agreement in the present case, several essential terms were left for future negotiations, such as, for example, the requirement that plans, et cetera, be acceptable to both parties. It was stated in the agreement, that plans were not, as of the time of signing, formalized. This left, perhaps, the most significant feature of the venture open for further discussion and negotiations. In a like manner, the instrument additionally supports this construction in its provision for forfeiture [of the good faith money] "if for any reasonable reason the plans, specifications and design are unacceptable to either party." What may constitute a "reasonable reason" is left to conjecture. At the very least, it is a matter for future negotiations, within the proscriptions of the Socony-Vacuum Case, supra.

* * *

Whatever may have been the true intentions of the parties to the instrument in question, the vehicle used lacks the basic certainty ***1516** which, under settled principles, is required before sanctions may be imposed. [FN51]

In Eerdmans v Maki, [FN52] the defendants listed a parcel of real estate for sale with an agent. The agent told the plaintiff that the defendants sold the property to a third party for a higher price. The plaintiff sued for breach of contract, arguing that his offer to purchase was in fact an acceptance to the defendant's offer to sell and that the defendants were contractually bound to sell the property to him. The trial court granted the defendants' motion for

summary disposition, finding that no contract existed.

In affirming, the Court of Appeals stated:

A valid contract requires **mutual assent on all essential terms. Mere** discussions and negotiation cannot be a substitute for the formal requirements of a contract**. Before a contract can be completed, there must be** an offer and acceptance. An offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Acceptance must be unambiguous and in strict conformance with the offer. [FN53]

The court concluded that no contract existed because the defendants had never made an offer to sell. The parties had done nothing more than discuss a possible transaction.

Finally, in Kamalnath v Mercy Mem'l Hosp Corp, [FN54] the parties engaged in a series of discussions concerning the terms of the plaintiff's employment at the defendant's health clinic. When the parties' relationship deteriorated and the plaintiff's employment was terminated, she sued for breach of contract. In affirming the summary disposition of this claim, the Court of Appeals noted that "[m]ere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract." [FN55] The court concluded that no contract existed because the parties had not reached clear agreement on "the essential terms on the contract .... Important differences remained between the parties as to basic contractual duties." [FN56]

THE DEFINITENESS OF THE AGREEMENT

Of course an intention to be bound is not necessarily sufficient to make a letter of intent enforceable. The preliminary document may fail for indefiniteness if it lacks "an essential term to be incorporated into the final contract." [FN57] As explained in Hansen v Catsman,

If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called "contract to make a contract" is not a contract at all. [FN58]

The concepts of indefiniteness and intent are not necessarily distinct. As Corbin notes, "[i]ndefiniteness may show a lack of finality, a lack of intention to be bound [whereas] [d]efiniteness may show finality and the presence of an intention to be bound." [FN59]

The Michigan Supreme Court has stated:

[W]here the conditions of the deferred contract are not set out in the provisional one, or where material conditions are omitted, it is not a contract in praesenti, because the minds have not met and may never meet. [FN60]

Thus,

although plaintiff may have agreed to enter into a contract at a future date, no action arises for the breach of the agreement as the terms of the proposed future contract were never determined. [FN61]

In Heritage Broadcasting, supra, the Michigan Court of Appeals found that a letter of intent, which contemplated the execution of a definitive agreement for the sale of two televisions stations, was an enforceable agreement. [FN62] The letter of intent specified all of the material and essential terms of the proposed future contract.

According to the court,

the letter of intent identified the parties, the assets to be sold, the consideration, the schedule for payment, the handling of the accounts receivable, the rights and remedies of each party upon breach, and mutual termination rights if closing did not occur with 360 days of the definitive agreement. [FN63]

The contemplated "definitive agreement would have added only the mechanics necessary to accomplish the conveyance." [FN64]

***1517** In a case decided in April 2000 by the Wyoming Supreme Court, Roussalis v Wyoming Medical Center, Inc, a local medical center was interested in acquiring additional properties for a planned future expansion. [FN65] Two physicians owned buildings on the property desired by the center. The parties executed a letter of intent

whereby the medical center promised to construct a replacement building for the physicians in exchange for the existing buildings. The letter of intent did not specify a cost cap or require the parties to agree on construction costs. The center later decided to abandon the project and claimed that no contract existed because of "the parties' failure to achieve mutuality of assent and definiteness on the scope and cost of the new medical office building." [FN66]

The court noted:

> The absence of some provisions in a document does not necessarily negate its viability as a binding agreement.
>
> The key factor is not the absence of any contractual undertakings which may normally be included by contracting parties engaged in a similar transaction. It is rather the intent of the particular parties involved in the transaction at issue. And the presence or absence of essential contract provisions is but an element in the evidential panorama underlying a factual finding of intent and enforceability. [FN67]

According to the letter of intent,

> [i]t is the general intent of the parties that the new building will be of comparable quality to the building which is currently occupied by [one of the physicians], i.e. that the new building will be a replacement building of the same high quality and state-of-the-art which was built into the existing building. [FN68]

Thus, "the kind of building, not the cost of that building, was an essential term of the contract." [FN69]

Moreover, the letter of intent contained several provisions regarding the general specifications of the building from which "a reasonable juror could also conclude that the parties achieved mutuality of assent and definiteness about the kind of building to be constructed." [FN70] Thus, the letter of intent was not unenforceable for indefiniteness as a matter of law.

THE CONDUCT OF THE PARTIES WITH REFERENCE TO THE AGREEMENT

The partial performance of any obligations outlined in the "letter of intent" is also a factor in determining enforceability. In Roussalis, the court noted, "[i]n determining whether a contract is formed, we may consider not only the alleged contract but also the conduct of the parties with reference to the alleged contract." [FN71] In that case, the parties proceeded to execute the terms outlined in the signed letter of intent. In fact, the letter of intent was referred to as a "contract" in board meetings by the medical center's in- house counsel. Moreover, after deciding to abandon the project outlined in the letter of intent, the medical center held a press conference declaring cancellation of the parties' agreement. The court stated: "From this post- Letter of Intent conduct, a reasonable juror could infer that the parties achieved mutual assent and definiteness in their exchange transaction." [FN72]

However, some courts explicitly downplay the significance of partial performance. For example, one federal district court noted that partial performance may be rendered without "a belief that the other side is bound." [FN73] In fact, "[a] party may make some partial performance merely to further the likelihood of consummation of a transaction it considers advantageous." [FN74]

TYPE OF CONTRACT

Other courts find that the complexities of a business transaction may make it more likely that the parties did not intend to be ***1518** bound before the execution of formal documents. This concept influenced the Second Circuit in a 1998 case involving a multimillion dollar sale of intellectual property, namely the rights to software and a license to use a database. [FN75] The court found that a preliminary agreement was inconsistent with the nature of the transaction, stating:

> the Agreement clearly was of the type that ordinarily would be committed not only to a writing but to a formal contract complete with representations and warranties and the other standard provisions usually found in sophisticated, formal contracts. [FN76]

CONTRACTING TO NEGOTIATE IN GOOD FAITH

Since at least 1974, Michigan courts have imposed a duty of good faith in performing discretionary duties. [FN77] In Paradata Computer Networks, Inc v Telebit Corp, [FN78] the court explained:

> Michigan courts will recognize an action for breach of an implied covenant of good faith and fair dealing where "a party to a contract makes the manner of its performance a manner of its own discretion." [FN79]

More than one court, including a court applying Michigan law, has held that parties must exercise good faith in negotiating future terms as called for in an agreement. As the Fifth Circuit said, summarizing Michigan law,

> [t]he implied covenant of good faith and fair dealing essentially serves to supply limits on the parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms. [FN80]

In Vylene Enterprises, Inc v Naugles, Inc, the Ninth Circuit held that a contractual provision that provided for renewal "on terms and conditions to be negotiated" carried an obligation "to negotiate in good faith concerning the terms and conditions of a renewal." [FN81] The court concluded that one of the parties breached this duty by proposing unreasonable terms for renewal.

In a 1997 decision, Howtek, Inc v Relisys, the parties had entered into a ten-year contract, which was renewable for additional five-year terms, in which one party, Teco, was to manufacture a product, the "Scanmaster III," designed by Howtek. The relevant contract language provided that

> if Howtek determined to market products other than the [Scanmaster III] or determine[d] to market modified versions .... Howtek [would] negotiate in good faith for the manufacture by Teco of such other products for Howtek pursuant to the provisions of [the] [a]greement. [FN82]

The court held that this contract provision, which it characterized as an agreement to negotiate, was enforceable. The court stated as follows:

> The modern view, and the view endorsed by most scholars, is that agreements to negotiate in good faith, unlike mere "agreements to agree," are not unenforceable as a matter of law ....
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> ***
>
> Under the modern view, the critical inquiry in evaluating the enforceability of an express or implied agreement to negotiate in good faith is whether the standard against which the parties' good-faith negotiations are to be measured is sufficiently certain to comport with the applicable body of contract law.
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> ***
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> The fact that an agreement grants a party some degree of discretion in performing does not render the agreement unenforceable. In such a situation, "the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting." [FN83]

DRAFTING HINTS AND CONCLUSION

A letter of intent can be used to memorialize an agreement in principle, such as the purchase price of a business and certain other significant aspects of the transaction, such as the schedule for concluding negotiations and due diligence. This can serve as a useful guide or outline for counsel drafting the transaction documents. Sometimes the negotiations surrounding a letter of intent can be extensive. For that reason, some counsel advise against them and recommend that parties attempt to start directly negotiating and drafting the transaction documents.

Some believe that there is significant risk that an enforceable agreement will arise from the letter of intent if negotiations are not successful. On the other hand, a clearly drafted letter of intent disclaiming any obligation may defeat implied claims, such as a breach of the duty to negotiate in good faith. [FN84]

If the parties do not intend to be bound by all of the provisions of a letter of intent, a drafter of a letter of intent

must consider several points. First, divide the letter into numbered paragraphs, clearly separating the expressly agreed nonbinding "agreement in principle" from the other sections, if any, that the parties desire to be binding. Provisions that are typically included as binding are confidentiality, exclusivity, and responsibility for expenses.

Second, make it clear that the parties do not intend to be bound to complete the transaction unless and until the transaction documents are executed. Third, include provisions expressly providing that either party may terminate negotiations at any time for any reason, or for no reason. Fourth, consider carefully before including an obligation to negotiate in good faith--which could be an invitation to litigation if negotiations are terminated. Fifth, consider making any transaction expressly subject to the approval of the board of directors or senior management.

[FNa1]. Frank Stellingwerf is special counsel in Detroit Edison's Legal Department where he is responsible for transactional matters.

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[FN1]. Quake Construction, Inc v American Airlines, Inc, 141 Ill 2d 281, 320-321, 565 NE2d 990, 1009, 152 Ill Dec 308, 327 (1990) (Stamos, J., concurring) (citations omitted), also quoted in I Corbin on Contracts, § 1.16, n 1, at 46 (rev ed 1993).

[FN2]. See Nichols v Seaks, 296 Mich 154, 158, 295 NW 596, 598 (1941) ("Destruction of contract because of indefiniteness is not favored .... In interpreting doubtful agreements a court will, if possible, attach a sufficiently definite meaning to a bargain of parties who evidently intended to enter into a binding contract and ambiguous words in an obligation should be interpreted most strongly against the party who used them."); Channel Home Centers v Grossman, 795 F2d 291, 298 (CA 3, 1986) (If the parties manifest an intention to be bound by the terms of the agreement and the terms are sufficiently definite to be specifically enforced, the contract will be enforced.); Dahar v Grzandziel, 599 A2d 217, 220 (Pa Super Ct 1991) ("An agreement is sufficiently definite and will not fail for vagueness if the parties intended to make a contract and the terms provide a reasonably certain basis for a court to give an appropriate remedy."); Byrne v Laura, 52 Cal App 4th 1054 (Cal App 1 Dist 1997) ("the modern trend of the law favors carrying out the parties' intention through the enforcement of contracts and disfavors holding them unenforceable because of certainty").

[FN3]. Canet v Gooch Ware Travelstead, 917 F Supp 969, 989 (ED NY 1996) (reasonable expectations of parties entering into contract should, if possible, be honored and even some indefinite terms are enforceable, and thus not mere "agreement to agree," where method to determine nature of the promised term is available); Gonzales v Don King Productions, Inc, 17 F Supp 2d 313, 316 (SD NY 1998) ("a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage").

[FN4]. Boatmen's Bank of Mid-Missouri v Crossroads West Shopping Center, Ltd, 907 SW2d 800, 803 (Mo App WD 1995).

[FN5]. Hunter's Run Stables, Inc v Triple H Const Co, Inc, 938 F Supp 166, 170 (WD NY 1996) ("Under New York law, rejection of contract for indefiniteness is at best a last resort, and promise that can be made certain by reference to outside matters is not too indefinite."); Hoffmann v Auto Club Ins Ass'n, 211 Mich App 55, 107, 535 NW2d 529, 554 (Mich App 1995) ("A party asserting a claim has burden of proving damages with reasonable certainty.")

[FN6]. ABT Associates, Inc v JHPIEGO Corp, No Civ H-99-3238, 2000 WL 977670, at 7 (D Md July 5, 2000)

(quotations omitted).

[FN7]. Rennick v O.P.T.I.O.N. Care, Inc, 77 F3d 309, 315 (CA 9, 1996).

[FN8]. Id.

[FN9]. Id.

[FN10]. 413 Mich 354, 320 NW2d 836 (1982).

[FN11]. Id. at 359, 320 NW2d at 838.

[FN12]. Id. at 360, 320 NW2d at 838. (quoting 1 Corbin, Contracts, § 29, pp 86-88).

[FN13]. Id. at 359-360, 320 NW2d at 838.

[FN14]. Id. at 360, 320 NW2d at 838.

[FN15]. Id.

[FN16]. Id. However, in a motion for summary disposition, a trial court may determine the meaning of unambiguous contract terms. Michigan National Bank v Laskowski, 228 Mich App 710, 714, 580 NW2d 8, 10 (1998).

[FN17]. Michigan Broadcasting Company v Shawd, 352 Mich 453, 456, 90 NW2d 451, 453 (1958) (quoting McConnell v Harrell & Nicholson Co, 183 Mich 369, 373, 149 NW 1042, 1043).

[FN18]. Id.

[FN19]. Arcadian Phosphates, Inc v Arcadian Corp, 884 F2d 69 (CA 2, 1989); Adjustrite Systems, Inc v GAB Business Service, Inc, 145 F3d 543 (CA 2, 1998); Teachers Insurance and Annuity Association v Tribune Co, 670 F Supp 491 (SD NY 1987).

[FN20]. Adjustrite, supra n 19, at 548.

[FN21]. Id. at 548.

[FN22]. Id. at 548 (quoting Tribune, supra n 19, at 498).

[FN23]. Gorodensky v Mitsubishi Pulp Sales (MC) Inc, 92 F Supp 2d 249 (SD NY 2000) (citing Arcadian, supra n

19).

[FN24]. Id. at 255.

[FN25]. Adjustrite, supra n 19, at 549.

[FN26]. Arcadian, supra n 19.

[FN27]. Id. at 70.

[FN28]. Id.

[FN29]. Id. at 71.

[FN30]. Id.

[FN31]. Id. at 70.

[FN32]. Id.

[FN33]. Id. at 73.

[FN34]. See supra n 7.

[FN35]. Id. at 312.

[FN36]. Id. at 316.

[FN37]. Id.

[FN38]. Id.

[FN39]. 541 F2d 584, 589 (CA 6, 1976) (construing Ohio law).

[FN40]. Id. at 589.

[FN41]. Id.

[FN42]. 170 Mich App 812, 815, 428 NW2d 784, 785 (1988).

[FN43]. Id. at 817, NW2d at 786.

[FN44]. Id.

[FN45]. Id. at 818, 428 NW2d at 787.

[FN46]. Id. at 819, 428 NW2d at 787.

[FN47]. 366 Mich 627 (1962).

[FN48]. Id. at 631-32 (emphasis added).

[FN49]. 371 Mich 79 (1963).

[FN50]. Id. at 81.

[FN51]. Id. at 82-84 (citations omitted; emphasis added).

[FN52]. 226 Mich App 360 (1997).

[FN53]. Id. at 364 (citations omitted; emphasis added).

[FN54]. 194 Mich App 543 (1992).

[FN55]. Id. at 549.

[FN56]. Id. at 549-50.

[FN57]. Opdyke, supra n 10, 413 Mich at 359, 320 NW2d at 838 (citing Socony-Vacuum Oil Co, Inc v Waldo, 289 Mich 316, 323-324, 286 NW 630 (1939)); See also, Corbin, supra n 1, § 2.8 at 131 "Even if an intention to be bound is manifested by both parties, too much indefiniteness may invalidate the agreement, because of the difficulty of administrating the agreement." Farnsworth on Contracts § 3.29, n 1 at 218 (1990): "The problem of the 'formal contract contemplated' is usually seen as differing from that of the 'agreement to agree' in that the former involves a question of whether the parties intended to be bound at the time of the initial agreement, while the latter involves a question of whether, assuming they intended to be bound, their intention is to be given effect."

[FN58]. 371 Mich 79, 82, 123 NW2d 265, 266 (1963) (quoting I Corbin on Contracts, sec 29, p 68).

[FN59]. Corbin, supra n 47 at 131.

[FN60]. Socony-Vacuum Oil Co, Inc, supra n 57, 289 Mich at 323, 286 NW2d at 632 (quoting Peer v Hughes, 25 Ariz 105; 213 P 691 1923).

[FN61]. Id.

[FN62]. See supra n 42.

[FN63]. Id. at 787.

[FN64]. Id.

[FN65]. 4 P3d 209 (Wyo 2000).

[FN66]. Id. at 229.

[FN67]. Id. at 234.

[FN68]. Id. at 258.

[FN69]. Id. at 234.

[FN70]. Id. (quotation omitted).

[FN71]. Id. at 232.

[FN72]. Id. at 237.

[FN73]. Tribune, supra n 19, at 502.

[FN74]. Id.

[FN75]. Adjustrite, supra n 19.

[FN76]. Id. at 551.

[FN77]. Burkhardt v City National Bank of Detroit, 57 Mich App 649, 652, 226 NW2d 678, 680 (1975).

[FN78]. 830 F Supp 1001 (ED Mich 1993).

[FN79]. Id. at 1005 (quoting Burkhardt, supra n 67).

[FN80]. Hubbard Chevrolet Co v General Motors Corp, 873 F2d 873, 876-877 (CA 5), cert denied, 110 S Ct 506 (1989).

[FN81]. 90 F3d 1472 (CA 9, 1996).

[FN82]. 958 F Supp 46 (D NH 1997).

[FN83]. Id. at 48 (quoting Centronics Corp v Genicom Corp, 132 NH 133, 143, 562 A3d 187, 193 (1989)).

[FN84]. See Flight Systems, Inc v Electronic Data Systems, 112 F3d 124 (CA 3, 1997), where there was no letter of intent and the court held that there was a duty to negotiate in good faith. For a discussion of the impact of the duty of good faith and fair dealing on letters of intent, see, Still Keeping the Faith: The Duty of Good Faith Revisited, G. Mantese and M. Newman, Michigan Bar Journal, November 1997 at 1196-1197.

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