

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

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I. INTRODUCTION

It is a fundamental tenet of contract law that mere participation in negotiations does not result in a binding obligation.¹ Rather, to form a contract, all parties to the agreement must manifest an intent to be bound.² Sometimes, however, the intent of the parties is not clear, and disputes between the parties arise.

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

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

Courts analyzing the intent of the parties to be bound by informal agreements—in the absence of a signed definitive written agreement—must balance competing interests. On one hand, courts seek to avoid trapping parties

1. *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987).

2. 1 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 3:2 (4th ed. 2007).

in surprise contractual obligations they never intended.³ On the other hand, courts must enforce agreements that the parties intended to be binding—even if one party has subsequently had a change of heart or if the parties intended to create more comprehensive documentation in the future.⁴ Ultimately, the aim of contract law is to “gratify, not defeat, expectations.”⁵

Unfortunately, for courts called upon to weigh these competing interests, there are no bright-line rules for determining the parties’ intent to be bound by either a preliminary written agreement or by an oral agreement. To determine intent in such cases, courts generally look at the totality of the circumstances, considering objective signs of the parties’ intent.⁶ These objective signs can come from a number of sources, including the language of the preliminary written agreements, the words and actions of the parties (as determined by oral testimony), language of un-executed drafts, and other written correspondence between the parties.⁷ Some jurisdictions, including New York, use a multi-factor test to guide their analysis of the facts and circumstances, while others take a less formulaic approach.⁸ Regardless of the approach used, however, an analysis of the facts and circumstances surrounding any given negotiation will often produce ambiguous results. In other words, some of the facts will frequently suggest the parties intended to be bound at the preliminary stage of negotiations, while other facts will indicate just the opposite—i.e., an intent not to be bound without a formal written agreement. Because this is a highly fact-dependent area of the law and there are no bright-line rules, similar cases produce seemingly inconsistent results across jurisdictions and even within the same jurisdiction.⁹

The complexity of this area of the law is compounded by the fact that the threshold question of who decides the issue—a judge or a jury—is often a murky one. The basic rule seems simple enough: whether the parties intended to be bound is a question of fact that should be resolved by a jury, but judgment as a matter of law is appropriate where the intent to be bound can be

3. *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 548 (2d Cir. 1998).

4. *Id.*

5. *Id.*

6. *Id.* at 549; *Bitterroot Int’l Sys., Ltd. v. W. Star Trucks, Inc.*, 153 P.3d 627, 635 (Mont. 2007); *Spencer Trask Software & Info. Servs. LLC v. RPost Int’l Ltd.*, 383 F. Supp. 2d 428, 441 (S.D.N.Y. 2003). See Part III.C.2 *infra* for a more complete discussion of the objective theory of intent.

7. RESTATEMENT (SECOND) OF CONTRACTS § 26, cmt. b (1981); WILLISTON, *supra* note 2, at § 3:5.

8. See Part III.C.2 *infra* for a more complete discussion.

9. See Part III.C.2 *infra* for a more complete discussion of the different approaches courts take to the *ad hoc* interpretation of parties’ intent to be bound.

conclusively determined on the record and there is no material dispute of fact.¹⁰ A review of the cases, however, exposes inconsistencies in application, with some courts more willing than others to decide such cases on summary judgment.¹¹

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

This concern is intensified when courts admit evidence at trial of internal communications between members of the same negotiating team.¹² Looking at the subjective intent of one party should be irrelevant to the critical inquiry of what objective manifestations of assent were made by each party to the other.¹³ Moreover, such evidence can be inflammatory when it involves internal communications that suggest callousness toward the disappointed party, as all too often appears in informal emails and other internal communications.¹⁴ Swayed by these facts, jurors understandably may be sympathetic to the disappointed party and more willing to return verdicts with large damages awards that grossly exceed the expectations of the alleged injured party.¹⁵

10. See *infra* notes 179 and 181 and accompanying discussion in Part III.C.2.c.

11. Compare *Spencer Trask*, 383 F. Supp. 2d at 439, 445, and *Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421, 426 (8th Cir. 1991), with *Consarc Corp. v. Marine Midland Bank, NA*, 996 F.2d 568, 573-74 (2d Cir. 1993).

12. See *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873, 876 (Ga. Ct. App. 2010).

13. See *Response to Petition for Writ of Certiorari* at 14-15, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E. 2d 873 (Ga. App. 2010), 2010 Ga. S. Ct. Briefs Lexis 97.

14. See *Id.*

15. John P. Daniels, Roy F. Hughes, Michael W. Jones, Henry R. Sarpy, Jr., John R. Woodward, III, Thomas Q. Perry, *Handling Sympathy in Jury Trials*, in *THE FOURTH ANNUAL LITIGATION MANAGEMENT SUPERCOURSE* 37, 43 (Practicing Law Institute ed. 1993).

A recent high-profile case in Georgia highlights some of the difficulties involved in interpreting parties' intent after-the-fact and the potential danger inherent in leaving such matters to a jury to decide. *Turner Broadcasting System, Inc. v. McDavid*¹⁶ involved an alleged oral contract for the purchase of two sports teams—the Atlanta Hawks and the Atlanta Thrashers—and certain operating rights involving the use of the sports arena.¹⁷ The parties entered into a mostly non-binding preliminary agreement that expressly stated the parties did not intend to be bound except by a definitive written agreement.¹⁸ The preliminary agreement subsequently expired, but negotiations between the parties continued.¹⁹ After several additional months of intense negotiations, the discussions ultimately broke down.²⁰ The result was that TBS, the putative seller, spurned McDavid, the putative buyer, and almost immediately inked a deal—on nearly identical terms—to sell the teams to a group headed by Ted Turner's son-in-law.²¹ McDavid sued TBS for breach of oral contract and the jury awarded McDavid \$281 million in damages, an award ultimately upheld on appeal.²² The *Turner* case vividly demonstrates the potential consequences for parties who do not clearly express their intent in written agreements and the necessity for courts to develop a consistent framework for adjudicating such disputes.

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

16. *See generally Turner*, 693 S.E.2d 873.

17. *Id.* at 875. The facts of the *Turner* case are more fully set out in Part IV.A *infra*.

18. *Id.* at 879.

19. *Id.* at 876.

20. *Id.* at 876-77.

21. *Id.* at 877. Ted Turner is the founder of TBS. *See Company History*, TURNER BROADCASTING SYSTEM, INC., <http://www.turner.com/company#/company/history> (last visited Aug 19, 2011).

22. Petition for Writ of Certiorari at 8, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2010 Ga. S. Ct. Briefs Lexis 96 at *8.

To increase certainty in this area of the law, this article contends that courts should explicitly apply a multi-factor test to analyze intent of the parties, rather than taking the more holistic “totality of the circumstances” approach. Though a bright-line rule may never be achievable in this area of the law, applying a multi-factor test provides guidance to parties on how they should model their behavior during negotiations to avoid an unintended result. Additionally, this article proposes ideas for how courts should analyze the more problematic factors of the test.

Finally, this article addresses the question of who should decide the issue of intent—a judge or a jury. It is argued that submitting fewer cases to a jury will better honor the expectations of the parties and potentially achieve more consistent results. Specifically, when language in a preliminary written agreement expresses intent not to be bound, that language should be sufficient for a court to determine the issue on summary judgment. In such cases, the decision should be submitted to a jury only if there has been an express written waiver of the language in the preliminary agreement. Mere expiration of the preliminary agreement should not constitute an express waiver sufficient to overcome the written language, effectively allowing the party asserting the existence of a contract to submit the issue to a jury. Moreover, subsequent oral statements made by the party disclaiming the existence of a contract should also be insufficient.

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

II. PRELIMINARY AGREEMENTS

When two or more parties enter into preliminary discussions about a proposed transaction, such as a merger, acquisition, or some other business combination, they may decide to memorialize the results of those early

negotiations in a written document called a letter of intent (“LOI”).²³ The parties typically intend for this LOI to ultimately be replaced by a later and much more comprehensive definitive written agreement.²⁴ As LOIs are often merely a precursor to the actual transaction agreement(s), the LOI is generally drafted in such a way as to make the majority of the provisions non-binding.²⁵

Further, because an LOI is typically intended to be mostly non-binding, it is not necessary to the negotiation process.²⁶ Rather, the parties are free to skip the LOI stage entirely and move into performing due diligence in earnest and negotiating the actual definitive written agreement.²⁷ In fact, there are often good reasons for parties to do exactly that. First, negotiating and drafting an LOI in the initial stages of the negotiation process can be time-consuming and

23. Sometimes parties refer to their preliminary agreement not as an LOI, but as a “commitment letter,” a “memorandum of understanding,” an “agreement in principle,” a “term sheet” or by some other name. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 250 (1987). Though the terminology may vary and stylistically these documents may look quite different, the same substantive legal principles apply equally to all of them. 24 WILLIAM M. PRIFTI, *SECURITIES: PUBLIC & PRIVATE OFFERINGS* § 4:2 (West/Thompson, 2001).

24. Mark D. Williamson, *Letters of Intent: Their Use in Minnesota Business Transactions*, BENCH & B. MINN. 22, 23 (Nov. 2007), available at <http://www.mnbar.org/benchandbar/2007/nov07/letters.htm>; see also AM. BAR ASS’N, ET AL., *MODEL ASSET PURCHASE AGREEMENT: WITH COMMENTARY* 107 (2001).

25. The LOI will typically contain a number of provisions about the actual deal terms themselves. AM. BAR ASS’N, *supra* note 24, at 107. For instance, it might include the purchase price or how the purchase price will be calculated; the structure of the deal (e.g., whether it will be an asset purchase or a stock purchase); conditions to closing; or any number of other provisions that will ultimately end up fleshed out in the definitive written agreement in more detail. *Id.* at 110. These deal terms are typically intended to be non-binding. *Id.* at 110. Since the buyer has usually not completed (or even really begun) its due diligence on the seller at this point, the parties generally want the flexibility to be able to change some of the terms if new, unexpected facts come to light in the course of the due diligence review prior to execution of the definitive written agreement. *Id.* at 108. Ultimately, these non-binding deal terms would be replaced by the binding written definitive agreement. However, the LOI will often contain some sub-set of provisions that are intended to be binding. These are typically not deal terms, but rather terms that regulate the rights and obligations of the parties during the interim period between the signing of the LOI and the signing of the definitive written agreement. *Id.* at 110. These are discussed further in Part II *infra*. Of course, the parties are free to craft the LOI however they want, with whatever combination of binding or non-binding terms they choose. The above-described generalizations merely provide a helpful framework for discussion.

26. Williamson, *supra* note 24, at 23.

27. *Id.* (“Nothing mandates a letter of intent, and parties can simply proceed to the drafting of a definitive agreement without ever signing a letter of intent.”).

will inevitably add to the legal fees incurred by the parties.²⁸ For smaller companies with fewer resources or parties who are rushed to get their transaction closed, the costs of negotiating a largely non-binding document may often outweigh the benefits.²⁹ Second, as highlighted in Part III of this article, sloppy drafting of the LOI can lead to the unintended consequence of parties becoming bound to a preliminary document they initially thought was non-binding.³⁰

While LOIs are largely non-binding, parties often find them to be useful tools for a number of reasons. First, the parties can choose to incorporate both non-binding and binding provisions.³¹ These binding provisions are typically not agreement terms. Rather, they relate to the rights and obligations of the parties during the interim period between the signing of the LOI and the signing of the actual definitive written agreement.³² For instance, the parties may include a confidentiality provision whereby the buyer agrees not to disclose information it learns about the seller through the due diligence process.³³ Another common binding provision found in LOIs is the creation of an exclusivity period, such as a no-talk or a no-shop provision, whereby the seller agrees not to negotiate with other potential buyers for some period of time.³⁴ Other provisions that parties often choose to include as binding terms

28. *Id.*

29. In fact, in the case of a small deal, the costs of drafting and negotiating an LOI can be substantial in comparison to the size of the deal. Maryann A. Waryjas, *Letters of Intent in the Acquisition or Sale of the Privately Held Company*, 1 ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 2009 363, 365 (Practising Law Institute ed. 2009).

30. *Id.* at 368. Additionally, for public companies bound by the SEC's reporting requirements, a signed LOI could trigger an obligation to publicly disclose a potential transaction very early in the process – well before the parties would otherwise wish to do so. *See id.* at 367-368. Under the SEC's reporting requirements, a regulated entity must disclose in an 8-K any contracts it has entered that provide for obligations that “are material to and enforceable against” the company, or “rights that are material to the company and enforceable by the company against one or more other parties by the agreement by the company. . . .” Disclosure Requirements, Exchange Act Release No. 8400, 82 S.E.C. Docket 1480 (Aug. 4, 2004). Though a non-binding letter of intent that contains a couple of binding terms like a confidentiality agreement typically does not trigger the filing requirements, if the LOI is deemed to have additional binding provisions, these could be considered “material” rights and obligations that would require disclosure. *Id.*

31. AM. BAR ASS'N, *supra* note 24, at 110.

32. *Id.*

33. *Id.* at 110. In fact, even if the parties do not execute an LOI, they will typically enter into a stand-alone non-disclosure agreement to protect the seller's confidential information from use or dissemination by the buyer in the event the transaction never occurs. *Id.*

34. *Id.*

are those relating to the buyer's access to due diligence materials, procedures for making public announcements about the transaction, and the provision of break-up fees or reverse break-up fees in the event the deal does not close.³⁵

Second, the use of a preliminary agreement can help prevent misunderstandings and selective memory as well as serve as a basis for drafting the definitive agreement.³⁶ For instance, the purchase price or other agreement terms are often of such a complicated nature that it is helpful to describe the terms in writing to make sure that each of the parties' understanding of the terms is consistent.³⁷ In addition to informing the parties themselves, the LOI can serve as a resource for informing third parties, such as lawyers, accountants, and prospective investors about the basic agreement terms.³⁸ Additionally, at least one party may think that the LOI will enhance its bargaining position in future negotiations, thus making it harder for the other side to withdraw concessions made in the LOI when it is time to draft the definitive agreement.³⁹ In other words, though the agreement technically is non-binding, parties may feel morally or psychologically obligated to the key terms set out in the writing, unless there has been an important new discovery during the due diligence process that warrants a change in position.⁴⁰

Third, a non-binding LOI allows parties to test one another's level of commitment before spending large amounts of money on due diligence and in-depth negotiations.⁴¹ If the parties can agree on essential terms quickly, then the parties are encouraged to continue.⁴² On the other hand, the drafting of the LOI may reveal that the parties' positions are too far apart to warrant further negotiations.⁴³

Fourth, the LOI can serve as a means of starting the clock on regulatory filings.⁴⁴ For example, to comply with the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,⁴⁵ parties must file a signed

35. *Id.*

36. Waryjas, *supra* note 29, at 368.

37. AM. BAR ASS'N, *supra* note 24, at 107.

38. Farnsworth, *supra* note 23, at 258; *see also* 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.16 (rev. ed. 1993).

39. Farnsworth, *supra* note 23, at 258.

40. AM. BAR ASS'N, *supra* note 24, at 107. Parties particularly develop a psychological or moral commitment to the terms of the transaction when the parties have issued press releases or otherwise made the proposed transaction known to employees or the public. *See* Williamson, *supra* note 24, at 23.

41. AM. BAR ASS'N, *supra* note 24, at 107.

42. Williamson, *supra* note 24, at 23.

43. *Id.*

44. AM. BAR ASS'N, *supra* note 24, at 107.

45. 15 U.S.C. § 18a (2006).

agreement with the Department of Justice and the Fair Trade Commission, which then starts the clock on a 30-day waiting period during which the transaction is reviewed and the business combination may not be consummated.⁴⁶ However, the signed agreement that must be filed need not be binding nor particularly detailed.⁴⁷ Therefore, a cursory, non-binding LOI can help the parties position themselves such that the regulatory requirements will have been fulfilled by the time they are ready to close the transaction, instead of having to wait for the 30-day period to run after the definitive written agreement has been negotiated and signed.⁴⁸ Finally, in addition to starting the clock on regulatory filings, a signed LOI can help parties line up financing with a lender who will not approve a loan without a signed agreement.⁴⁹

Because of its many advantages, the LOI is frequently used to memorialize the parties' understanding of the outcome of preliminary negotiations. As mentioned above, the LOI typically includes a combination of binding and non-binding provisions.⁵⁰ However, the entire LOI may be drafted to be entirely binding (either expressly or accidentally) or entirely non-binding.⁵¹ The parties to an LOI who do not wish to be bound can so articulate in the preliminary agreement with language such as "not binding until a final definitive written agreement is executed."⁵² Alternatively, the LOI can clearly differentiate between the binding and non-binding provisions.⁵³ But, often the drafting of the LOI is not clear or circumstances change such that a question of whether the LOI is binding arises.⁵⁴ When negotiations go awry and one party tries to enforce the terms of a preliminary agreement, courts are often called upon to determine the intent of the parties in hindsight.⁵⁵ The way in which courts analyze whether a preliminary agreement is binding is the subject of Part III. The potentially drastic consequences of a court's decision that a preliminary agreement is binding are illustrated by the case study set forth in Part IV.

46. *Id.*

47. *See* Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions Instructions § 3(b), *available at* http://www.ftc.gov/bc/hsr/hsrform-instructions1_0_0.pdf.

48. Williamson, *supra* note 24, at 23; *see also* AM. BAR ASS'N, *supra* note 24, at 107.

49. AM. BAR ASS'N, *supra* note 24, at 107.

50. *Id.* at 110.

51. Williamson, *supra* note 24, at 23.

52. Farnsworth, *supra* note 23, at 257.

53. *See, e.g.*, Waryjas, *supra* note 29, at 373, app. 2 (providing a sample LOI that carves out the binding provisions in the first paragraph.).

54. Indeed, "[t]he question of whether a letter of intent is binding" has been said to be "the thorniest – and the most litigated – issue associated with the topic of preliminary agreements." Williamson, *supra* note 24, at 24.

55. *Id.* at 24.

III. POTENTIAL LIABILITY ARISING UNDER PRELIMINARY AGREEMENTS

When parties to preliminary negotiations have yet to reach a final, written, and binding contract, their negotiations fall into one of four categories. First, if the parties have engaged in negotiations but not agreed to a deal, the parties are not bound to any of the terms discussed in their negotiations nor do they have any obligation to continue discussions.⁵⁶ In short, no liability attaches and the disappointed party cannot recover anything.⁵⁷ The next three categories involve preliminary agreements that may entitle a disappointed party to a remedy.⁵⁸

The first of these next three categories involves situations wherein the parties engaged in preliminary negotiations and did not agree to a contract, but wherein equitable concerns prevail and the court permits the disappointed party to recover under a theory of promissory estoppel (“Equitable Claims”).⁵⁹ As discussed in more detail in Part III.B, because these scenarios lack the formation of a contract, the possible recovery for the disappointed party will be limited.⁶⁰

The next two categories involve preliminary agreements that, unlike the Equitable Claim scenario, will actually be binding.⁶¹ One such agreement occurs when the parties come to a preliminary agreement regarding certain terms but leave others open.⁶² While normally the presence of open terms suggests a binding agreement has not been reached, a court might determine that it was the parties’ intent to obligate themselves to bargain in good faith over open terms toward the consummation of a transaction.⁶³ In other words, while the parties would not have bound themselves to the actual deal terms found in the preliminary agreement, they would have obligated themselves to further negotiate in good faith. Under this theory, a court would allow the disappointed party to recover due to the other contracting party’s failure to further negotiate in good faith (“Good Faith Claims”). As in the Equitable

56. Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 664 (2007).

57. *Id.*

58. *Id.*; *Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co.*, 670 F. Supp. 491, 498 (S.D.N.Y. 1987).

59. See Schwartz, *supra* note 56, at 664.

60. See Part III.B *infra*.

61. Judge Leval defined these two types of binding preliminary agreements in the seminal case *Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co.*, 670 F. Supp. 491, 498 (S.D.N.Y. 1987). See also 1 CORBIN, *supra* note 38, at § 1.16.

62. *Teachers*, 670 F. Supp. at 498; see also Schwartz, *supra* note 56, at 664.

63. *Teachers*, 670 F. Supp. at 498.

Claims for promissory estoppel, and as further discussed in Part III.A, a plaintiff's recovery under a Good Faith Claim will be limited.

The other binding preliminary agreement is created when the parties reach a complete agreement (including the agreement to be bound) on all of the material issues requiring negotiation, and a court allows a disappointed party to recover under a theory of breach of contract ("Fully-Formed Contract Claims").⁶⁴ Even if the parties desire a more formal and definitive written agreement in the future, the future agreement is viewed as merely desirable, not actually necessary.⁶⁵ In other words, the parties are bound to the actual terms of the preliminary agreement if the court determines the parties intended to be bound—even though the formal instrument may have never been executed.⁶⁶ Under Fully-Formed Contract Claims, full breach of contract remedies, such as benefit-of-the-bargain damages, are available to the plaintiff, as described more fully in Part III.C.

Fully-Formed Contract Claims are likely the only ones under which a disappointed party will have access to broader remedies. Therefore, a smart plaintiff will always try to assert such a claim if the facts support it. Yet, when a plaintiff believes his or her facts are weak, he or she may choose to argue in the alternative—i.e., the plaintiff asserts a Fully-Formed Contract Claim, but in the event the court does not hold in the plaintiff's favor, he or she also asserts

64. See, e.g., *id.*; *Bear Sterns Inv. Prods., Inc., v. Hitachi Auto. Prods.*, 401 B.R. 598, 618 (S.D.N.Y. 2009); see also John Klein & Carla Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 HOUS. J. INT'L L. 1, 9 (Fall 1994).

65. Stephen L. Brodsky, *Federal Courts in New York Provide Framework for Enforcing Preliminary Agreements*, 73-APR N.Y. ST. B.J. 16, 17 (2001); see also *Teachers*, 670 F. Supp. at 498 ("[W]hen the parties have reached complete agreement (including the agreement to be bound). . . [s]uch an agreement is preliminary only in form – only in the sense that the parties desire a more elaborate formalization of the agreement."); *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 548 (2d Cir. 1998) ("A binding preliminary agreement binds both sides to their ultimate contractual objective in recognition that, 'despite the anticipation of further formalities,' a contract has been reached. Accordingly, a party may demand performance of the transaction even though the parties fail to produce the 'more elaborate formalization of the agreement.'") (citations omitted).

66. See, e.g., *Trowbridge v. McCaigue*, 992 A.2d 199, 202 (Pa. Super. Ct. 2010) (agreement was not merely an unenforceable "agreement to agree" because there were no other terms to be agreed upon in the future and the only future occurrence contemplated was execution of the definitive agreement); see also 1 CORBIN, *supra* note 38, at § 1.16 ("[T]here are times when letters of intent are signed with the belief that they are letters of commitment. If this belief is shared, or if one party is aware of the other's belief, the letter is a memorial of a contract.").

secondary Equitable and Good Faith Claims to hopefully ensure *some* recovery.⁶⁷

Any of these claims may be asserted based on a preliminary writing or merely by preliminary oral communications.⁶⁸ Due to the greater appeal Fully-Formed Contract Claims have for plaintiffs—and the fact that the larger damages awards make these claims potentially devastating for defendants—the law surrounding Fully-Formed Contract Claims will be the focus of this article. However, by way of background and to give a more complete understanding of this murky area of the law, this article briefly describes the law relating to Good Faith Claims and Equitable Claims in Parts III.A and B.

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

Every contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract.⁶⁹ However, that duty typically only extends to issues of contract performance, not contract formation—in other words, it applies only *after* the parties are bound.⁷⁰ Generally, there is no requirement that the parties negotiate in good faith unless the parties agree to such an obligation.⁷¹ This is not the case in a number of

67. See, e.g., *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1220, 1223 (7th Cir. 1988); *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Grp., Inc.*, 873 F.2d 155, 157 (7th Cir. 1989); *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 425 (N.Y. App. Div. 2010) *leave to appeal denied*, 15 N.Y.3d 704 (2010). Of course, sometimes the facts only support one of the secondary claims. See, e.g., *Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421, 425 (8th Cir. 1991). (“[The plaintiff] concedes that the letter of intent did not constitute a binding agreement to merge, but it contends that the letter did establish a duty on the part of both parties to negotiate in good faith.”).

68. See generally Schwartz, *supra* note 56, at 663. (In describing claims for enforcement of preliminary agreements, the authors note that “neither the transaction nor what the parties are to do is precisely described, and neither may be written down”).

69. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

70. *Novinger Grp., Inc. v. Hartford Ins., Inc.*, 514 F. Supp. 2d 662, 671-72 (M.D. Pa. 2007).

71. Delphine Descamps & Robert C. Macdonald, *Withdrawing from Pre-Contractual Negotiations Under French Law: An Increased Risk*, 15 No. 5 M & A LAW. 10, 11 (May 2011); see also *Feldman*, 850 F.2d at 1223 (“No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not to sue for ‘bad faith’ in negotiations.”); *A/S Apothekernes*, 873 F.2d at 159 (holding that there is no general duty to negotiate in good faith and that “the scope of any obligation to negotiate in good faith can only be determined from the framework the parties have established for themselves in their letter of intent.”). There are, however, certain exceptions to the basic rule that there is typically no obligation

foreign jurisdictions where the opposite is true.⁷² But in the U.S., the basic rule permits parties to pre-contractual negotiations to terminate the negotiations without incurring liability at any time, for any reason (or for no reason whatsoever), even if the disappointed party has been led to believe the transaction will likely be consummated.⁷³ The risk every party takes by entering negotiations is that the other party will terminate the discussions and walk away, leaving the disappointed party without a remedy.⁷⁴

to negotiate in good faith during the formation of a contract. For instance, a contract will not be enforceable if one of the parties to the contract was forced into it under duress. RESTATEMENT (SECOND) OF CONTRACTS § 174-77 (1981). Similarly, a contract will not be enforceable by a party that used fraud to induce the other party into the contract. *Id.* at § 7 cmt. b (“Typical instances of voidable contracts are those where one party was an infant, or where the contract was induced by fraud, mistake, or duress . . .”). Additionally, sometimes parties may be subject to a statutorily created duty to negotiate in good faith, such as under section 8(d) of the National Labor Relations Act and the Federal Truth in Lending Act. *Id.* at § 205 cmt. c (1981); *see also* Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 408 (Jan. 1964).

72. For instance, European courts tend to be more willing than American courts to accept this notion of “pre-contractual liability based on a general obligation of fair dealing.” Farnsworth, *supra* note 23, at 239. For instance, under French law, a disappointed party can bring a claim sounding in tort for withdrawing from contract negotiations in bad faith. A French court will find bad faith where: “(i) the withdrawing party never had any intention to sign an agreement; (ii) the negotiations lasted for an extended period of time. . . ; (iii) there was no legitimate ground on which to withdraw from negotiations; (iv) the withdrawal was brutal, unexplained, and unilateral; and (v) the defendant willfully maintained negotiations. . . knowing that the plaintiff was incurring costs.” Descamps, *supra* note 71, at 11; *see also* Klein, *supra* note 64, at 16. Similarly, under German law, once parties enter into negotiations for a contract, a relationship of “trust and confidence” is created and a party can be held liable under contract law theory for negligently creating the expectation in the other that a contract would be completed. Kessler, *supra* note 71, at 404; *see also* Klein, *supra* note 64, at 17.

73. Farnsworth, *supra* note 23, at 221, 239.

74. R. Peter Fontaine, *Letter of Intent and the Obligation of Good Faith Negotiation*, 10 ACCA DOCKET 76 (Fall 1992). A number of policy reasons have been put forth to support this general rule. First, there is the practical difficulty of courts trying to determine when exactly in the particular negotiation process such a duty of good faith to negotiate would arise. Farnsworth, *supra* note 23, at 242-243. Additionally, when a court imposes a duty to negotiate in good faith, the court has little guidance in instructing parties exactly what they are supposed to negotiate over or at what point a refusal to do so constitutes bad faith. Schwartz, *supra* note 56, at 675-76. In other words, courts struggle with fashioning an appropriate remedy for the breach since there is no way to know the terms of the agreement that would have resulted from the negotiations. Farnsworth, *supra* note 23, at 267. Imposing such a duty could be said to have a chilling effect on negotiations by discouraging parties from entering negotiations in the first place if they thought the likelihood of consummation of the transaction was low. *Id.* at 243. Conversely, imposing such a duty could also have an

However, while a general duty to negotiate in good faith does not exist, most jurisdictions recognize that parties can *contractually* obligate themselves to such a duty. In such jurisdictions, a court enforces a preliminary agreement containing express language of such an obligation.⁷⁵ For example, the parties might enter into an LOI stating an intention to evidence the parties' "mutual intent to negotiate in good faith to enter into a definitive Agreement."⁷⁶ The converse is true as well as courts also enforce clear language in a preliminary agreement disclaiming any duty to negotiate in good faith.⁷⁷ Of course, sometimes the contractual language is ambiguous, rather than being clear or "express" on this issue.⁷⁸ In such instances, courts will typically try to determine whether the parties intended to enter an agreement to negotiate in good faith.⁷⁹

accelerating effect, making parties inclined to bring negotiations to a conclusion more quickly than may be appropriate, potentially leading to errors and incomplete deal terms. *Id.* Finally, courts struggle with what should be the remedy for a party who has successfully shown bad faith. Schwartz, *supra* note 56, at 675-76.

75. Descamps, *supra* note 71, at 11. In fact, even in the face of a more general statement in an LOI that the LOI is non-binding, if the parties elsewhere clearly state they intend to be bound to an obligation of good faith negotiation, courts may enforce that obligation. Fontaine, *supra* note 74, at 76. For instance in *Itek Corp. v. Chicago Aerial Indus., Inc.*, the LOI stated that "[i]f the parties fail to agree upon and execute [a definitive agreement,] they shall be under no further obligation to one another." 248 A.2d 625, 627 (Del. 1968). However, the LOI also stated that the parties "shall make every reasonable effort to agree upon and have prepared as quickly as possible a contract providing for the foregoing purchase. . . embodying the above terms and such other terms and conditions as the parties shall agree upon." *Id.* at 627. The court held that if all the provisions are read together, it became apparent that the parties obligated themselves to "make every reasonable effort" to agree on a finalized contract and as such were obligated to continue good faith negotiations. *Id.* at 629.

76. Descamps, *supra* note 71, at 11.

77. An example of such language might be: "This summary of terms is for discussion purposes only, and is not intended to constitute a legally binding or enforceable agreement or commitment, including any duty to negotiate or conclude an agreement, on the part of either party or any of their affiliated entities or parties . . ." Deborah J. Ludewig, *A Pragmatic View of Term Sheets and Ancillary Agreements*, in *DRAFTING AND NEGOTIATING CORPORATE AGREEMENTS 2011*, at 99 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1858, 2011).

78. See Descamps, *supra* note 71, at 11 (citing *Itek*, 248 A.2d at 625).

79. Descamps, *supra* note 71, at 11. In attempting to glean the parties' intent, courts will look at a number of factors, including the language of the agreement; the extent of open terms; whether there has been partial performance; the customary practice for such contracts regarding formalities; and the context of the negotiations. Schwartz, *supra* note 56, at 675-676. Similar factors are used to ascertain the parties' intent to be bound to the actual terms of a preliminary agreement where the language of such agreement is ambiguous. As such, these factors will be discussed in greater detail in Part III.C.2.a *infra*.

Though some jurisdictions have historically refused to enforce an agreement by the parties to negotiate in good faith, and even in the face of explicit language spelling out such an agreement,⁸⁰ the modern trend appears to be an increased willingness to enforce agreements that are intended to be binding, even if some terms are left open.⁸¹ By enforcing these agreements to negotiate in good faith, parties are provided with some assurance that the deal will get done unless there is a genuine disagreement.⁸² There is still a minority of jurisdictions that either will not enforce an agreement to negotiate in good faith, even in the face of an express agreement of the parties, or will only enforce these agreements if they are expressly and unambiguously stated.⁸³

80. Farnsworth, *supra* note 23, at 267. The justifications for such a position were largely policy-based, as described more fully in note 75 *supra*. Other courts relied on the notion that they would not be able to determine the scope of the obligation to negotiate in good faith. *Id.* However, many of the policies relied upon by courts to ignore a duty to negotiate in good faith have come to be recognized as unimportant – at least in the face of the counter-veiling concern that contract law “gratify, not defeat expectations.” *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 409 n.6 (4th Cir. 2002). Professor Farnsworth has provided some insight into why some of the policy concerns initially asserted by jurisdictions refusing to enforce agreements to negotiate in good faith are unavailing. Farnsworth, for instance, criticizes the argument that a court cannot fashion an appropriate remedy for a breach of the duty because of the inability to know what agreement would have resulted. Farnsworth, *supra* note 23, at 267. He says that the appropriate remedy for such a breach is not expectation damages, but rather damages caused by the injured party’s reliance on the agreement to negotiate. *Id.* If the disappointed party can prove reliance damages, such as a lost opportunity, then it can recover. *Id.* Though Farnsworth admits that the rationale that a court cannot determine the scope of the obligation of fair dealing is a more “substantial reason for refusing to enforce” an agreement to negotiate in good faith, he still ultimately rejects this rationale. *Id.* He points out that courts apply the concept of fair dealing to the *performance* of a contract (by using “good faith” and “best efforts” terminology), so there should be no more difficulty in applying it to the *formation* of a contract. *Id.*

81. *Burbach*, 278 F.3d at 409 n.6; *see also* Schwartz, *supra* note 56, at 675. (“Recently, in a major shift in doctrine, courts have relaxed the knife-edge character of the common law by which parties are either fully bound or not bound at all. Instead, a new default rule is emerging to govern cases in which the parties contemplate further negotiations.”).

82. *Id.*

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

Even in jurisdictions where contractual commitments to negotiate in good faith are enforceable, the remedies for these Good Faith Claims are circumscribed. The relief available for claimants establishing a breach of the duty to negotiate in good faith is typically: (a) an injunction or specific performance requiring the parties to continue the negotiations; and/or (b) reliance damages.⁸⁴ Generally, courts prohibit a party from recovering expectation or benefit-of-the-bargain damages because the agreement does not guarantee that the parties will ultimately conclude the final contract.⁸⁵

Specifically, once a court determines the parties intended to bind themselves to a duty to negotiate in good faith, the parties are typically required to negotiate the open issues in good faith in an attempt to reach the ultimate objective.⁸⁶ However, neither party has the ability to demand actual consummation of the transaction.⁸⁷ In other words, the parties may ultimately reach an impasse in their negotiations due to good faith differences in the open issues, resulting in the transaction not being consummated.⁸⁸ Parties losing interest in the deal and mutually abandoning negotiations will not violate this duty of good faith.⁸⁹ But the obligation does “bar a party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement.”⁹⁰

supra note 23, at 267 (explaining that courts that refuse to enforce such agreements often characterize such agreements “pejoratively as an ‘agreement to agree’”).

84. Brodsky, *supra* note 65, at 20; Schwartz, *supra* note 56, at 664-65.

85. Brodsky, *supra* note 65, at 20. (“Attributing lost profits to the other party’s bad faith abandonment of negotiations is [usually considered] too speculative.”). *But see* Venture Assocs. Corp. v. Zenith Data Sys. Corp., 96 F.3d 275, 278 (7th Cir. 1996) (suggesting in dicta that additional damages might be available in some circumstances where the plaintiff can prove that the parties would have made a final contract had it not been for the defendant’s bad faith, provided the loss of benefit was a foreseeable consequence.).

86. Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987).

87. *Id.*; see also NICK J. VIZY, LAW OF PURCHASING § 49:28 (West/Thompson 2011).

88. *Teachers*, 670 F. Supp. at 498; see also A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Grp. Inc., 873 F.2d 155, 159 (“A letter of intent is no guarantee that the final contract will be concluded, even if the parties fulfill their good faith obligations.”).

89. *Teachers*, 670 F. Supp. at 498; see also VIZY, *supra* note 87, at § 49:28.

90. *Teachers*, 670 F. Supp. at 498; see also Klein, *supra* note 64, at 9-10 (“The good faith duty . . . prevent[s] the parties from refusing to negotiate or offering only unreasonable proposals.”).

B. Equitable Claims: Liability Under a Promissory Estoppel Theory

In situations where no contract has been formed, and therefore a disappointed party does not have a viable Fully-Formed Contract Claim or even a Good Faith Claim, that party is not necessarily without a remedy. The equitable claim of promissory estoppel may be available.⁹¹ Generally, a claim for promissory estoppel requires the plaintiff to show: “(i) a clear and unambiguous promise by the defendant to close the transaction; (ii) reasonable and foreseeable reliance by the plaintiff on the promise; and (iii) an injury [to the plaintiff] resulting from the reliance.”⁹² “[P]romissory estoppel claims are extremely fact-specific and are not susceptible to the application of generalized rules.”⁹³ That said, some basic principles can be pulled from the cases about each of the basic elements of the claim.

With respect to the first element, a “clear and unambiguous” promise is one where the assertion is explicit and without any doubt or tentativeness.⁹⁴ A

91. Descamps, *supra* note 71, at 12. The origins of the promissory estoppel claim were in gratuitous promises that lacked the consideration necessary to be considered a binding promise, and some of the early authorities limited the doctrine to such scenarios. 4 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:8 (4th ed. 1989). The doctrine has expanded dramatically, however, since the early Twentieth century. *Id.* Though some courts have declined to extend the doctrine into commercial settings, the doctrine is now typically more widely applicable to any relied-upon promise – whether gratuitous or commercial. *Id.*

92. Descamps, *supra* note 71, at 12; *see also* R.G. Grp., Inc. v. Horn & Hardart Co., 751 F.2d 69, 78 (2d Cir. 1984); Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 264 (2d Cir. 1984); Olympic Holding Co., L.L.C. v. ACE Ltd., 909 N.E.2d 93, 101 (Ohio 2009). Some jurisdictions have minor variations on this formulation. *See, e.g.*, WILLISTON, *supra* note 92, at § 8:8 (elements are “[a] promise which foreseeably results in a substantial detrimental change in position where justice requires enforcement”); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise”); Budget Mktg., Inc. v. Centronics Corp., 927 F.2d 421, 427 (8th Cir. 1991) (plaintiff “must establish: (1) a clear and definite agreement; (2) that it acted to its detriment in reasonable reliance on the agreement; and (3) that the equities support enforcement of the agreement.”); Fortress Sys., L.L.C. v. Bank of W., 559 F.3d 848, 852-53 (8th Cir. 2009) (“a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement”); Doll v. Grand Union Co., 925 F.2d 1363, 1371 (11th Cir. 1991) (plaintiff must show that “(1) the defendant made certain promises; (2) the defendant should have expected the plaintiff would rely on such promises; and (3) the plaintiff did in fact rely on such promises to his detriment.”).

93. Doll, 925 F.2d at 1372; *see also* WILLISTON, *supra* note 92, at § 8:7.

94. Andersen Inv., LLC v. Factory Card Outlet of Am., Ltd., 630 F. Supp. 2d 1030,

statement of opinion or future intent not involving a specific undertaking on the part of the promisor will not satisfy the first element.⁹⁵ Per the second element, the reliance must be “reasonable.” For instance, the defendant’s repeated expressions that he does not intend to be bound to an agreement until a final definitive written agreement is executed serve as evidence of the unreasonableness of the plaintiff’s subjective reliance.⁹⁶ Similarly, when the terms of the agreement are vague and uncertain, the plaintiff’s reliance is more likely to be viewed as unreasonable than if the terms of the agreement are more definite.⁹⁷ Finally, with respect to the third element, some courts suggest that where the loss induced is negligible, no injustice results from a refusal to enforce the promise, and as such, a promissory estoppel claim is not established.⁹⁸ The loss suffered must be substantial in an economic sense and related to the promise to satisfy the third element.⁹⁹

An Equitable Claim, like a Good Faith Claim, is not as appealing to a plaintiff as a Fully-Formed Contract Claim because of the limited remedy available. While some courts allow full-scale enforcement of a promise asserted under a promissory estoppel claim,¹⁰⁰ most courts—particularly in the commercial setting—limit the remedy to restitution or to reliance damages.¹⁰¹ Since this theory is typically used when no contract was formed, courts have

1041 (S.D. Iowa 2009).

95. WILLISTON, *supra* note 92, at § 8:7. However, a minority of courts suggest the promise need not be as definite as it would have to be in the case of a claim for a breach of contract. *Id.*

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

97. *Doll*, 925 F.2d at 1372. The less clear or specific the promise, the more likely the court will find that the reliance was unreasonable. WILLISTON, *supra* note 92, at § 8:7.

98. *Barnes & Robinson Co., v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 645. (Tenn. Ct. App. 2006).

99. Therefore, if for instance a promisee who expects to receive a promised amount of money for the purchase of a car instead buys a new suit through the extension of credit, this will not be considered detrimental reliance related to the promise since the money was used for a different purpose. WILLISTON, *supra* note 92, at § 8:7.

100. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981) (“[F]ull-scale enforcement by normal remedies is often appropriate.”); WILLISTON, *supra* note 92, at § 8:7 (“[S]ome courts . . . have taken the position that expectation or ‘benefit of the bargain’ damages should be recoverable rather than limiting a promisee to reliance damages.”).

101. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981) (“[R]elief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee’s reliance rather than by the terms of the promise”); *see also* Clifford R. Gray, *Inc. v. LeChase Const. Servs.*, 857 N.Y.S.2d 347, 349-50 (N.Y. App. Div. 2008); *Blanton Enters. V. Burger King Corp.*, 680 F. Supp. 753, 776 (D.S.C. 1988).

reasoned the plaintiff should be precluded from offering evidence of expectancy damages.¹⁰² In other words, the “plaintiff is not entitled to the benefit of his bargain since there was no bargain” to begin with,¹⁰³ and the plaintiff’s recovery will likely be limited to those expenses the plaintiff incurred in relying on the alleged promise.¹⁰⁴

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

As discussed above, when a plaintiff brings an Equitable Claim or a Good Faith Claim, the plaintiff may only be entitled to reliance damages and likely is prohibited from recovering benefit-of-the-bargain or other compensatory damages that he or she might be awarded in a classic breach of contract claim. As such, a disappointed party interested in establishing additional damages will need to show that the parties were contractually obligated to the actual deal terms of the preliminary agreement (a Fully-Formed Contract Claim). Because of the potential for greater damages awards, Fully-Formed Contract Claims are the most appealing to plaintiffs and, consequently, potentially the most devastating for defendants. This part discusses the law surrounding the enforcement of the terms of a preliminary agreement, whether that agreement is written or oral.

1. Basic Principles of Law

To establish a breach of contract, “a plaintiff must prove . . . (i) the existence of a contract; (ii) breach by the other party; and (iii) damages suffered as a result of the breach.”¹⁰⁵ The element at issue for purposes of this article is the first: whether a contract was ever formed. When there is a preliminary agreement, whether written or oral, a court will apply certain basic principles in determining whether or not an enforceable contract exists.

First, if the parties do not intend to be bound prior to the execution of a definitive agreement, courts will give effect to that intent and the parties will not be bound, even if all of the business issues have already been resolved at

102. See, e.g., *Clifford R. Gray*, 857 N.Y.S.2d at 349-50.

103. *Id.*

104. *Id.*

105. See, e.g., *Bear Sterns Inv. Prods., Inc., v. Hitachi Auto. Products (USA), Inc.*, 401 B.R. 598, 615 (S.D.N.Y. 2009); see also *CDF Firefighters v. Maldonado*, 70 Cal. Rptr. 3d 667, 679 (2008); *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003); *Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc.*, 545 S.E.2d 745, 751 (N.C. App. 2001).

this preliminary stage.¹⁰⁶ If, on the other hand, the parties do intend to be bound by the terms of the preliminary agreement prior to the execution of a definitive agreement, the parties will be bound even if they contemplate replacing their earlier understanding with a definitive agreement at a later date.¹⁰⁷ Further, parties intending to be bound prior to the execution of a definitive agreement will be bound even if there are certain issues that have not been resolved.¹⁰⁸ Finally, a written LOI or other such document need not have been executed for these principles to come into play.¹⁰⁹ Even in the absence of a written preliminary agreement, a plaintiff might argue that the parties, in the course of their early negotiations, came to a meeting of the minds and entered into a binding oral contract.¹¹⁰ The same principles that apply when considering the binding nature of a preliminary written agreement also apply when considering the enforceability of a preliminary oral agreement.¹¹¹

106. AM. BAR ASS'N, *supra* note 24, at 108; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 27 cmt. b (1981); *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 427 (N.Y. App. Div. 2010) *leave to appeal denied*, 15 N.Y.3d 704 (2010); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 788 (Tex. App. 1987); *Cont'l Labs., Inc. v. Scott Paper Co.*, 759 F. Supp. 538, 540 (S.D. Iowa 1990) *aff'd sub nom.* *Cont'l Labs., Inc. v. Scott Paper*, 938 F.2d 184 (8th Cir. 1991).

107. AM. BAR ASS'N, *supra* note 24, at 109; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 27 cmt. a (1981); WILLISTON, *supra* note 2, at § 4:11; *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 582 (3d Cir. 2009); *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 74 (2d Cir. 1984); *V'Soske v. Barwick*, 404 F.2d 495, 499 (2d Cir. 1968); *Cont'l Labs.*, 759 F. Supp. at 540; *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 499 (S.D.N.Y. 1987).

108. AM. BAR ASS'N, *supra* note 24, at 109; *see also* *Itek Corp. v. Chicago Aerial Indus., Inc.*, 248 A.2d 625, 629 (Del. 1968). “Depending on the importance of the open [issues left to be resolved], the courts will either supply commercially reasonable terms for those [open items] or impose a contractual obligation on the parties to negotiate resolution of those issues in good faith.” AM. BAR ASS'N, *supra* note 24, at 109.

109. AM. BAR ASS'N, *supra* note 24, at 109.

110. *See, e.g., Andersen Inv., LLC v. Factory Card Outlet of Am., Ltd.*, 630 F. Supp. 2d 1030, 1034 (S.D. Iowa 2009).

111. *See, e.g., id.* at 1035 (“Iowa law recognizes the validity of oral contracts, even in those cases in which the parties intended to later reduce their agreement to writing . . . Under such circumstances the writing is merely an expression of a contract already made. On the other hand, the parties may intend that obligation should arise *only* upon the signing of a written instrument embodying the terms they have tentatively agreed to.”); *see also* *Steven R. Perles, P.C. v. Kagy*, 473 F.3d 1244, 1249 (D.C. Cir. 2007); *R.G. Grp.*, 751 F.2d at 69, 74; *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80-83 (2d Cir. 1985); RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981); WILLISTON, *supra* note 2, at § 3.2. The only additional consideration in the oral agreement context is whether or not an oral agreement is permissible under the applicable Statute of Frauds. *Id.*

The purpose of these principles is to give parties the freedom to contract as they please—to be bound by an LOI or similar agreement after the preliminary negotiation stage or to maintain immunity from liability until a written definitive agreement is executed.¹¹² Ultimately, as evidenced by the principles set out above, whether or not a preliminary agreement will be enforceable comes down to a question of the intent of the parties.¹¹³ Parties can show their intent by expressly stating in the LOI whether they wish to be bound.¹¹⁴ Parties who do so successfully may avoid a court's involvement in the negotiations.¹¹⁵ If the parties' intent is unclear from the preliminary agreement, subsequent events make the meaning of the LOI ambiguous, or there is no written preliminary agreement and oral terms are disputed, a judge or jury must decide whether the parties meant to bind themselves contractually.¹¹⁶ Part III.C.2 discusses the process courts use to determine the intent of the parties.

2. Determining the Intent of the Parties

The Restatement (Second) of Contracts suggests a number of factors a court should consider when determining whether a contract has been concluded and is enforceable.¹¹⁷ Those factors are: the extent to which there are open issues remaining, whether the contract is of a type usually put in writing, whether it needs a formal writing for its "full expression," whether the agreement has few or many details, the size of the transaction from a monetary standpoint, whether a standard form contract is used in similar transactions, and whether there has been partial performance.¹¹⁸ As discussed in more detail in Part III.C.2.a., a number of jurisdictions have adopted some variation on this factors test for determining the intent of the parties. Other jurisdictions, however, take a less formulaic approach, considering instead all of the facts and circumstances "without trying to fit the evidence into specific pigeonholes,"¹¹⁹ as discussed more fully in Part III.C.2.b.

Regardless of the test applied, the end goal is to apply an objective theory of intent to determine whether there was a manifestation of a desire to be

112. *R.G. Grp.*, 751 F.2d at 74.

113. *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987).

114. *See* Farnsworth, *supra* note 23, at 257.

115. *See* AM. BAR ASS'N., *supra* note 24, at 109.

116. *See* Williamson, *supra* note 24, at 24.

117. RESTATEMENT (SECOND) OF CONTRACTS § 27 cmt. c (1981).

118. *Id.*

119. Response to Petition for Writ of Certiorari at 19, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010), 2010 Ga. S. Ct. Briefs LEXIS 97, at *19.

bound.¹²⁰ Under an objective theory of intent, the party's intention is "deemed to be that meaning a reasonable [person] in the position of the other contracting party would ascribe to the first party's manifestations of assent, or that meaning which that other contracting party knew the first party ascribed to his manifestations of assent."¹²¹ A court applying an objective theory of intent should not consider the parties' unexpressed, subjective intentions or understandings.¹²² Evidence of this objective intent can come from a number of sources, such as the words or actions of the parties,¹²³ as determined from oral testimony or by preliminary or draft agreements.¹²⁴ When making the determination of intent, the court will consider the totality of the circumstances.¹²⁵

a. Factors Test

A number of jurisdictions that have considered the issue, New York being one of the most commercially notable,¹²⁶ apply a multi-factor test to determine

120. *Weigel Broad. Co. v. TV-49, Inc.*, 466 F. Supp. 2d 1011, 1016 (N.D. Ill. 2006); *Cont'l Labs., Inc. v. Scott Paper Co.*, 759 F. Supp. 538, 540-41 (S.D. Iowa 1990).

121. *Cox Broad. Corp. v. Nat'l Collegiate Athletic Ass'n.* 297 S.E.2d 733, 737 (Ga. 1982); *see also McKenna v. Capital Res. Partners, IV, L.P.*, 650 S.E.2d 580, 583 (Ga. Ct. App. 2007); WILLISTON, *supra* note 2, at § 3:5.

122. WILLISTON, *supra* note 2, at § 3:5 ("Under this reasonable person standard, the law accords to individuals an intention that corresponds with the reasonable meaning of their words and conduct, and if their words and conduct manifest an intention to enter into a contract, their real but unexpressed intention is irrelevant. The courts' inquiry, therefore is not into the parties' actual, subjective intention, but rather into how the parties manifested their intention; not on whether there has been a subjective 'meeting of the minds,' but rather on whether the parties' outward expression of assent is sufficient to show an apparent intention to enter into a contract."); *see also Bustamante v. Intuit, Inc.*, 45 Cal. Rptr. 3d 692, 698-99 (2006); *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 549 (2d Cir. 1998); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 788 (Tex. App. 1987); *Blanton Enters., Inc. v. Burger King Corp.*, 680 F. Supp. 753, 771 (D.S.C. 1988).

123. *Adjustrite*, 145 F.3d at 549; *Bitterroot Int'l Sys., Ltd. v. W. Star Trucks, Inc.*, 153 P.3d 627, 635 (Mont. 2007).

124. RESTATEMENT (FIRST) OF CONTRACTS § 26 cmt. b (1932).

125. WILLISTON, *supra* note 2, at § 3:5 ("[A]ll of the parties' words, phrases, expressions and acts should be viewed in light of the circumstances that existed at that time, including the situation of the parties, both individually and relative to one another, and the objectives they sought to attain."); *see also, Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 582, 584 (3d Cir. 2009). This does not violate the parol evidence rule because that rule only comes into play after the existence of a contract has been determined. *Itek Corp. v. Chicago Aerial Indus., Inc.*, 248 A.2d 625, 629 (Del. 1968).

126. *See* NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 113 (Tina L. Stark ed. 2003) ("New York . . . ha[s] a] well-developed bod[y] of corporate law, making an

whether the parties intended to be bound to the terms of their preliminary written or oral agreement.¹²⁷ A few of these jurisdictions apply a test identical to the multi-factor Restatement test,¹²⁸ while others add additional factors.¹²⁹ Still others consolidate a number of the factors together, incorporating most but not necessarily all.¹³⁰

New York and others have adopted a four-factor variation on the Restatement test. Under New York law, to determine the intent of the parties, a court will consider: (i) whether a party expressly reserved the right to be bound only when a written agreement is signed; (ii) whether there was any partial performance by the disappointed party that the party disclaiming the contract accepted; (iii) whether all essential terms of the alleged contract had been agreed upon; and (iv) whether the complexity or magnitude of the transaction was such that a formal, executed writing would normally be expected.¹³¹ Some jurisdictions include a fifth factor: the context of the negotiations.¹³² However, some case law is conflicting, suggesting that the context of the negotiations is a factor that should only be reviewed to determine if there was an agreement to negotiate in good faith (i.e., a Good Faith Claim), not to determine if there was an agreement to be bound to the actual terms of the preliminary agreement (i.e., a Fully-Formed Contract Claim).¹³³

agreement's interpretation far more predictable than would be true under the law of most other jurisdictions.").

127. AM. BAR ASS'N, *supra* note 24, at 109; WILLISTON, *supra* note 2, at § 4:11. *See also* *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768,788-89 (Tex. App. 1987) (Court of Appeals of Texas applying New York law); *Adjustrite*, 145 F.3d at 549 (7th Circuit applying New York law); *Blanton*, 680 F. Supp. at 772; *Ciaramella v. Reader's Digest Ass'n, Inc.*, 131 F.3d 320, 323 (2d Cir. 1997) (2nd Circuit applying New York law); *Faught v. Budlong*, 540 N.W.2d 33, 40 (Iowa 1995); *Cochran v. Norkunas*, 919 A.2d 700, 709 (Md. 2007); *Miller Const. Co. v. Stresstek*, 697 P.2d 1201, 1203 (Idaho App. 1985).

128. *See, e.g.*, *Cont'l Labs., Inc. v. Scott Paper Co.*, 759 F. Supp. 538, 541 (S.D. Iowa 1990); *Cochran*, 919 A.2d at 709; *Andersen Inv., LLC v. Factory Card Outlet of Am., Ltd.*, 630 F. Supp. 2d 1030, 1038 (S.D. Iowa 2009).

129. *Consarc Corp. v. Marine Midland Bank, NA*, 996 F.2d 568, 575-76 (2d Cir. 1993).

130. *See infra* note 131 and accompanying text.

131. *See, e.g.*, *Texaco*, 729 S.W.2d at 788-89; *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75-76 (2d Cir. 1984); *Blanton*, 680 F. Supp. at 772; *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80-81 (2d Cir. 1985).

132. *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 500 (S.D.N.Y. 1987); Klein, *supra* note 64, at 10.

133. *Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd.*, 383 F. Supp. 2d 428, 445-46 (S.D.N.Y. 2003); *Bear Sterns Inv. Prods., Inc., v. Hitachi Auto. Products (USA), Inc.*, 401 B.R. 598, 625 (S.D.N.Y. 2009). *See also* Brodsky, *supra* note 65, at 18.

The number of factors required to point in the same direction to be decisive on the issue of intent is uncertain,¹³⁴ though a number of courts have suggested that the first factor is the most important.¹³⁵ The trier of fact is ultimately granted a significant amount of discretion in these cases because there is no bright-line test and the application of the factors can be a malleable process.¹³⁶

i. Express Language

The first factor—whether the parties expressly reserved the right to be bound only in a definitive agreement—is generally thought to be the most important.¹³⁷ In fact, if the language of the preliminary agreement is unambiguous, this factor often controls.¹³⁸ For instance, in *Feldman v. Allegheny International, Inc.*, the preliminary agreement at issue had language that stated the parties “understood that [the LOI] is not a binding agreement and the obligations and rights of the parties shall be set forth in the definitive agreement executed by the parties.”¹³⁹ The plaintiff argued that the law allows for a presumption that formal execution is not always necessary to have a

134. See, e.g., *Ciaramella v. Reader’s Digest Ass’n, Inc.*, 131 F.3d 320, 323 (2d Cir. 1997) (“No single factor is decisive, but each provides significant guidance.”).

135. See *infra* Part III.C.2.a.i.

136. Klein, *supra* note 64, at 15.

137. See, e.g., *Teachers*, 670 F. Supp. at 499; *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 549 (2d Cir. 1998). See also AM. BAR ASS’N, *supra* note 24, at 109; Brodsky, *supra* note 65, at 18.

138. See, e.g., *Barnes & Robinson Co., Inc. v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006) (holding that the court will only resort to rules of construction if the terms of an instrument are ambiguous and that since the language of the LOI clearly showed an intent to require a signed definitive agreement, the parties were not bound by the terms of the preliminary agreement); *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75 (2d Cir. 1984) (“Courts are reluctant to discount such a clear signal as a party’s explicit statement that it reserves the right to be bound only when a written agreement is signed.”); *Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421, 426 (8th Cir. 1991) (“Where the language of a contract is clear and unambiguous, the language itself prevails over the intent or interpretation of a party . . . While the court may find an implied term on a point not covered by the express terms of the agreement, there cannot be an implied contract on a point fully covered by an express contract and in direct conflict therewith.”); see also WILLISTON, *supra* note 2, at § 14:11 (“Certainly if the parties expressly provide that no obligation shall arise until the formal writing is executed, that expression of intent will be given effect.”). However, a “mere reference” in a LOI that a “formal agreement [is] to follow,” while it may be seen as some evidence that the parties did not intend to be bound by the preliminary agreement, it does not necessarily “conclusively show this.” Farnsworth, *supra* note 23, at 258-59.

139. 850 F.2d 1217, 1221 (7th Cir. 1988).

binding agreement.¹⁴⁰ However, the court held that such a presumption is only effective in the face of silence.¹⁴¹ When there is no silence, but rather an unambiguous statement requiring formal execution, there is no contract without a formal executed document.¹⁴²

However, express language requiring a writing that is contained in a preliminary agreement or a draft definitive agreement will be given less effect when the alleged oral contract the plaintiff asserts is binding *precedes* the execution of the preliminary agreement or the subsequent circulation of draft definitive agreements. For instance, in *United International Holdings, Inc. v. Wharf (Holdings) Ltd.*, the court held that even in the face of a preliminary agreement requiring a formal writing, the evidence presented supported an inference that an oral contract existed and was binding.¹⁴³ But in that case, the alleged oral contract (formed in October 1992) came before the draft Memorandum of Understanding (exchanged by the parties in 1993) and before the later circulation of the definitive agreement, which contained the writing requirement.¹⁴⁴

Additionally, some courts show a willingness to override express language of the LOI purporting to make it non-binding if the circumstances surrounding the negotiation suggest the parties may have subsequently changed their minds about their intent to be bound.¹⁴⁵ For instance, oral communications and other actions by the parties will be given weight by some courts to such a degree that they overcome earlier seemingly express and unambiguous statements of intent not to be bound.¹⁴⁶ The *Turner* case, discussed in detail in Part IV *infra*, involves just such a scenario where oral communications and other actions overcame a preliminary agreement's writing requirement.

Unlike the *Turner* court, other courts willing to override express language will do so only when the party asserting the existence of an enforceable agreement can satisfy a seemingly higher evidentiary burden. For instance, a court might require an "express waiver" of that writing requirement before it will override the language in the LOI or draft agreements. An express waiver

140. *Id.* at 1222.

141. *Id.*

142. *Id.*

143. 649 F. Supp. 861, 867-68 (D. Colo. 1996).

144. *Id.*

145. AM. BAR ASS'N, *supra* note 24, at 109.

146. *Id.* at 109; *see also* *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1360 (Fed. Cir. 2005) (holding that parties "may abrogate a prior written agreement with a subsequent oral one, if they so mutually intend. . . . The question as to whether [the abrogation is effective] depends on the intention of the parties to be determined by the surrounding facts and circumstances . . .").

must be clear and unambiguous, such as a written waiver expressly overriding the writing requirement.¹⁴⁷ In *Ciaramella v. Reader's Digest Association*, for example, the parties had been negotiating a settlement agreement.¹⁴⁸ The defendant authorized his lawyer to accept the agreement.¹⁴⁹ The lawyer made several suggestions for revisions that were incorporated into a revised draft.¹⁵⁰ After reviewing the draft, the lawyer asked for some additional changes and said, “[w]e have a deal.”¹⁵¹ Before the agreement could be executed, however, the defendant consulted another attorney, and ultimately decided the proposed agreement was not acceptable and refused to sign.¹⁵² The language of the proposed agreement included a number of terms that suggested the agreement would not become effective until signed.¹⁵³ Fortunately for the defendant, the court held that the communication that “[w]e have a deal” was not an explicit waiver of the signature requirement and, therefore, there was no binding contract.¹⁵⁴

147. For instance, in *Southern Colorado MRI, Ltd. v. MED-Alliance, Inc.*, the parties had signed an LOI that explicitly stated it was not an offer and that the rights and obligations of the parties would be defined in a later purchase agreement. 166 F.3d 1094, 1097 (10th Cir. 1999). The parties exchanged drafts of the definitive written agreement and the board of the buyer approved the transaction. *Id.* The buyer sent a letter revising the purchase price and referred to the revision as its “offer.” *Id.* In a subsequent written correspondence, the seller responded that it would “formally accept” the offer. *Id.* The court held that this offer and acceptance served as a clear and unambiguous written waiver of the LOI’s requirement of a definitive written agreement. *Id.* at 1099-1100. But not all courts require the waiver to be in writing. *See Lamle*, 394 F.3d at 1360 (“Under California law it is well settled that the intent to abrogate an earlier written agreement can be inferred from the fact of a later oral agreement.”).

148. 131 F.3d 320, 321 (2d Cir. 1997).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 325. The 2nd Circuit came to a similar conclusion in *R.G. Group, Inc. v. Horn & Hardart Company*, 751 F.2d 69 (2d Cir. 1984). In that case, the parties had exchanged multiple drafts of a definitive written agreement over a period of months of negotiations. *Id.* at 76. The proposed agreement had a provision that it would be binding “when duly executed.” *Id.* The agreement, however, was never signed. *Id.* The plaintiff pointed to a statement made by the defendant on a telephone conference where he said the parties had “a handshake agreement” as evidence that the deal was binding. *Id.* However, the court held that this statement was not an explicit waiver of the requirement that the contract be in writing, especially given the fact that, over the months of negotiation, no one had ever suggested removing the writing requirement from the drafts. *Id.* *See also Abrams v. Unity Mut. Life Ins. Co.*, 70 F. Supp. 2d 846, 851 (N.D. Ill. 1999) *aff’d*, 237 F.3d 862 (7th Cir. 2001) (concluding that a handshake agreement during the negotiations was insufficient

Even when an agreement does not contain “express language” requiring a formal written agreement before the parties will be contractually obligated, courts have sometimes found other, less direct language to be indicative of a similar intent not to be bound.¹⁵⁵ For instance, titling a preliminary agreement as a “proposal” and stating that a party “desires” to purchase assets have been found to be indicative of intent not to be bound.¹⁵⁶ However, such language frequently creates ambiguities resulting in disputed facts. For instance, in *IRV Merchandising Corp. v. Jay Ward Productions*, the preliminary agreement stated that the parties needed their lawyers’ “go ahead per a contract to be signed” before proceeding further, indicating an intent not to be bound prior to signing a final contract.¹⁵⁷ However, the preliminary agreement also stated that the contractual relationship between the parties was created as of the date of the preliminary agreement, indicating an intent to be bound by the terms of the preliminary agreement as of that date.¹⁵⁸ This created an ambiguity that prevented the court from resolving the issue at the summary judgment stage.¹⁵⁹

Finally, in addition to looking at the actual language in a preliminary written agreement, courts will look at language in other documents to satisfy this first factor. In fact, in the oral contract context, no language of a preliminary written agreement exists, yet this factor still may apply. For instance, the court might look to the language of a press release issued by both parties about the proposed transaction.¹⁶⁰ Or, as in *Ciaramella*, courts might also look to language in the drafts of the definitive written agreement that was never signed.¹⁶¹ Those drafts might indicate that the agreement will not be effective until executed and delivered, suggesting no intent to be bound prior to execution.¹⁶² Similarly, a court might view a merger clause or signature lines

to demonstrate an explicit waiver of the parties’ stated intent to only be bound by a signed writing.).

155. *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 550 n.7 (2d Cir. 1998); Brodsky, *supra* note 65, at 18.

156. *Adjustrite*, 145 F.3d at 549; *see also* *Barnes & Robinson Co., Inc. v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006) (language of LOI stating that parties were to “consider” a “proposed purchase” or a “contemplated transaction” would be indicative of an intent not to be bound until a later definitive agreement).

157. 856 F. Supp. 168, 171 (S.D.N.Y. 1994).

158. *Id.* at 172-73.

159. *Id.*

160. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 789-90 (Tex. App. 1987); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 262 (2d Cir. 1984).

161. 131 F.3d 320, 321 (2d Cir. 1997).

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

in draft agreements as evidence of intent not to be bound orally.¹⁶³ For instance, in *Continental Laboratories, Inc. v. Scott Paper Company*, the court noted that the inclusion of a merger clause stating that “this [a]greement and the [e]xhibits hereto reflect the complete agreement of the parties and there are no other agreements or understandings applicable hereto” was indicative of an intent not to be bound without the agreement actually being executed.¹⁶⁴

ii. Partial Performance

The second factor in the four-factor test is whether or not the parties have engaged in partial performance. Partial performance consists of one party conferring something of value accepted by the other party.¹⁶⁵ Partial performance can serve as evidence that one party believes there is a contract, and in turn, the party who accepts performance signals that it too understands there to be a binding commitment.¹⁶⁶ On the other hand, performance by one party, unless actually received as such by the other party, does not provide clear evidence of a binding agreement.¹⁶⁷ An issue that frequently arises in this context is whether one party’s actions serve as partial performance or are merely preparatory in anticipation of the agreement.¹⁶⁸ Because of this uncertainty, it seems rare that a court’s decision will turn on the issue of partial performance, and this factor is sometimes ignored. For instance, a court might discount even substantial partial performance if the other factors more clearly indicate intent not to be bound.¹⁶⁹

and delivered”).

163. Brodsky, *supra* note 65, at 18, 20.

164. 759 F. Supp. 538, 542 (S.D. Iowa 1990).

165. *Spencer Trask Software & Info. Servs. LLC v. RPost Int’l Ltd.*, 383 F. Supp. 2d 428, 443-44 (S.D.N.Y. 2003).

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

167. *WILLISTON*, *supra* note 2, at § 4:11.

168. Klein, *supra* note 64, at 15 (“A party may make some partial performance of a preliminary agreement merely to further the likelihood of consummation of a transaction.”) (citations omitted); *see also* *Blanton Enters., Inc. v. Burger King Corp.*, 680 F. Supp. 753, 773 (D.S.C. 1988) (holding that submission of and acceptance of franchise application was merely preparatory to obtaining the necessary approvals to be a franchisee and not indicative of a binding agreement prior to execution of the formal franchise agreement).

169. Brodsky, *supra* note 65, at 18. *But see* *Balta v. Ayco Co., LP*, 626 F. Supp. 2d 347, 364 (W.D.N.Y. 2009) (summary judgment for defendant denied because, despite considerable evidence the defendant only intended to be bound in writing, there were still triable issues of fact relating to partial performance – specifically evidence that one party billed the other for services and the recipient paid the bill.) However, where evidence of partial performance is overwhelming, it can be a determinative factor. *R.G. Grp.*, 751 F.2d at 75-76.

iii. Open Issues

The third factor courts analyze is whether all of the terms have been agreed upon or whether there are still material open issues. Even if the parties intend to enter into an agreement, if essential terms are omitted or are too indefinite, there will not be a legally enforceable contract.¹⁷⁰ Although not all of the terms need to be fixed before a contract will be binding,¹⁷¹ some courts suggest that the failure to spell out customary terms evidences a lack of intent to be bound.¹⁷² Consequently, a frequently litigated issue is whether the parties mutually agreed on sufficient terms for the agreement to be enforced. As a general matter, the terms must be certain enough for the court to ascertain the scope of the parties' obligations,¹⁷³ but the degree of certainty required varies with the transaction involved.¹⁷⁴

Often there will be conflicting testimony about the significance of open issues, and the fact finder will have to decide the implications of these contradictions on the parties' intent.¹⁷⁵ This issue arises when parties are exchanging drafts of a definitive agreement and one party tries to enforce that agreement without the definitive agreement having been signed. In this context, a defendant might argue that there was no intent to be bound, evidenced by the fact that revised drafts were still being exchanged after the time the plaintiff argues an enforceable contract was in place. Some courts

170. *V'Soske v. Barwick*, 404 F.2d 495, 500 (2d Cir. 1968); *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987).

171. *V'Soske*, 404 F.2d 495 at 500. So long as a court is convinced the parties intended the agreement to be binding, and so long as the essential terms of the agreement are set out, a court will be willing to supply missing terms or give meaning to indefinite terms using any criteria available in the agreement itself for establishing the open terms, using "accepted business practices," or using "a prior or subsequent course of dealing" between the parties to the dispute. Kessler, *supra* note 71, at 413.

172. Farnsworth, *supra* note 23, at 260.

173. *Bustamante v. Intuit, Inc.*, 45 Cal. Rptr. 3d 692, 699 (Cal. Ct. App. 2006); Schwartz, *supra* note 56, at 664. ("[A]n enforceable contract requires promises that are sufficiently certain and definite that a court can ascertain the parties' intentions with a reasonable degree of certainty.") Some essential terms for an LOI to be binding would be "price, structure, and the assets or properties involved." Williamson, *supra* note 24, at 25 n.3.

174. Kessler, *supra* note 71, at 414. For instance, if a contract with standard terms was contemplated, a court will likely be more willing to fill in missing or indefinite terms. *Id.* Open terms will also be less of an issue when determining whether the parties intended to be bound to an obligation to negotiate in good faith than when determining whether the parties intended to be bound to the actual terms of the agreement. Klein, *supra* note 64, at 12.

175. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 794 (Tex. App. 1987).

tasked with analyzing such a scenario might deem the revisions to be minor or to involve unimportant issues, thereby concluding the contract is enforceable based on the terms set out in a draft of the definitive agreement.¹⁷⁶ But other courts, when faced with these situations, recognize that the changes must have been important enough to the parties that they had not yet agreed to sign. Thus, for a judge or jury to deem the changes so minor that the contract was binding, despite the parties' unwillingness to have it executed, would deprive the parties of their right to enter "only the exact contract they desired."¹⁷⁷

iv. Type of Contract Usually Committed to Writing

The fourth factor courts consider in determining the parties' intent to be bound is whether the contract at issue is the type of agreement customarily committed to writing. Finding that the agreement is a type of contract usually made in writing weighs in favor of an intent not to be bound by an informal preliminary written or oral agreement.¹⁷⁸

Courts look at a number of facts to help determine whether the particular contract would normally be in writing.¹⁷⁹ For instance, the larger the amount of money at stake, the more likely a court will find that this factor weighs in favor of an intent not to be bound.¹⁸⁰ Additionally, courts will look at the complexity

176. See, e.g., *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010); see also *infra* Part IV.

177. *Bear Stearns Inv. Prods., Inc. v. Hitachi Auto. Products (USA), Inc.*, 401 B.R. 598, 621 (S.D.N.Y. 2009); see also *Cont'l Labs., Inc. v. Scott Paper Co.*, 759 F. Supp. 538, 541 (S.D. Iowa 1990) (viewing the exchange of a later revised draft of the definitive agreement after a telephone call where an oral contract was purportedly made as evidence that there was no binding agreement at the time of the call).

178. *Texaco*, 729 S.W.2d at 795.

179. *Brodsky*, *supra* note 65, at 20.

180. See, e.g., *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir. 1984) (initial investment required of two million dollars and plaintiff alleging lost income and profits of at least eighty million dollars – no binding contract); *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 551 (2d Cir. 1998) (million dollar acquisition – no binding contract); *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 83 (2d Cir. 1985) (\$62,500 was "not a trifling amount" and payment was to be made over several years based on a percentage of earnings – no binding contract); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 263 (2d Cir. 1984) (four million dollar sale of six companies – no binding contract). But just because this factor weighs in favor of a finding of no intent to be bound does not mean that it will be determinative on the issue. For instance, in *Texaco*, the court admitted that it was unlikely that, in a transaction worth over five billion dollars, the parties would not have expected a detailed written agreement and agreed that this factor supported the position that a signed agreement would ordinarily be expected in a similar situation. 729 S.W.2d 768 at 786, 795. However, the court held that it could not, "as a matter of law, [hold] that this factor alone [was] determinative of the . . . parties' intent." *Id.* at 795. There was sufficient

of the transaction and the length of the contract. The more complex the transaction or the longer the period of time over which performance is to extend, the more likely a court will find that the agreement should be one in writing.¹⁸¹ Moreover, when parties are engaged in settlement negotiations, courts may be more likely to find that any agreement resulting from such negotiations is typically in writing.¹⁸² Finally, when the applicable statute of frauds requires that the type of agreement be in writing, an oral contract about the subject matter will not be enforceable.¹⁸³

v. Context of Negotiations

As discussed above, some jurisdictions consider the context of negotiations as a fifth factor. Often courts' analysis of the fifth factor considerably overlaps the analysis of other factors in the test. For instance, a court considering the context of negotiations might look at the course of dealing between the parties.¹⁸⁴ A court may be more likely to find that parties required a final written agreement before they would be bound when such parties had shown an interest in observing contractual formalities throughout the entire negotiation.¹⁸⁵ Similarly, the court might ask whether the relevant business community attributes binding force to the type of preliminary agreement at issue and might look at the complexity and scope of the proposed agreement.¹⁸⁶ Additionally, the court may address the language of the preliminary agreement

evidence to support an inference by the jury that the parties intended to be bound by the preliminary agreement. *Id.*

181. *Adjustrite*, 145 F.3d at 551 (assets being purchased were rights to software and a license to use a database, with five-year periods of employment contemplated – no binding agreement); *Blanton Enterprises, Inc. v. Burger King Corp.*, 680 F. Supp. 753, 773 (D.S.C. 1988) (franchise agreement to last 20 years and included numerous details regarding capital structure for franchisees, development of real estate, store construction, and trade secrets, among others – no binding agreement); *Reprosystem*, 727 F.2d at 262-63 (completing transaction required “approvals of foreign governments, sales of both securities and assets, . . . the transfer of almost 1,000 foreign employees,” and a number of additional details – no binding agreement).

182. *See, e.g., Winston*, 777 F.2d at 83 (where the parties are adversaries and the purpose of the agreement is to forestall litigation, typically agreement would be in writing – no binding agreement).

183. *See, e.g., In re Read-Rite Corp.*, CV-06004173 SC, 2007 WL 2318901 at *4 (N.D. Cal. Aug. 13, 2007) *aff'd*, 393 F. App'x 535 (9th Cir. 2010) (involving a contract subject to the requirement in the New York statute of frauds that “any agreement that cannot be performed within one year” be in writing).

184. Klein, *supra* note 64, at 11-12.

185. *Id.* at 12.

186. *Id.* at 11.

and find that a condition precedent—such as the requirement of third party approvals, which would not likely be secured without a formal executed contract—indicates an intent not to be bound prior to satisfaction of that condition.¹⁸⁷ While some courts may not expressly analyze the context of negotiations as a separate factor, they may do so informally, further complicating the application of this factor.¹⁸⁸

b. Jurisdictions Not Applying Factors Test

A number of jurisdictions do not expressly apply either the Restatement factors test or the more streamlined four or five factor tests.¹⁸⁹ Such courts take a more holistic approach, considering the facts and circumstances, without trying to fit the evidence into specific factors or elements.¹⁹⁰ It is unclear

187. *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 501 (S.D.N.Y. 1987).

188. In *Spencer Trask Software and Info. Services, LLC v. RPost International, Ltd.*, though the court did not expressly state it was looking at the “context of the negotiations,” it nonetheless appeared to do so when it addressed certain facts. 383 F. Supp. 2d 428, 446-47 (S.D.N.Y. 2003). For instance, the court noted the fact that the defendant had admitted there was an “agreement on terms” and the fact that the two parties shook hands on the oral agreement made in a meeting as an indication of the parties’ intent to be bound, though the court did not ultimately find these facts to be conclusive on the issue of intent. *Id.* at 443. Similarly, in *Blanton Enterprises, Inc. v. Burger King Corporation*, the court set out the four-factor test but went on to look at facts that suggested the context of the negotiations were important. 680 F. Supp. 753, 772 (D.S.C. 1988). For example, the court addressed oral statements of the defendant franchisor such as “the franchise is yours” and “it’s official.” *Id.* at 776. The court found these statements to be outweighed by other facts and circumstances such as the fact that it was a hard and fast policy of the franchisor to only award franchises if proper processes had been followed, which included execution of two formal agreements. *Id.* at 772, 776. Therefore, the court held there was no binding agreement. *Id.* at 776.

189. *See, e.g.*, *Steven R. Perles, P.C. v. Kagy*, 473 F.3d 1244, 1249-50 (D.C. Cir. 2007); *Schaller Tel. Co. v. Golden Sky Sys., Inc.*, 298 F.3d 736, 743-44 (8th Cir. 2002); *Doll v. Grand Union Co.*, 925 F.2d 1363, 1368-70 (11th Cir. 1991); *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1222-23 (7th Cir. 1988); *Bustamante v. Intuit, Inc.*, 45 Cal. Rptr. 3d 692, 698-99 (Cal. Ct. App. 2006); *Itek Corp. v. Chicago Aerial Indus., Inc.*, 248 A.2d 625, 629 (Del. 1968); *Merry v. Georgia Big Boy Mgmt., Inc.*, 218 S.E.2d 694, 696 (Ga. Ct. App. 1975); *Weigel Broad. Co. v. TV-49, Inc.*, 466 F. Supp. 2d 1011, 1016 (N.D. Ill. 2006).

190. *Response to Petition for Writ of Certiorari, Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2010 Ga. S. Ct. Briefs Lexis 97, at *18-19; *see also Itek Corp. v. Chicago Aerial Induc., Inc.*, 248 A.2d at 629 (“In making [the determination of intent], the trier of fact . . . must look at the circumstances surrounding the negotiations and the actions of the principals at the time and subsequently From all of these, the intention of the parties to be bound or not be bound must be ascertained.”); *Weigel Broad. Co. v. TV-49, Inc.*, 466 F. Supp. 2d 1011, 1016 (“Courts look to all of the circumstances surrounding the negotiations, including the actions of the principals both

whether the failure to apply the factors test has a substantive effect on the outcome of cases. Because courts from jurisdictions that do not expressly apply any factors test still analyze the same type of facts that are involved in the analysis of the factors test, an argument can be made that failure to utilize the factors test is not outcome determinative. This plays out in a number of the cases, but for illustration purposes, this article describes two in more detail below.

In *Weigel Broadcasting Co. v. TV-49, Inc.*, the court did not apply the factors test but instead looked at “all of the circumstances surrounding the negotiations, including the actions of the principals both during and after” the negotiations to determine the intent of the parties.¹⁹¹ Despite not expressly applying the factors test, however, the court went on to emphasize the express language of the preliminary agreement,¹⁹² not unlike a court applying the first factor. The court also found that, while the LOI contained some of the terms of the proposed agreement, it did not cover a majority of the terms one would expect to find in such a large transaction, reflecting a similarity to both the third and fourth factors.¹⁹³ Finally, the court impliedly considered the fifth factor by analyzing emails exchanged between lawyers during the negotiation of the definitive agreement that was never signed, which repeatedly referred to the LOI as non-binding.¹⁹⁴

Similarly, in *Perles v. Kagy*, the court did not apply the factors test in analyzing whether a binding employment agreement existed; however, the court considered that “the parties did not agree on two essential elements of the contract”—how long the employee would work and what work she would be required to do.¹⁹⁵ This fact is similar to what might be considered under an analysis of the third factor. The court also looked at the conduct of the parties after the alleged oral contract became effective, pointing out that neither of the parties’ behavior suggested either one thought the agreement was binding.¹⁹⁶ Such analysis is comparable to considering both the second and fifth factors. Finally, the court noted that the alleged oral contract involved a large amount of money, indicating that the parties likely did not intend to be bound without a

during and after, to determine what the parties intended.”).

191. *Weigel*, 466 F. Supp. 2d at 1016.

192. The agreement stated it was non-binding and contemplated a future formal Stock Purchase Agreement. *Id.*

193. *Id.*

194. *Id.* at 1017.

195. *Steven R. Perles, P.C. v. Kagy*, 473 F.3d 1244, 1249-50 (D.C. Cir. 2007).

196. For instance, the plaintiff specifically did not reduce her understanding of the oral agreement to writing to present to the defendant “because she was concerned that [the defendant] would not [agree] to sign it.” *Id.* at 1250.

written agreement.¹⁹⁷ Such consideration is similar to the fourth factor considered by courts when applying the factors test.

As discussed above, since there is no bright-line test for determining the intent of the parties, jurisdictions not using the factors test may reach the same conclusions as jurisdictions that do use such a test. But, there is room for the opposite argument as well. For instance, it is generally believed in jurisdictions that apply the factors test that the first factor—the language of the preliminary agreement itself—is the most important.¹⁹⁸ If jurisdictions not applying the factors test tend to give less weight to the first factor, then it is possible that divergent outcomes would result. This concept will be explored in more detail in connection with the *Turner* case discussed in Part IV and in the Recommendations in Part V.

c. Who Decides?

When it comes to the question of intent of the parties to be bound, the threshold question arises of whether a judge or jury decides the issue. As a general matter, whether the parties intended to be bound by a preliminary agreement is thought to be a question of fact that should be resolved at trial.¹⁹⁹ However, in certain circumstances, a court will find that deciding whether parties entered into a binding contract is a question of law, to be determined by the court.²⁰⁰

Judgment as a matter of law is thought to be appropriate when the issue of intent to be bound can be conclusively determined based on the record before the court—i.e., where there is no genuine issue of material fact.²⁰¹ This

197. *Id.* at 1251.

198. See *supra* note 118 and accompanying text.

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

200. *Spencer Trask*, 383 F. Supp. 2d at 439; BANKS, *supra* note 199, at § 3:29.

201. *Schaller Tel. Co. v. GoldenSky Sys., Inc.*, 298 F.3d 736, 743-44 (8th Cir. 2002); *Andersen*, 630 F. Supp. 2d at 1035 (“While the determination of whether an oral contract existed is ordinarily a question of fact, summary judgment is appropriate if a party has not offered sufficient evidence to support the existence of a contract.”); *Schaller Tel. Co.* 298 F.3d at 744 (8th Cir. 2002); see also BANKS, *supra* note 199, at § 3:29.

question is often not straightforward, however, and inconsistent results are not uncommon.²⁰² For instance, some courts suggest there is a strong presumption against finding a binding obligation in preliminary agreements that contain open terms, call for future approvals, or expressly anticipate a future definitive transaction agreement.²⁰³ These courts find that this presumption is sufficient to warrant the entry of summary judgment against the party asserting the existence of a contract.²⁰⁴ But other courts refuse to grant summary judgment, even in light of this presumption, where the plaintiff asserts evidence that the court determines would warrant a jury finding of intent to be bound.²⁰⁵ Additionally, summary judgment may be granted when a written preliminary agreement unambiguously asserts an intent not to be bound without a definitive written agreement.²⁰⁶ As already discussed in Part III.C.2.a.i. *supra*, however, courts may refuse to grant summary judgment when there has been a subsequent “waiver” of the unambiguous writing requirement. But such courts do not consistently define the types of facts sufficient to constitute such a waiver.²⁰⁷ These inconsistencies are addressed in more detail in the proposed framework for the analysis set forth in Part V.B *infra*.

IV. *TURNER BROADCASTING SYSTEM, INC. v. MCDAVID*: A CAUTIONARY TALE FOR DEAL MAKERS

A recent case out of Georgia highlights many of the above-discussed legal issues—a breach of oral contract claim, the interpretation of a preliminary LOI, and a promissory estoppel claim. The case, *Turner Broadcasting System, Inc. v. McDavid*, made national news²⁰⁸ largely due to: (i) its historical impact—the

202. See *BANKS*, *supra* note 199, at § 3:29.

203. *Id.*

204. *Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421, 426 (8th Cir. 1991) (holding that since the language of the LOI was clear, its interpretation was a matter of law for the court); *Texaco*, 729 S.W.2d at 796 (“Where a question of the parties’ intent is determinable by written agreement, the question is one of law for the court . . . however, the parties’ intent here is not conclusively discernible from their writings alone; therefore extrinsic evidence of relevant events is properly considered on the question of intent.”); *BANKS*, *supra* 200, at § 3:29.

205. *BANKS*, *supra* note 199, at § 3:29.

206. See, e.g., *Budget Mktg.*, 927 F.2d at 426; *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75 (2d Cir. 1984); *Barnes & Robinson Co., Inc. v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006).

207. See *supra* notes 145-54 and accompanying text.

208. National reporting sources included David Beasley, *Time Warner’s Turner Unit Settles Suit over Sale of Atlanta Sports Teams*, BLOOMBERG (Aug. 31, 2010), bloomberg.com/news/Falseturner-broadcasting-said-to-settle-mcdavid-s-suit-over-atlanta-team-sales.html; Danny Shea, *TBS Ordered to Pay \$281M over Atlanta Sports Sale: “This*

\$281 million jury verdict was the largest compensatory verdict in Georgia history;²⁰⁹ (ii) the fact that the assets being sold were two sports teams—the National Basketball Association’s Atlanta Hawks and the National Hockey League’s Atlanta Thrashers; and (iii) the seemingly scandalous facts—after renegeing on the deal with the proposed buyer at the eleventh hour, TBS quickly sold the teams, on practically the same terms, to a group headed by Ted Turner’s son-in-law.²¹⁰ Additionally, the case drew the attention of a high-profile attorney: Theodore Olson, the former Solicitor General, who was brought in to represent TBS on appeal.²¹¹

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

Jury Proved it Was Not the World According to Turner,” HUFFINGTON POST (Dec. 10, 2008 8:01 AM), www.huffingtonpost.com/2008/12/10/tbs-ordered-to-pay-281m-o_n_149831.html; Laurence Viele Davidson & David Beasley, *McDavid’s Plan for TBS Teams Was Disclosed, Jury Told (Update 2)*, BLOOMBERG (Oct. 17, 2008), www.bloomberg.com/apps/news?pid=21070001&sid=as3HfEjs6wUY; among others.

209. Petition for Writ of Certiorari, *supra* note 22, at *24.

210. Ted Turner, the founder of TBS, was one of two members of the TBS board to vote against the sale to McDavid, expressing concern that the price was too low. Brief of Appellee at 1, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2009 Ga. App. Ct. Briefs Lexis 901, at *2 (“Ted Turner voted against the deal, [because it] was at a ‘fire sale’ price.”). Two votes against the transaction were not enough to prevent the approval of the deal by the board. As such, the implication was that Ted Turner, unhappy the company was being sold for so little, may have used his influence to get the new buyer – a company in which his son-in-law was a principal – to the table on the same favorable terms McDavid had negotiated. See John Manasso, *McDavid Wins \$281 in Case Against Turner*, ATLANTA BUSINESS CHRONICLE (Dec. 9, 2008, 3:20pm), available at <http://www.bizjournals.com/atlanta/stories/2008/12/08/daily39.html?page=all>. In opening arguments, “[McDavid’s lawyer] contended Ted Turner played a key role in sending the teams to his son-in-law’s group over McDavid once he saw the deal McDavid was getting.” *Id.*

211. Though Ted Olson’s name does not appear as counsel of record in the Court of Appeals opinion, he is listed as counsel on the party’s briefing to both the Court of Appeals and the Supreme Court. *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873, 875 (Ga. App. 2010); Brief of Appellant at 4, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (A09A2314), 2009 Ga. App. Ct. Briefs Lexis 721.

posits a framework for courts to analyze claims for breach of preliminary agreements.

A. *The Facts*

This case involves prolonged negotiations and an alleged oral contract for the proposed purchase of two major sports teams—the Hawks and the Thrashers—and certain operating rights to Phillips Arena (the “Assets”).²¹² After negotiations broke down, David McDavid, the putative buyer, brought suit against TBS, the putative seller.²¹³ At trial, the jury found for McDavid on his oral contract-of-sale claim, and awarded him \$281 million in damages.²¹⁴ The Court of Appeals of Georgia affirmed the jury verdict, and TBS ultimately withdrew its petition for writ of certiorari to the Georgia Supreme Court.²¹⁵

In October 2002, TBS publicly announced its desire to sell the Assets as part of a “deleveraging program.”²¹⁶ In November 2002, McDavid entered negotiations with TBS to purchase the Assets.²¹⁷ On April 30, 2003, the parties signed a LOI that included, among other things, a forty-five day exclusivity period.²¹⁸ The LOI provided that no binding agreement would arise unless the parties had “negotiated, executed and delivered to each other Definitive Agreements.”²¹⁹

On June 14, 2003, by its express terms, the LOI expired and the definitive agreements had yet to be finalized, much less executed, although the parties were continuing to negotiate. TBS’s principal negotiator responded to McDavid’s inquiry about extending the LOI by reassuring him it was not necessary because they were close to a deal.²²⁰ The parties continued to negotiate throughout June.²²¹

212. *Turner*, 693 S.E.2d at 873, 875.

213. *Id.* at 877.

214. The jury also awarded McDavid \$35 million on his promissory estoppel claim. The court entered judgment for the \$281 million since it was the larger of the duplicative awards. Petition for Writ of Certiorari, *supra* note 22, at *6.

215. *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d at 888. The Petition for Certiorari was filed on April 29, 2010, and was withdrawn on August 30, 2010. *See Computerized Docketing System and Case Types*, SUPREME COURT OF GEORGIA (Aug. 30, 2010), http://www.gasupreme.us/docket_search/results_one_record.php?caseNumber=S10C1309.

216. *Turner*, 693 S.E.2d at 876.

217. *Id.*

218. *Id.*

219. *Id.* at 879.

220. *Id.*

221. *Turner*, 693 S.E.2d at 876.

The parties agreed to meet in the middle of July “to resolve all of the outstanding issues and finalize” the deal.²²² At the July meeting, TBS raised an issue related to tax allocation, “which the parties failed to resolve.”²²³ McDavid left the meeting frustrated while his advisors continued negotiating to resolve the remaining open issue.²²⁴ On a July 30 conference call between the parties, McDavid’s advisors told TBS that McDavid would agree to the tax issue if TBS agreed this would resolve all issues and the parties could finalize the agreement.²²⁵ After asking around the room if there were any other issues on TBS’s end, TBS CEO, Phil Kent, announced, “we have a deal.”²²⁶ Internal communications at TBS confirmed that TBS believed that negotiations were complete when TBS’s principal negotiator reported to TBS parent company, Time Warner, that they had worked out a deal.²²⁷

The parties exchanged multiple drafts of a definitive agreement after the meeting.²²⁸ In the exchange of drafts, the parties’ lawyers identified additional “open issues” for the agreement.²²⁹ Around August 1, 2003, TBS drafted an internal memo to its employees with a draft of a public announcement of the deal that noted TBS had reached final agreement with McDavid for the sale of the Hawks and Thrashers.²³⁰ Later “[i]n August 2003, [TBS] consulted with McDavid . . . on team management decisions, including the hiring of a general manager and head coach for the Hawks” as well as the “hiring of trainers, assistants, and scouts.”²³¹

Around August 16, 2003, the principal negotiator for TBS proposed a “simplified restructure for the transaction, assuring him that the restructure would ‘not change the deal’ [and] that the ‘deal was done.’”²³² McDavid ultimately agreed to the restructuring, and the attorneys circulated revised drafts.²³³ On August 19, 2003, the board of Time Warner approved the sale.²³⁴

222. *Id.*

223. *Id.* Specifically, TBS inserted a new requirement that McDavid guarantee TBS \$100 million in tax losses. Brief of Appellant, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (A09A2314), 2009 Ga. App. Ct. Briefs LEXIS 721, at *4-5.

224. *Turner*, 693 S.E.2d at 876.

225. *Id.*

226. *Id.*

227. Brief of Appellant, *supra* note 223, at 35; *Turner*, 693 S.E.2d at 876.

228. *Turner*, 693 S.E.2d at 876.

229. *Id.*

230. *Id.*; Brief of Appellant, *supra* note 223, at 16.

231. *Turner*, 693 S.E.2d at 876.

232. *Id.*

233. *Id.* TBS characterized this restructure a bit differently, as the parties having “substantially altered the proposed deal’s financial structure . . .” Petition for Writ of Certiorari, *supra* note 22, at *5. TBS asserted there was continued disagreement over some

The next day, Ted Turner's son-in-law, Rutherford Seydel, and the son of Micheal Gearon, Jr., a member of the Hawks' board of directors, "approached [TBS] about purchasing the Assets on behalf of their corporation, Atlanta Spirit."²³⁵ TBS began to negotiate a deal for the sale of the Assets to the Atlanta Spirit, but simultaneously continued to exchange drafts of an agreement with McDavid.²³⁶

According to TBS, "[t]he parties continued to negotiate and propose changes to terms of the draft [p]urchase [a]greement and exchanged revised drafts on August 1, 12, 18, 19, and 25, and September 10 and 11."²³⁷ They "exchanged open-issues lists on August 11 and 21 and September 5, 8, and 9."²³⁸ Each draft agreement provided it would be effective only when signed by both parties.²³⁹ Around September 12, McDavid and TBS orally reached a final agreement on the open items and TBS's negotiator said that the deal was done and they should meet for a press conference and closing the following week.²⁴⁰ Later that day, and in direct contradiction to the purported deal with McDavid, TBS signed an agreement for the sale of the Assets to the Atlanta Spirit.²⁴¹ On September 15, as McDavid was preparing to travel to Atlanta for the closing and the press conference, he received a phone call informing him that Turner had sold the Assets to the Atlanta Spirit.²⁴²

B. *The Parties' Arguments*

1. TBS's Arguments

At all relevant stages of the litigation, TBS maintained its position that the parties had clearly expressed their intent in the preliminary negotiations not to be bound unless there was a signed written definitive agreement—i.e., because no final agreement was signed, there was no deal.²⁴³ In support of this position, TBS pointed to the enormous value of the transaction, the complexity of the

of the terms such as the level of capitalization of the parent entity that would own the Assets. *Id.*

234. Ted Turner was one of the two board members who opposed the deal. *Turner*, 693 S.E.2d at 876.

235. *Id.* at 877.

236. *Id.*

237. Petition for Writ of Certiorari, *supra* note 22, at *5.

238. *Id.*

239. *Id.*

240. *Turner*, 693 S.E. at 877.

241. *Id.*

242. *Id.*

243. Petition for Writ of Certiorari, *supra* note 22, at *2.

proposed deal, and the fact that the transaction could not be finalized without league approval (which required a signed written agreement) as evidence that no rational party would have agreed to a deal without a signed written agreement.²⁴⁴

On appeal, TBS asserted that the trial court incorrectly allowed the case to go to the jury, which was improperly swayed by alleged oral statements made by TBS officers.²⁴⁵ TBS argued that in circumstances such as this case—where the only fact in dispute was whether TBS representatives made statements like “we have a deal” during the talks—common law jurisdictions reject oral contract claims as a matter of law.²⁴⁶ TBS’s position was that such statements are insufficient to overcome both parties’ express manifestations of intent in a preliminary LOI to be bound only by a definitive written agreement.²⁴⁷ TBS contended that if the uncontroverted facts show a party’s intent not to be bound when looking at objective indicia of the parties’ intent, the court must hold as a matter of law that no contract exists.²⁴⁸ Only when there is a dispute over the evidence of the parties’ intent must a jury resolve the factual dispute.²⁴⁹ TBS argued that the fact-finder must only be allowed to consider *objective* manifestations of intent, and not unilateral understandings and beliefs taken from internal communications at TBS that were never communicated to the other side.²⁵⁰ Alternatively, TBS asserted that even if McDavid’s evidence was accepted as true, the parties were not contractually bound.²⁵¹

In making its arguments, TBS walked through the four factor Restatement test. TBS recognized that Georgia courts had not yet applied the factors test to the issue of whether the parties intended to be bound but suggested that the factors should be considered and doing so would be consistent with Georgia

244. *Id.* at *17-19.

245. *Id.* at *2.

246. *Id.* at *21.

247. *Id.* at *16.

248. *Id.* at *10.

249. Reply Brief of Petitioner, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2010 Ga. S. Ct. Briefs LEXIS 199, at *2.

250. *Id.* at *2 (emphasis added). For instance, evidence was submitted at trial that TBS’s principal negotiator “admitted to gaming McDavid” and said he suspected “infamy” for all of the people at TBS involved. Brief of Appellee, *supra* note 210, at *11. Additionally, email correspondence between TBS’s CEO and the principal negotiator was submitted showing the two joking about having treated McDavid, a Texan, poorly. Specifically, the email said: “I’m sorry you’ll miss the Spirit press conference! I told them you had bought 20,000 lbs of fine Texas steaks we’ll grill up at the home opener of the Hawks.” Appellee’s Reply Brief, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2009 Ga. App. Ct. Briefs LEXIS 1509, at *7.

251. Reply Brief of Petitioner, *supra* note 249, at *2.

law.²⁵² TBS asserted that each of the factors in the test pointed the same way and required holding, as a matter of law, that no contract was formed.²⁵³

Specifically, applying the first factor—the express statements of the parties—TBS pointed to the language of the April 30 LOI to show that the parties did not intend to be bound in the absence of a writing.²⁵⁴ Even though the LOI had expired at the time of the alleged oral contract, this merely meant that the liabilities and obligations of the parties under the LOI expired.²⁵⁵ The statement that the parties would not be bound without a written agreement, TBS argued, was not a liability or obligation. Rather, it was a statement of fact—an “affirmative expression”—of the parties’ mutual intent, which was still accurate despite the expiration of the exclusivity period.²⁵⁶ Furthermore, according to TBS, there was never any express waiver of this explicit statement of the parties’ mutual intent not to be bound.²⁵⁷ Indeed, facts and circumstances supported the initial indication of the parties’ intent not to be bound.²⁵⁸ The exchanged draft agreements stated that the agreement would only become effective when each party signed.²⁵⁹ The effective date on the drafts was never filled in, indicating the parties did not yet think they were bound.²⁶⁰ TBS also argued that the provision in the drafts requiring that any modifications of the agreement be in writing and signed would not logically

252. Petition for Writ of Certiorari, *supra* note 22, at *9. TBS argued that other courts following the common law approach apply the same mutuality principles followed in Georgia. Supplemental Brief of Petitioner, *Turner Broadcasting System, Inc. v. McDavid*, 693 S.E.2d 873 (A09A2314), 2009 Ga. App. Ct. Briefs LEXIS 1508, at *3-4, 6. Additionally, TBS pointed to Georgia authority that expressly endorsed the first factor – the explicit language of intent in the written documents – of the common law factors test. *Id.* at *1, 6.

253. Petition for Writ of Certiorari, *supra* note 22, at *8. TBS distinguished the facts of this case from those relied on by McDavid’s camp. For instance, TBS stated that the cases relied on did not involve “unambiguous pre-formation statements of intent not to be bound orally” as there was here in the LOI. Supplemental Brief of Petitioner, *supra* note 252, at *13. While some of the cases relied on by McDavid involved an alleged statement of intent not to be bound orally, in those cases such statement was made only after the alleged oral agreement (rather than before), thereby rendering the statement ineffective to void the already existing contract. *Id.*

254. Petition for Writ of Certiorari, *supra* note 22, at *11-12.

255. *Id.* at *12.

256. *Id.*

257. *Id.* at *12-13.

258. *Id.* at *14, 16.

259. *Id.* at *14.

260. *Id.* at *14-15.

follow if the parties did not intend the original agreement to be in writing and signed.²⁶¹

Aside from the written communications, other evidence supported TBS's argument as well. TBS pointed to a statement made by McDavid to the local news media in mid-July that he thought a deal was getting close, but that he did not think he would consider the deal done until "everyone has signed the line."²⁶² Additionally, TBS pointed to the fact that NBA and NHL league approval would be required to consummate the transaction as evidence of the parties' intent not to be bound by oral agreement because such league approval could not be gained without a written signed agreement.²⁶³

TBS also argued that the other factors in the test indicated intent not to be bound without a formal writing. TBS explained that this is exactly the type of large, complex transaction that is expected to be put in writing by pointing out that each draft was over 80 pages in length, there were five side agreements, and the purchase price was over \$200 million.²⁶⁴ Additionally, TBS pointed out that a number of open issues were left to be resolved, evidenced by the fact that the parties continued exchanging drafts and open issues lists for weeks after the July 30 telephone conference when the alleged oral agreement was reached.²⁶⁵ Finally, TBS refuted McDavid's partial-performance claim by pointing out that no consideration had changed hands.²⁶⁶ Though McDavid used the fact that he was allowed to participate in personnel matters as evidence of partial performance, TBS countered by asserting that McDavid's participation began in June, prior to the time that McDavid even alleged a contract had been formed and, thus, could not be viewed as partial performance.²⁶⁷

2. McDavid's Arguments

McDavid, on the other hand, took the position that the parties' agreement to be bound only in writing, contained in the LOI, terminated when the LOI expired and TBS's subsequent actions "repeatedly affirmed" that the parties had an oral agreement.²⁶⁸ McDavid relied on Georgia authority suggesting that the circumstances surrounding the making of a contract, like correspondence

261. *Id.*

262. *Id.* at *14.

263. *Id.* at *17-18.

264. *Id.* at *18.

265. *Id.* at *19.

266. *Id.* at *20.

267. Supplemental Brief of Petitioner, *supra* note 252, at *11.

268. Brief of Appellee, *supra* note 210, at *15.

and discussions, were relevant in deciding if there was mutual assent to be bound.²⁶⁹ According to McDavid, where such evidence exists, the question of whether a contract existed is an issue for the jury to decide.²⁷⁰

McDavid argued that Georgia courts do not use the factors test and therefore it should not be applied in McDavid's case.²⁷¹ McDavid also asserted, however, that application of the factors test would prove to be irrelevant anyway.²⁷² McDavid suggested that, even though Georgia may not expressly use the factors test to determine whether the evidence of intent is in conflict, Georgia is similar to jurisdictions that do. Georgia courts just employ a more direct inquiry—simply asking whether factual disputes as to the parties' intent exist without trying to fit them into specific elements.²⁷³

McDavid went on to show that, even if the factors test was applied, he would still prevail. With respect to the express reservation of a right to be bound, McDavid pointed out that TBS chose not to require any agreement be in writing after the expiration of the LOI, though the LOI did provide a survival clause for the confidentiality provisions.²⁷⁴ Testimony of TBS's general counsel supported McDavid's assertion that the parties easily could have drafted the LOI to include a provision addressing not being bound to oral contracts after the LOI's expiration and a provision extending the entire LOI upon expiration.²⁷⁵ In fact, McDavid noted, TBS's LOI with the Atlanta Spirit included a writing requirement that never expired, indicating that TBS knew how to draft such an agreement, had that been its intent.²⁷⁶ Because the LOI expired, McDavid argued there need not be any additional waiver to negate the

269. *Id.* (citing *McKenna v. Capital Res. Partners, IV, L.P.*, 650 S.E.2d 580 (Ga. Ct. App. 2007)).

270. *Id.* In fact, McDavid argued that judgment as a matter of law is inappropriate for determining the parties' intent even in cases where the evidence "strongly suggests the contrary." Supplemental Brief of Appellee, *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010) (A09A2314), 2009 Ga. App. Ct Briefs LEXIS 1510, at *8 (citing *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 576 (2d Cir. 1993)).

271. Supplemental Brief of Appellee, *supra* note 271, at *8-9.

272. *Id.* at *9.

273. *Id.*

274. Brief of Appellee, *supra* note 210, at *23. The LOI stated that "[e]xcept as provided in the Confidentiality Agreement, and except for the provisions set forth in [the paragraph of the LOI governing certain confidentiality terms] of this letter, upon the expiration of the term[s] of this letter, neither party shall have any further liability or obligation whatsoever hereunder[.]" *Turner Broad. Sys., Inc. v. McDavid*, 693 S.E.2d at 879 n.8.

275. *Turner*, 693 S.E.2d at 879.

276. Brief of Appellee, *supra* note 210, at *23.

writing requirement.²⁷⁷ Moreover, McDavid argued that the language in the drafts of the definitive agreement requiring the agreement be signed to be effective was not controlling evidence of intent because those agreements were never signed.²⁷⁸ McDavid also used the language in the drafts to his advantage by suggesting that language of the merger clause—which stated that the executed drafts would “supersede all prior agreements [and] understandings, both written and oral”—was an indication that earlier oral agreements would have been possible.²⁷⁹

McDavid also argued evidence of partial performance existed, stating that TBS would not have allowed McDavid to participate in decision-making regarding team personnel without a binding agreement—TBS even allowed McDavid to be in direct contact with players and coaches and a candidate for the general manager position for the Hawks after July 30.²⁸⁰ With respect to whether there were still a number of open issues at the time of the alleged oral contract, McDavid argued that any issues that were still open at that time were immaterial.²⁸¹ Finally, McDavid asserted that league approval requiring a written document to complete the transaction was not determinative.²⁸² According to McDavid’s authorities, TBS needed to prove that the leagues would have rejected the deal to avoid liability, and it had failed to do so.²⁸³ In fact, McDavid argued, the record was replete with evidence that the leagues would have approved the deal had TBS not backed out.²⁸⁴

C. *The Decision of the Court of Appeals*

After the jury returned a verdict in favor of McDavid and awarded \$281 million in damages, the Court of Appeals of Georgia ultimately rejected TBS’s arguments and affirmed the jury verdict.²⁸⁵ The opinion began with a recognition that under Georgia law, oral contracts falling outside the purview of the Statute of Frauds may be binding and enforceable, and that neither party

277. *Id.* at *22.

278. *Id.* at *17 (citing *General Hosps. of Humana, Inc. v. Jenkins*, 188 Ga. App. 825, 826 (1988)).

279. *Id.* at *18.

280. *Id.* at *1, 8, 24.

281. *Id.* at *25. He claimed that the issues lists that the parties exchanged after July 30 reflected minor details the lawyers were working out but that the business people had made a deal and argued that issues lists are routine in large transactions and entirely consistent with the existence of an agreement. *Id.* at *25.

282. *Turner*, 693 S.E.2d at 881.

283. Brief of Appellee, *supra* note 210, at *33.

284. *Id.* at *28.

285. *Turner*, 693 S.E.2d at 887-88.

claimed that the oral agreement at issue was subject to the Statute of Frauds.²⁸⁶ Also, as a preliminary matter, the court stated the basic rule that, when determining whether there was an intent to be bound, the trial court was obliged to apply an objective theory of intent, looking at the “meaning a reasonable man in the position of the [disappointed party] would ascribe to the other party’s manifestations of assent.”²⁸⁷ The court noted that the circumstances surrounding the formation of the contract—like correspondence and discussions—are relevant to the inquiry. Where there is such evidence but it is disputed, the question of the parties’ intention to be bound is generally a question for the jury.²⁸⁸ The court held, in this case, the matter was one for the jury to decide.²⁸⁹

Further, the court articulated that the jury was authorized to conclude, based on the evidence, that the writing requirement in the LOI had expired and had no effect.²⁹⁰ Referencing Georgia precedent, the court stated that it was not bound to apply the common-law factors test to the inquiry.²⁹¹ Despite this declaration, the court, much like other courts that do not apply the factors test, went on to analyze facts that touch on a number of the factors.²⁹² For instance, the court looked at the express language of intent in the LOI and found that the terms of the LOI reflected an intent not to be bound absent signed agreements.²⁹³ Additionally, it was undisputed that the parties intended to ultimately sign written documents that memorialized the terms of their oral agreement.²⁹⁴ However, because TBS failed to provide a survival provision for that term in the LOI, combined with the fact that TBS allowed the LOI to expire, a reasonable jury could view such actions as contradicting TBS’s claim that it had no intent to be bound by an oral agreement after the expiration of the LOI.²⁹⁵ The court held that this conflict was enough to support the jury verdict.²⁹⁶

286. *Id.* at 877 n.4.

287. *Id.* at 878.

288. *Id.*

289. *Id.* The court stated that “[w]hile circumstances indicating that the parties’ [intent] to prepare a [future] writing is strong evidence that they did not intend to be bound by a preliminary agreement, contrary evidence bearing” on this issue presents a question for the jury. *Id.* at 880-81.

290. *Id.* at 879.

291. *Id.* at 883.

292. *Id.* at 879-80.

293. *Id.* at 879.

294. *Id.* at 880.

295. *Id.* at 879.

296. *Id.* at 888.

According to the court, the jury's conclusion that the parties intended to be bound was further supported by the words and actions of the parties at and after the July 30 conference call, when the alleged oral agreement was formed.²⁹⁷ The court pointed to statements by TBS CEO ("we have a deal") and its principal negotiator ("deal is done"), internal communications at TBS about a press conference to announce the deal, and the fact that McDavid was allowed to participate in management decisions, as evidence from which the jury was entitled to conclude the parties intended to be bound.²⁹⁸ Additionally, though there were conflicts in the testimony whether there were material open issues after the time of the alleged oral contract formation, the evidence supported the jury's finding that the parties had reached agreement on all material terms by TBS's September 12 announcement that the deal was "done."²⁹⁹ Finally, while the leagues' requirement of a writing to obtain league approval served as some evidence of the parties' intent not to be bound, it was not dispositive of the issue.³⁰⁰

The court went on to state that, even if it were to adopt the factors test suggested by TBS, the conclusion would be the same.³⁰¹ The court did not go through each of the factors individually, but rather made the sweeping statement that there was evidence in the case that "both supported and refuted the existence of a binding oral agreement," which demanded resolution by a jury.³⁰² However, the court specifically addressed the fourth factor—whether this was the type of agreement typically committed to writing.³⁰³ In so doing, the court relied on the fact that the Georgia Statute of Frauds did not require this type of contract to be in writing.³⁰⁴ The court used the concept of *expressio unius est exclusio alterius*—the canon of statutory construction that says the express mention of one thing implies the exclusion of another—to suggest that it was not the intent of the legislature to require this type of agreement to be in writing.³⁰⁵ The court indicated that since the Statute of Frauds did not *require* this type of agreement to be in writing, then it was not the type of agreement that would *typically* be in writing for purposes of establishing the factors test.³⁰⁶

297. *Id.* at 878-79.

298. *Id.* at 878-79.

299. *Id.* at 883.

300. *Id.* at 881.

301. *Id.* at 883.

302. *Id.*

303. *Id.* at 884.

304. *Id.* (citing the Georgia Statute of Frauds at Ga. Code Ann. § 13-5-30).

305. *Id.*

306. *Id.*

V. RECOMMENDATIONS

Part V.B recommends an approach to analyzing the intent of the parties in breach of contract claims that would better approximate the intent of the parties at the time of their preliminary contract negotiations than did the court in *Turner* and similar cases. However, because this area of the law is fraught with complexity,³⁰⁷ and in recognition that in some jurisdictions parties may continue to be at risk of being bound to contracts before they intended to be, in Part V.A, this article first suggests some advice to practitioners on how to avoid unintended consequences—such as their clients incurring liability for breach of contract after entering into a mostly non-binding LOI but prior to execution of a definitive written agreement.

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

First, a number of drafting considerations should be kept in mind when drafting the preliminary agreement that relate specifically to this issue of the parties' intent. When drafting the LOI, practitioners should make sure that the language expressly disclaims any obligation to negotiate the deal and states clearly that there is no deal until definitive written agreements are signed.³⁰⁸ To the extent the LOI has both binding and non-binding provisions, it should clearly distinguish between the two and the language of the writing requirement should be identified as a binding provision.³⁰⁹ Separating the binding and non-binding provisions into two separate articles in the agreement can be useful in this regard,³¹⁰ as can using conditional language in the non-binding sections, such as “the proposed transaction would provide. . .” and “the parties desire. . .” instead of words of agreement such as “the seller shall. . .” or “the buyer will. . .” that suggest existence of a contract.³¹¹

Additionally, parties should carefully consider how they draft termination provisions in a LOI. To the extent the LOI is entirely non-binding, no termination provision is needed. In fact, a termination provision might actually seem consistent with an intention to be bound.³¹² But often the LOI will

307. In fact, Alan Farnsworth has said “[i]t would be difficult to find a less predictable area of contract law.” Farnsworth, *supra* note 23, at 259-60.

308. Waryjas, *supra* note 29, at 369.

309. *Id.*

310. AM. BAR ASS'N, *supra* note 24, at 110.

311. See *supra* notes 156-160 and accompanying text.

312. Ludwig, *supra* note 77, at 59; Quake Const., Inc. v. Am. Airlines, Inc., 565 N.E.2d 990, 997 (Ill. 1990) (“[T]he cancellation clause exhibited the parties' intent to be

contain binding provisions as well. If the parties want to make sure that binding provisions—like an exclusivity provision—terminate at some point in the future, the LOI should make clear exactly which provisions terminate and when termination occurs.³¹³ Any provisions of the LOI that survive termination should be clearly identified, and to avoid a *Turner*-like outcome, the writing requirement should be identified as one of the provisions that will survive termination.

In addition to carefully drafting the LOI, we are reminded by *Turner* that clients should be counseled regarding their words and actions during the negotiation process. Clients must understand they should avoid making statements like “we have a deal” that can be viewed as evidence of their intent to be bound.³¹⁴ Even internal communications, such as emails between the in-house lawyers and their business counterparts, can be subject to discovery.³¹⁵ Though the interpretation of the intent of the parties is supposed to be based on objective intent, we know all too well from cases like *Turner* that evidence of internal communications can make its way to a jury. As such, clients should be cautioned against putting statements in writing that would suggest an intent to be bound or otherwise paint the client in a bad light with respect to how they have treated the other party during negotiations.

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

B. A Workable Framework for Courts to Analyze Similar Cases

1. The Framework

The lack of clarity in this area of the law leads to inconsistent results across jurisdictions and makes it difficult for parties to know how to proceed in preliminary negotiations without unwittingly incurring contractual liability.³¹⁶ Laypersons sitting on juries are understandably swayed by negative facts—

bound by the letter because no need would exist to provide for the cancellation of the letter unless the letter had some binding effect.”).

313. Waryjas, *supra* note 29, at 376.

314. AM. BAR ASS’N, *supra* note 24, at 109.

315. ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY PRAC.* § 27.03[D] (2012).

316. Schwartz, *supra* note 56, at 662.

behavior that they perceive to be “unfair” dealing, but that, in the realities of the business world, is not out of line with the expectations of the contracting parties.³¹⁷ Swayed by this perception, jurors may be more willing to submit verdicts for large damages awards, such as the \$281 million jury verdict in *Turner* that well exceed the expectations of the alleged injured parties.³¹⁸ To avoid inconsistent results and honor the expectations of parties in preliminary negotiations, it is recommended below how courts ought to analyze the question of the parties’ intent to be bound, particularly in scenarios involving a preliminary written agreement.

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

Admittedly, the application of the factors test alone will not transform this area of the law completely. In order for the factors test to promote clarity, it

317. See Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?*, 36 VAND. L. REV. 1383, 1387-88 (1983).

Left to their own devices, jurors may favor underdogs by relying upon alleged oral terms, thereby deciding the case in a manner calculated to avoid a perceived injustice. Jurors also may lack the sophistication needed to deal effectively with complex commercial transactions involving numerous alleged oral and written contract terms.

Id.

318. Catherine J. Dargan, *Confidentiality Agreements, Standstill Agreements, Letters of Intent and Exclusivity Agreements*, in DRAFTING AND NEGOTIATING CORPORATE AGREEMENTS 2011 73, 90 (PLI Corp. Law & Practice, Course Handbook Ser. No. 34774, 2012) (“The *Turner* case may have been decided differently if the parties had a bench, rather than a jury, trial.”).

must be applied consistently. Using lessons learned from cases like *Turner*, a few ways to achieve more consistent application are suggested below, with a focus on the first and fourth factors of the test.

As discussed in Part III.C.2.a., jurisdictions applying the factors test typically agree that the first factor—whether the parties expressly reserved the right to be bound only when a written agreement is signed—is the most important.³¹⁹ This is particularly important when there is a written preliminary agreement with a clearly stated writing requirement. As discussed in Part III.C.2.c., judgment as a matter of law regarding the issue of the parties' intent is appropriate where the issue of intent can be conclusively determined based on the record before the court.³²⁰ When there is a preliminary written agreement that clearly and unambiguously asserts an intent not to be bound, and there has been no express waiver of that language, courts should find this sufficient to warrant entry of summary judgment against the party asserting the existence of a contract.³²¹ If all jurisdictions adopt the factors test and agree to place the most weight on the first factor, particularly in cases where there is a preliminary written agreement rather than just oral negotiations, fewer cases will be submitted for jury determinations of intent. Because jurors may be overly sympathetic to the disappointed party, consequently leading to potentially unreasonable awards of damages, this result seems appropriate. Additionally, it will impart more certainty in the law by more clearly defining which cases will be determined as a matter of law and which will be considered appropriate for determination by the fact-finder. In turn, this will promote consistency throughout different courts and across jurisdictions.

If this recommendation is adopted, in cases where there is a preliminary agreement with an unambiguous expression of intent not to be bound except in writing, the only question a court would need to resolve would be whether there has been an “express waiver” of that intent. As described in Part III.C.2.a.i., courts generally hold that a waiver must be clear and unambiguous.³²² However, there is no agreement over what “clear and unambiguous” means. For instance, in *Lamle v. Mattel, Inc.*, the United States Court of Appeals for

319. See *supra* note 137 and accompanying text.

320. See *supra* note 201 and accompanying text.

321. This conclusion is not without precedent. See *supra* notes 147-154 and accompanying text for a description of cases with holdings supporting this position. These cases involved unexecuted drafts of definitive agreements that included a writing requirement instead of the *Turner*-like scenario where there is a preliminary LOI with the writing requirement. The same analysis applies, however, and the requirement of an express waiver of the intent not to be bound is arguably even more crucial in the face of a preliminary written agreement than when the evidence of intent comes merely from unexecuted draft agreements.

322. See *supra* note 147 and accompanying text.

the Federal Circuit, applying California law, held that it is “well settled” under California law that “the intent to abrogate an earlier written agreement can be inferred from the fact of a later oral agreement.”³²³ But other courts have found evidence of subsequent oral agreements to be incapable of overcoming language even in unexecuted *draft* agreements suggesting the parties will not be bound until execution.³²⁴ In other words, in some jurisdictions, oral agreements may not be enough to serve as a waiver even in the absence of a signed preliminary agreement requiring a writing, suggesting a much higher burden on the disappointed party.³²⁵

It is proposed, at least in the cases where there is a written preliminary agreement requiring a writing, that a “clear and unambiguous” express waiver must be in writing. Words frequently uttered by parties in the course of negotiations such as “we have a deal” or “the deal is done” should not be enough to allow submission of the issue to a jury when there is express language in a LOI to the contrary. This is particularly important for honoring the intent of the parties when there is additional evidence supporting the intent expressed in the LOI—for instance, when the draft definitive agreements also reflect the same intent not to be bound through the inclusion of a merger clause, signature lines, and a statement that the agreement will only be binding when executed. This, again, would lead to certainty in the law and would allow parties to tailor their negotiations accordingly based on their mutually understood intent.

Additionally, this article takes the position that a LOI containing a writing requirement that has expired should still be considered objective evidence of the parties’ intent, capable of determining the issue on summary judgment. Lapse of a LOI should not be considered an “express waiver” of the language demonstrating the parties’ intent not to be bound orally. Typically parties who include termination provisions in their LOI do so mainly to establish the end of certain binding provisions, like the end of an exclusivity period or due diligence period.³²⁶ Therefore, the lapse of the LOI is typically intended to indicate nothing more than that the seller is free to solicit other buyers and is no longer required to provide the buyer unfettered access to his books, records, and personnel. As such, it is most likely a matter of oversight when parties inadvertently allow the “no oral contracts” provision to expire. As TBS’s counsel pointed out, the expiration of the LOI indicates that the parties’ binding

323. 394 F.3d 1355, 1360 (Fed. Cir. 2005).

324. *See, e.g., Ciaramella v. Reader’s Digest Ass’n, Inc.*, 131 F.3d 320, 325 (2d Cir. 1997).

325. *Id.*

326. *See, e.g., AM. BAR ASS’N, supra* note 24, at 111-16 (providing a sample LOI).

rights and obligations have expired.³²⁷ Since the provision regarding no oral agreements is not a right or obligation discharged by the expiration of the LOI, it should still be treated as an affirmative expression of the parties' mutual intent.³²⁸

The premise behind this recommendation—that an expired LOI is still a good objective indicator of the parties' intent—is not without precedent. For instance, in *Manon v. Corporate Solutions, LLC*, the parties entered an initial LOI reflecting the results of their preliminary negotiations.³²⁹ The LOI included a clause that stated the LOI was not intended, with a few exceptions, to “create legally binding obligations” on the parties and none of the parties would be “legally bound until the execution and delivery of a mutually agreeable definitive purchase agreement.”³³⁰ The LOI expired but the parties continued to negotiate and draft a definitive purchase agreement.³³¹ The agreement was finalized and the parties began talking about a closing date, but unbeknownst to the plaintiff, the defendant was negotiating on the side with a third party.³³² The day after finalizing the transaction document, the defendant told the plaintiff it was going to contract with a third party instead.³³³ When the plaintiff sued for breach of oral contract, the United States District Court for the Eastern District of Michigan was called upon to determine the intent of the parties.³³⁴ The court placed a great deal of weight on the express language of the LOI—even though it recognized that the LOI had expired—and, on summary judgment, ultimately concluded that “the undisputed evidence demonstrates that the parties continued to operate under a belief that a written and executed” definitive agreement was necessary for the parties to be contractually obligated to one another.³³⁵

Moreover, even an expired LOI is better objective evidence of intent than internal communications of one party not shared with the other side. For instance, when the *Turner* court looked at internal communications between members of the TBS team—and more importantly, when the jury was allowed to hear this inflammatory evidence—the court was looking merely at the subjective intent of one party, not at outward manifestations of intent that the other contracting party could see. Evidence of subjective intent is supposed to

327. Petition for Writ of Certiorari, *supra* note 22, at *12-13.

328. *Id.*

329. No. 04-73649, 2005 WL 3534765, at *2 (E.D. Mich. Dec. 23, 2005).

330. *Id.*

331. *Id.* at *6.

332. *Id.* at *3.

333. *Id.*

334. *Id.* at *5.

335. *Id.* at *6.

be immaterial to the question of whether the parties are bound.³³⁶ Rather, it is the manifestations of intent shared *between* the parties—such as a LOI—that should be instructive.

Turning to the courts' application of the fourth factor of the test—whether the type of agreement is typically in writing—a state's Statute of Frauds should not be determinative of the issue, as it seemed to be with the *Turner* court. As described above, the *Turner* court found that, since the Georgia Statute of Frauds did not *require* the particular type of contract to be in writing, it was therefore not typical for such a contract to be in writing and the fourth prong thus supported a finding that there was an intent to be bound without a written contract.³³⁷ The Georgia Statute of Frauds is not unusual in the fact that it does not have a requirement that contracts over a certain dollar amount be in writing.³³⁸ In fact, no state currently has a dollar requirement in its basic statute of frauds.³³⁹ Despite this fact, some transactions for the purchase or sale of a

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

337. See *supra* text accompanying notes 302-305.

338. See *Turner*, 693 S.E.2d at 884.

339. Alabama- Ala. Code § 8-9-2 (1975); Alaska- Alaska Stat. § 09.25.010 (1978); Arizona- Ariz. Rev. Stat. Ann. § 44-101 (1967); Arkansas- Ark. Code Ann. § 4-59-101 (1962); California- Cal. Civ. Code § 1624 (1973); Colorado- Colo. Rev. Stat. Ann. § 38-10-112 (1974); Connecticut- Conn. Gen. Stat. Ann. § 52-550 (1960); Delaware- Del. Code Ann. tit. 6, § 2714 (1975); Dist. of Col.- D.C. Code § 28-3502 (1973); Florida- Fla. Stat. Ann. § 725.01 (1969); Georgia- Ga. Code Ann. § 13-5-30 (1997); Hawaii- Haw. Rev. Stat. Ann. § 656-1 (1976); Idaho- Idaho Code Ann. § 9-505 (1979); Illinois- IL ST CH 740 §§ 80/1-2 (1972); Indiana- Ind. Code Ann. § 32-21-1-1 (2002); Iowa- Iowa Code Ann. § 622.32 (1950); Kansas- Kan. Stat. Ann. § 33-106 (1973); Kentucky- Ky. Rev. Stat. Ann. § 371.010 (1972); Louisiana- La. Rev. Stat. Ann. § 6:1122 (1989); Maine- Me. Rev. Stat. Ann. tit. 33, § 51 (1978); Massachusetts- Mass. Gen. Laws Ann. ch. 259, § 1 (1968); Michigan- Mich. Comp. Laws Ann. § 566.132 (1992); Minnesota- Minn. Stat. Ann. §§ 513.01, 513.05 (1947); Mississippi- Miss. Code Ann. § 15-3-1 (1972); Missouri- Mo. Ann. Stat. § 432.010 (1969); Montana- Mont. Code Ann. § 28-2-903 (1979); Nebraska- Neb. Rev. Stat. §§ 36-105, 36-202 (1978); Nevada- Nev. Rev. Stat. §§ 111.210, 147.230 (1963); New Hampshire- N.H. RSA §§ 506:1 506:2 (1968); New Jersey- N.J. Stat. Ann. § 25:1-5 (1940); New York- N.Y. Gen. Oblig. Law §§ 5-701, 5-703 (1978); North Carolina- N.C. Gen. Stat. §§ 22-1, 22-2 (1965); North Dakota- N.D. Cent. Code § 9-06-04 (1975); Ohio- Ohio Rev. Code Ann. § 1335.05 (1979); Oklahoma- Okla. Stat. Ann. tit. 15, § 136 (1961); Okla. Stat. Ann. tit. 58, § 521 (1965); Oregon- Or. Rev. Stat. § 41.580 (1961); Pennsylvania- 33 Pa. Stat. Ann. §§ 1, 3, 4 (1967); Rhode Island- R.I. Gen. Laws § 9-1-4 (1969); South Carolina- S.C. Code § 32-

business might still get caught up by the Statute of Frauds in Georgia or elsewhere. For instance, if a transaction involves the sale of real property, it may trigger a Statute of Frauds issue.³⁴⁰ Similarly, if the transaction involves some type of employment arrangement or long-term lease, it may trigger the Statute of Frauds requirement that agreements that will last for longer than one year be in writing.³⁴¹ Finally, all but one state has a separate statute of frauds under the UCC that requires a signed writing for a contract for the sale of goods over \$500.³⁴² Typically, however, a sale of business will not constitute a “sale of goods” for purposes of a state’s UCC, although in some jurisdictions, under certain circumstances, it might.³⁴³ But in Georgia and a majority of other

3-10 (1976); South Dakota- S.D. Code §§ 53-8-2, 56-1-4 (1967); Tennessee- Tenn. Code Ann. § 23-201 (1955); Texas- Tex. Bus. & Com. Code Ann. § 26.01 (1968); Utah- Utah Code Ann. §§ 25-5-1, 25-5-3, 25-5-4 (1976); Vermont- Stat. Ann. tit. 12, § 181 (1973); Virginia- Code § 11-2 (1978); Washington- Wash. Rev. Code § 19.36.010 (1978); West Virginia- Code § 55-1-1 (1966); Wisconsin- Wis. Stat. Ann. § 241.02 (1957); Wyoming- Wyo. Stat. § 1-23-105 (1961).

340. Most of the statutes set forth in note 339 *supra* include a requirement that a contract for the sale of land or concerning any interest in land must be in writing. *See, e.g.*, Ga. Code Ann. § 15-5-30; Del. Code Ann. tit. 6, § 2714; Cal. Civ. Code § 1624; N.Y. Gen. Oblig. 5-703.

341. Again, most of the statutes set forth in note 339 *supra* include a requirement that a contract that cannot be performed within one year be in writing. *See, e.g.*, Ga. Code Ann. § 15-5-30; Del. Code Ann. tit. 6, § 2714; Cal. Civ. Code § 1624; N.Y. Gen. Oblig. 5-703.

343. Louisiana’s UCC does not have a statute specific to sales of goods, but has a general provision that allows for contracts over \$500, even if they are not in writing, so long as the contract is “proved by at least one witness and other corroborating circumstances.” La. Civ. Code Ann. art. 1846 (1984).

343. *MBH, Inc. v. John Otte Oil & Propane, Inc.*, 727 N.W.2d 238, 246 (Neb. App. 2007) (“Our research reveals that many courts have concluded in their decisions that the U.C.C. does not apply to mixed sales contracts for the sale of ongoing businesses. . . . Our research also reveals several decisions holding that the U.C.C. was applicable to sales of ongoing businesses.”) Some jurisdictions will apply a “predominant purpose” test to the transaction to determine whether the UCC is applicable. *See, e.g.*, *Midwest Mfg. Holding, LLC v. Donnelly Corp.*, 975 F. Supp. 1061, 1067 (1997). Under the test, courts will look at whether the predominant purpose of the transaction was the sale of an entire business or was the sale of goods. If the contract predominantly involves the sale of goods, the entire contract will be subject to the UCC, and therefore will have to be in writing to be enforceable if it is for greater than \$500. *Id.* Some courts will look at the value of the assets involved in a transaction to determine the predominant purpose of the transaction. *Compare Fink v. DeClassis*, 745 F. Supp. 509, 516 (1990) (holding that since only a relatively small percentage of the total purchase price consisted of goods, the transaction was not a sale of goods), *with Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 13-14 (1st Cir. 1987) (holding that because approximately 98% of the total purchase price was for inventory and equipment, the sales agreement was primarily one for goods and therefore subject to the UCC). Other courts, however, place less emphasis on quantitative terms and look at what the most important goal of the agreement was. *Midwest*, 975 F. Supp. at 1067-68; *Field v.*

states, a transaction like the one at issue in *Turner*—one without a sale of real property and that will not endure beyond one year—will not trigger a Statute of Frauds requirement.

Frequently, large business combinations do not trigger the applicable Statute of Frauds. Thus, to decide whether the relevant Statute of Frauds requires a writing essentially guts the factor and renders it impotent. If the Statute of Frauds requires a writing for a particular transaction, a court should conclude that the fourth factor is satisfied, at least when the issue is one of whether an oral contract has been formed, as opposed to whether a preliminary written agreement is binding.³⁴⁴ However, to say that because a contract is not *required* to be in writing automatically means it is not *typically* in writing is nonsensical.³⁴⁵ Instead of looking at the Statute of Frauds, courts should take into account several considerations. These include the size and complexity of the transaction, whether the particular type of contract is usually in writing, and ever not in writing in the relevant industry, and the length of the relationship in question.³⁴⁶

2. Policies Supporting the Framework

This article does not suggest that preliminary agreements—written or oral—should never be binding. Preliminary binding agreements serve a

Golden Triangle Broad, Inc., 305 A.2d 689, 696 (Pa. 1973).

344. Of course, in the oral contract context, this becomes a moot point because if the Statute of Frauds requires writing, the court need not analyze the intent of the parties – there will be no oral contract if it is not permitted by the Statute of Frauds. *See, e.g.*, Ga. Code Ann. § 13-5-30 (1997) (“the promise must be in writing and signed” to be binding.) But if there is a written preliminary agreement, thereby satisfying the Statute of Frauds, the intent of the parties would still be an issue and the fourth factor would be relevant to the inquiry of whether it is typical for that type of transaction to be agreed upon in a *preliminary* writing as opposed to something more formal.

345. This position is not without precedent. *See, e.g.*, Spencer Trask Software & Info. Servs. LLC v. RPost Int’l Ltd., 383 F. Supp. 2d 428, 445 (S.D.N.Y. 2003) (holding that even though the plaintiffs could establish that the type of agreement in question was exempted from the Statute of Frauds, that fact alone did not provide “support for their argument that it was not a type of contract that normally would have been committed to writing.”).

346. *See supra* notes 179-182 and accompanying text. “Circumstances which have been suggested as being helpful in determining the intention of the parties are whether the contract is one usually put in writing: whether there are few or many details; whether the amount involved is large or small; whether it requires a formal writing for a full expression of the covenants and premises; and whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations.” *W.T. Grant Co. v. Jaeger*, 224 Ill. App. 538, 546 (1922).

valuable function, particularly for standardized transactions, such as loans.³⁴⁷ They allow parties to make plans in reliance on the agreement and avoid spending large amounts of money negotiating every detail of the transaction without knowing whether a contract will ultimately result.³⁴⁸ Protecting the right of parties to contract informally, so that one cannot objectively manifest his intent to be bound and then renege without consequence, may in fact encourage business activity in the marketplace.³⁴⁹

As such, oral and preliminary agreements should be enforced, but only in appropriate circumstances where the parties clearly intended to be bound.³⁵⁰ Parties should not be trapped in surprise contractual obligations that they never intended. In fact, it is a fundamental tenet of contract law that merely participating in negotiations does not create binding obligations, even if all of the terms of the negotiation are seemingly finalized.³⁵¹ Particularly in the context of large, complex commercial transactions, parties often have important reasons for not wanting to be bound until they have a definitive written agreement. For instance, the act of putting pen to paper and actually reducing the terms of the negotiations to writing will often reveal gaps or points of disagreement, misunderstandings, or ambiguity.³⁵² Parties may hesitate to enter negotiations if they feel they have no control over whether and when tentative proposals become binding.³⁵³

Additionally, allowing courts to look at internal communications between players on the same side of the transaction as evidence of intent may have a chilling effect. Businesses do not want isolated remarks of individual employees working on a deal to incur liability towards a party disappointed by a failed negotiation.³⁵⁴

Moreover, parties who are concerned about entering costly negotiations without any security that such negotiations will ultimately culminate in a transaction have a number of protections at their fingertips. First, parties can secure some certainty by including a binding exclusivity provision, like a no-shop or no-talk clause, in their preliminary agreement.³⁵⁵ This at least gives

347. *Bear Sterns Inv. Prods., Inc., v. Hitachi Auto. Products (USA), Inc.*, 401 B.R. 598, 624-25 (S.D.N.Y. 2009).

348. *Id.*; *see also* Brodsky, *supra* note 65, at 18.

349. Supplemental Brief of Appellee, *supra* note 270, at *3.

350. *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987).

351. *Id.*

352. *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75 (2d Cir. 1984).

353. *Ciaramella v. Reader's Digest Ass'n, Inc.*, 131 F.3d 320, 323 (2d Cir. 1997).

354. *Petition for Writ of Certiorari*, *supra* note 22, at *21-22.

355. *Waryjas*, *supra* note 29, at 336.

them the security that, for some agreed-upon period of time, their counterpart will not enter into negotiations with a third party without incurring contractual liability. Additionally, a concerned party can demand inclusion of a break-up fee or a reverse break-up fee as a binding provision in an LOI, allowing the party to at least recover its costs (or more) in the event the transaction falls through due to no fault of his own.³⁵⁶ Finally, the marketplace itself serves as a check on bad behavior. Companies who routinely treat their counterparts in negotiations poorly and back out of deals at the eleventh hour when it seems commercially unreasonable (even if not illegal) to do so, quickly gain a negative reputation in the marketplace that can have a detrimental effect on the bottom line.³⁵⁷ And, even when a disappointed party has not protected itself contractually and the marketplace check has broken down such that the party feels it has been mistreated, the disappointed party still has intact its remedies at law and in equity. Even a disappointed party unable to succeed on a Fully Formed Contract Claim still may be able to support an Equitable Claim or a Good Faith Claim (discussed in Parts III A and B *supra*) and, as a result, may be entitled to reliance damages.

VI. CONCLUSION

Determining whether or not parties intended to be bound by preliminary oral or written agreements presents a challenge for courts. Indeed, it may be impossible to craft a bright-line test for determining the intent of parties after negotiations break down without the execution of a definitive written agreement. Inevitably, there is going to be some uncertainty in this area of the law, but it is possible to achieve a more workable framework that leads to increased predictability in the law. Jurisdictions that allow uncertainty to prevail in this area of contract law risk companies avoiding such uncertainty in favor of those states where courts provide more assurance that a party will not

356. AM. BAR ASS'N, *supra* note 24, at 113 (The “break-up fee provision may be viewed by many as aggressively pro-buyer, in that the buyer may be entitled to a break-up fee even if the Company honors the exclusive dealing provisions and only locates a buyer for its assets after the Company and the buyer were unable to reach an agreement during the . . . exclusive period.”).

357. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1499 (1996) (“Both society and the legal system impose sanctions. The most powerful sanction that society can impose on a corporation is lost reputation or stigma.”). See also JOHN M. T. BALMER & STEPHEN A. GREYSER, REVEALING THE CORPORATION: PERSPECTIVES ON IDENTITY, IMAGE, REPUTATION, CORPORATE BRANDING, AND CORPORATE-LEVEL MARKETING 230 (Psychology Press 2003) (Reputations summarize *assessments of past performance* by diverse evaluators who assess a firm’s ability and potential to satisfy diverse criteria).

be trapped in a surprise contractual obligation it never intended. The ability of parties to avoid oral contracts when such agreements are not intended is particularly important for large commercial transactions, where contracts typically involve more terms, complexities, and money.

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

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

In addition to applying the multi-factor test, courts should recognize that the first factor—express language of intent in a preliminary agreement—is the most important. If there is a preliminary written agreement with an unambiguous expression of intent not to be bound except with a formal writing, courts should be willing to determine the parties' intent on summary judgment. However, summary judgment may not be appropriate when there has been a clear and unambiguous express waiver of that intent in writing, but mere expiration of the preliminary agreement should not be considered an express waiver.

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

Finally, courts should recognize that the fourth factor—whether it is typical of the type of transaction to be in writing—should be analyzed separately from

the applicable Statute of Frauds. To say that the Statute of Frauds does not require a certain type of contract to be in writing and, therefore, it is not typical for the contract to be in writing, makes little sense and would essentially render the fourth factor meaningless for many commercial transactions.

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