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ARTICLE

THE HIGH PRICE OF IMPRECISION: AN EXAMINATION OF THE ENFORCEMENT OF LETTERS OF INTENT UNDER CALIFORNIA LAW

By Bradley D. Scheick*

Letters of intent and other similar pre-contractual documents, such as term sheets or memorandums of understanding, are used extensively in California real estate transactions as a means for negotiating parties to demonstrate commitment to the deal at hand and memorialize agreements on key business points early in the process. In most cases, parties do not intend for their letter of intent to constitute a binding contract. Rather, the goal is usually to craft a document that can be used to facilitate and guide the preparation of final, comprehensive contract documents, while leaving the parties free to walk away in the event agreement on final documents cannot be reached. In fact, many letters of intent contain specific language stating that the parties do not intend the document to be binding.

Under California law, however, such unenforceability is not always certain. Depending on the specific language of the letter of intent and the conduct of the parties before and after its execution, it is possible for a purportedly non-binding letter of intent to morph from simply an agreement to agree, which is unenforceable under California contract law,[1] into either a fully binding obligation to carry out the contemplat-

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ed transaction or an enforceable agreement to negotiate in good faith. Thus, without sufficient care in drafting and in conduct, a party who believes it is creating nothing more than a negotiating tool could find itself obligated under an enforceable agreement.

This article provides an overview of the minimum requirements for formation of an enforceable contract under California law and illustrates the circumstances in which a California court could find that a letter of intent satisfies those requirements.

I. LETTERS OF INTENT AS ENFORCEABLE CONTRACTS

A. Manifestation of Mutual Consent

The first requirement for a binding contract to exist under California law is the presence of consent between the parties to enter into a contract, which is freely given, mutual and communicated by each to the other.[2] The test for whether such consent exists does not, however, depend on the subjective intent of the parties. Instead, under what is called the "objective theory" of mutual consent, it is the "outward manifestation or expression of consent that is controlling" such that "mutual consent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding."[3] When the outward evidence of intent is sufficient to allow a third party to reasonably infer that the parties intended to enter into a contract, the subjective belief of the parties is not material.[4] Thus, the question of whether the parties intended to form a contract is one of fact that is determined based on an examination of the conduct of the parties and surrounding circumstances.[5] As a result, where a court determines, in its reasonable judgment, that the words of a letter of intent evidence mutual consent between the parties to form a contract, it can hold the letter enforceable, even if the parties subjectively had no such intent.

To avoid this result, it is common for parties to include in their letters of intent requirements that more formal and comprehensive contracts be executed in the future or statements that the letter is intended to be non-binding. When drafted with sufficient precision and clarity, such provisions can prove effective at preventing enforcement as a contract.[6] However, if it is not absolutely explicit from the face of the document that the parties have no intent to be bound, it is possible for courts to interpret around such protective language or find cause in the actions of the parties to look past it.[7]

One of the most striking examples of the consequence of an ambiguous letter of intent is found in the Ninth Circuit's decision in *First Na-*

tional Mortgage Company v. Federal Realty Investment Trust.[8] In that case, two highly sophisticated parties had been engaged in negotiations over a piece of property in San Jose, California for several years. During the course of those negotiations, the parties exchanged various negotiation related documents, including a "Revised Proposal," a "Counter Proposal" and, finally, a "Final Proposal." The Final Proposal, which consisted of only nine paragraphs, set forth the basic terms on which the property would be ground leased to Federal Realty with certain options to purchase the property, and First National would receive certain reimbursement payments for terminating the lease of the then current tenant of the property. Additionally, the last clause of the Final Proposal provided that its terms were "accepted by the parties subject only to approval of the terms and conditions of a formal agreement" regarding the intended ground lease.[9] After Federal Realty failed to make the specified reimbursement payments, First National brought suit for breach of contract and won an award of $15.9 million in damages.

In affirming that award, the Court of Appeals found the statement that the terms of the letter "are hereby accepted by the parties subject only to approval of the terms and conditions of a formal agreement" sufficient to constitute evidence of intent to be bound. In reaching this decision the court gave little consideration to the facts that the document in question was titled a "Proposal," consisted of only one page, and specifically contemplated the execution of a formal ground lease agreement. In fact, the parties' negotiations later broke down due to their failure to reach agreement on the terms of a ground lease that had gone through several drafts that were exchanged among the parties. As to the lack of a formal agreement, the court explained that:

> [W]here the parties … have agreed in writing upon the essential terms of the lease, there is a binding lease, even though a formal instrument is to be prepared and signed later. The formal instrument may be more convenient for purposes of recordation and better designed to prevent misunderstanding then the other writings but it is not essential to the existence of the lease. The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing. When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement is not material.[10]

Thus, according to the court, the language of the Final Proposal sufficiently demonstrated mutual consent between the parties to be bound, and the fact that they planned to negotiate a full contract to replace the Final Proposal did not relieve them from the obligation to perform its terms.[11]

B. Inclusion of Essential Terms

A second prerequisite for creation of an enforceable contract is that it be sufficiently definite in its essential terms to allow a court to determine what the purported contract means and to fix the legal liabilities of the parties.[12] Thus, if an instrument leaves essential terms to future agreement or is otherwise uncertain to the point that the intention of the parties in regard to the essential terms cannot be ascertained, it is usually unenforceable.[13] The California Supreme Court has explained the rational for this rule as follows:

> Although a promise may be sufficiently definite when it contains an option given to the promisor or promise, yet if an essential element is reserved for future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.[14]

Accordingly, in the case of *Ablett v. Clauson*, the court found that a renewal provision contained in an existing written lease amounted to nothing more than an unenforceable agreement-to-agree based on the fact that the relevant provision fixed only the duration of the contemplated renewal term and left all other provisions, such as the applicable rent, up to the future agreement of the parties. This absence of key terms made the option too uncertain to be enforceable.[15]

Despite this general rule, "the modern trend of the law favors carrying out the parties' intentions through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty."[16] California courts have therefore adopted the approach that "if the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their transaction if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left."[17] As a result, in a dispute regarding the enforceability of a letter of intent California law allows the court to admit

extrinsic evidence of the parties' intent in order to "explain essential terms that were understood by the parties but would otherwise be unintelligible to others."[18] In fact, the Court of Appeal recently made clear that a failure to consider extrinsic evidence is an appealable error. According to the court:

> [w]here the meaning of the words used in contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its facet. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.[19]

Thus, in *Okun v. Morton*, the Court of Appeal held enforceable a promisor's written commitment to provide the promissee an opportunity to participate in certain future business opportunities notwithstanding the fact that the document failed to expressly state the terms for such participation.[20] The document at issue was a private placement memorandum setting forth certain terms on which Okun would invest in a corporation being formed by Morton, a restaurateur, to develop Hard Rock Cafe restaurants throughout the United States. It provided in relevant part that if any Hard Rock Cafe related business opportunities arose which the corporation itself did not elect to pursue, then Okun and Morton individually would "have the right to exploit such opportunity together in a manner mutually agreeable in the same ratio which we currently hold stock in [the corporation]."[21] Following a deterioration of the relationship between the parties, Morton began development of restaurants in Houston and Honolulu without offering Okun an opportunity to participate and Okun brought suit to enforce the joint exploitation provision of the memorandum. In rejecting the defendant's claim that that language amounted to only an unenforceable agreement-to-agree, the court relied on evidence of the financing and ownership of the parties' prior ventures and found that the fundamental structure of each was based on an 80/20 ownership ratio used for the parties' first Hard Rock Café development. According to the court, this past practice effectively defined the parties' agreement as to their respective capital contribution requirements for

all future investments and, thus, provided persuasive evidence that the language in the private placement memorandum, when interpreted in accordance with the parties' intended meaning, encompassed the necessary essential terms.[22]

In *Patel v. Liebermensch*[23] the California Supreme Court took this trend even further and ruled that, in the context of an agreement for the sale of real property, the only essential terms necessary for enforcement are the identities of the buyer and seller, the identity of the property and the purchase price. According to the court, all other terms, including the manner and timing of payment, are incidental and, if not specified in the written agreement, will be furnished by the court based on what it determines to be usual and customary.[24] This decision overruled a long history of California case law holding that the time and method of payment were essential terms for an agreement to sell real property.[25] In reaching this decision, the court stated that "[i]t is settled that if a contract for the sale of real property specifies no time for payment, a reasonable time is allowed. The manner of payment is also a term that may be supplied by implication."[26] Thus, the court held that an option to purchase set forth in the parties' lease agreement was enforceable even though the document in question failed to include, among other things, the timing for payment of the purchase price, the terms for the escrow, or the timing for closing on the sale.[27]

These cases make clear that, when presented with a letter of intent that is ambiguous or apparently lacking in essential terms on its face, California courts are not hesitant to look beyond its four corners to find clarification and support for enforcing it. Moreover, these cases evidence an increasingly narrow view of what terms are essential for purposes of contract formation and, with respect to any terms deemed non-essential, a willingness by the courts to take it upon themselves to effectively impose terms on the parties based on the court's own determination of what is reasonable or customary.

C. Statute of Frauds

In addition to satisfying the basic requirements for formation of a contract discussed above, any agreement to lease real property for more than one year or to sell an interest in real property must also comply with the statute of frauds.[28] This requires that any such agreement be memorialized in some note, memorandum, or other writing which is subscribed by the party to be charged or by his agent.[29] The memorandum or writing in question must also identify the subject of the parties' agreement, show that they made a contract, and state the essential terms of that contract with reasonable certainty.[30]

However, the modern preference for honoring parties' agreements has also influenced the rigidity with which courts apply the statute of frauds. As a result, even when the parties themselves are disputing whether a particular writing sets forth the necessary essential terms for compliance, the court takes upon itself the determination of what constitutes an "essential term" based on the context of the agreement and the conduct of the parties. In such cases, the court may enforce an agreement where the essential terms can be explained by extrinsic evidence or inferred from the parties' conduct.[31] Accordingly, "an agreement will not be held deficient for failure to express that which is clearly implied when the writing is interpreted in accordance with the intentions of the parties."[32]

In *Seaman's Direct Buying Service, Inc. v. Standard Oil Company of California*,[33] for example, the California Supreme Court ruled that a letter of intent related to the supply of oil to the plaintiff's marine fuel distributorship was sufficiently precise to satisfy the statute of frauds notwithstanding the fact that it failed to expressly state the quantity of oil the plaintiff was purchasing. The court resolved this apparent deficiency by interpreting language in the letter of intent that said the plaintiff's distributorship would become a Chevron dealer to mean that the parties intended to form a "dealership arrangement," the obvious implication of which was, according to the court, that the parties' intended for the defendant to supply as much fuel as the plaintiff required.[34] Thus, the court concluded, the letter of intent, when viewed in light of what the court decided was the parties' intentions, did contain all the essential terms of a contract and was therefore enforceable.

Similarly, in the *First National Mortgage v. Federal Realty Investment Trust* decision discussed above, the Court of Appeal upheld the jury's determination at trial that the duration of a ground lease, which is an essential term for purposes of the statute of frauds in the context of a lease, could be inferred from the parties' inclusion of a ten year put and call option in their letter of intent. According to the court, the test for the admission of extrinsic evidence to explain the meaning of a written instrument is "whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."[35] Because the court found that the language of the letter of intent regarding duration of the ground lease was reasonably susceptible of either of two interpretations (i.e., that the letter of intent failed to provide a duration or that a duration was implied by the put and call options), it ruled that the trial court properly allowed the jury to consider evidence regarding the conduct of the parties' negotiations as a means to evaluate their intent.[36] The court also found that the evidence presented, specifically testimony that Federal

Realty's goal all along was to purchase the subject property rather than lease it and that, therefore, Federal Realty intended to exercise its call option at the end of ten years if First National did not first exercise its call option, was sufficient to support the jury's finding that the parties intended a ten year term for the ground lease and that the letter of intent was therefore enforceable under the statute of frauds.[37]

II. LETTER OF INTENT AS AN AGREEMENT TO NEGOTIATE

Even where a letter of intent is not enforceable as a binding contract to perform the contemplated transaction, it is possible, as was made clear by the Court of Appeal in *Copeland v. Baskin Robbins U.S.A.*,[38] for the parties to create an enforceable obligation to negotiate in good faith.

A. *Copeland v. Baskin Robbins U.S.A.*—Facts

In the *Copeland* case, the plaintiff, Kevin Copeland, was engaged in negotiations with Baskin Robbins for the purchase of an ice cream manufacturing plant located in Vernon, California. Throughout these negotiations Copeland repeatedly stressed that any agreement to purchase the plant had to be contingent on the parties entering into a co-packing agreement pursuant to which Baskin Robbins would purchase the ice cream produced by Copeland's operations at the plant. After several months of negotiations, the terms of a deal began to take shape and in May 1999 Baskin Robbins sent Copeland a letter summarizing certain business terms, which included a statement that "Baskin Robbins would agree, subject to a separate co-packing agreement and negotiated pricing, to provide [Copeland] a three year co-packing agreement." The letter went on to request that Copeland acknowledge his agreement with the proposed terms by delivering to Baskin Robbins a signed copy of the letter, along with a non-refundable deposit of $3,000. Copeland accepted Baskin Robbins' terms and the parties continued negotiating the specific terms of the co-packing agreement. Shortly thereafter, however, Baskin Robbins informed Copeland that, for strategic reasons, it would not be engaging in any further negotiations of the co-packing agreement and returned Copeland's deposit.[39]

Copeland filed suit for breach of contract and the trial court granted Baskin Robbins summary judgment based on the conclusion that no matter how the letter agreement was interpreted it failed as a contract because certain essential terms of the co-packing agreement were never agreed to and there was no reasonable basis on which those missing terms could be ascertained.[40]

B. *Copeland v. Baskin Robbins U.S.A.*—Decision

On appeal, rather than arguing that the terms of the May 1999 letter were sufficient to constitute an enforceable co-packing agreement, Co-

peland claimed that the May 1999 letter constituted a contract to negotiate the terms of a co-packing agreement and that Baskin Robbins had breached this by failing to continue negotiations in good faith.[41]

The Court of Appeal, though it ultimately affirmed summary judgment for Baskin Robbins based on an absence of damages, agreed with this interpretation and found that a commitment to engage in negotiations can constitute an enforceable obligation. In reaching this conclusion, the court explained that unlike in the case of an agreement-to-agree, which can never be performed because of a lack of sufficiently defined obligations, the parties to a contract to negotiate can actually fulfill their obligations under such a contract. As stated by the court:

> A contract to negotiate the terms of an agreement is not, in form or substance, an "agreement to agree." If, despite their good faith efforts, the parties fail to reach ultimate agreement on the terms in issue the contract to negotiate is deemed performed and the parties are discharged from their obligations.[42]

In the context of such an agreement, a failure of negotiations to result in a final agreement is not, itself, a breach of the contract to negotiate. Instead, a party will be liable only if a failure to reach an ultimate agreement results from a breach of that party's obligation to negotiate or to negotiate in good faith.[43] Additionally, where a party has breached a contract to negotiate, the damages recoverable by the nonbreaching party are limited to reliance damages as measured by "the injury the plaintiff suffered in relying on the defendant to negotiate in good faith."[44] This includes the plaintiff's out of pocket costs incurred in conducting the negotiations and potentially costs for any opportunities foregoing in order to conduct the negotiations, but it does not include any expectation damages such as lost profits. The reasoning for the exclusion of the latter is that "there is no way of knowing what the ultimate terms of the agreement would have been or even if there would have been an ultimate agreement."[45]

III. CONCLUSION

As demonstrated by the decisions reached in the cases discussed above, California contract law leans decidedly in favor of enforcing purported agreements to the greatest extent possible and, in order to further that objective, it instructs a court evaluating whether a letter of intent is an enforceable agreement to look beyond the parties' written words and take

into consideration such other factors as the parties' conduct surrounding the execution of the subject letter, any terms that may be implied by the language of the subject letter, and the general custom applicable to transactions of the type contemplated in the subject letter. Because of this, parties seeking to form a non-binding letter of intent cannot reliably insure such non-enforceability simply by giving their document a conditional sounding title, such as "Letter of Intent" or "Proposal," or including general statements that they intend to later execute more formal contracts. Instead, to minimize the risk of a court deeming their letter of intent enforceable, negotiating parties should make sure to explicitly state in the letter of intent that it is non-binding on the parties and that no party shall be bound in any way until a final contract has been agreed to, executed and delivered by each party. Moreover, all parties involved in the deal should avoid taking any actions that could imply that they intend to be bound by the letter of intent or believe that a binding contract exists, such as making public announcements that a deal has been reached.

Additionally, the court's ruling in *Copeland* makes clear that inclusion of language in a letter of intent contemplating negotiation of future documents, especially if that language imposes some sort of standard on the conduct of such negotiations such as "best efforts" or "good faith," could be interpreted as creating binding obligation to negotiate in good faith. To avoid this result, negotiating parties should include in their letter of intent language clearly denying the existence of a duty to negotiate in good faith and expressly stating that either party may terminate negotiations for any reason, or no reason, at any time prior to consummation of the contemplated final agreement.

NOTES

1. *Autry v. Republic Productions*, 30 Cal. 2d 144, 151, 180 P.2d 888 (1947).
2. Civ. Code, §§1550, 1565.
3. Witkin, 1 Summary of California Law, Contracts §116; see also *Beck v. American Health Group Internat., Inc.*, 211 Cal. App. 3d 1555, 1563, 260 Cal. Rptr. 237 (2d Dist. 1989) ("*Beck*"), quoting *Citizens Utilities Co. v. Wheeler*, 156 Cal. App. 2d 423, 432, 319 P.2d 763 (2d Dist. 1957).
4. *Beck, supra*, 211 Cal.App. 3d at 1562; see also *Market Ins. Corp. v. Integrity Ins. Co.*, 188 Cal. App. 3d 1095, 1098, 233 Cal. Rptr. 751 (2d Dist. 1987); *King v. Stanley*, 32 Cal. 2d 584, 591, 197 P.2d 321 (1948); *Brant v. California Dairies*, 4 Cal. 2d 128, 133, 48 P.2d 13 (1935).
5. *California Food Service Corp. v. Great American Ins. Co.*, 130 Cal. App. 3d 892, 897, 182 Cal. Rptr. 67 (4th Dist. 1982) ("*California Food Service Corp.*").
6. *Beck, supra*, 211 Cal.App.3d at 1562; see also *Rennick v. O.P.T.I.O.N Care, Inc.*, 77 F.3d 309 (9th Cir. 1996); *Smissaert v. Chiodo*, 163 Cal. App. 2d 827, 330 P.2d 98 (1st Dist. 1958).
7. *First Nat. Mortg. Co. v. Federal Realty Inv. Trust*, 631 F.3d 1058 (9th Cir. 2011) ("*First*

National Mortgage Co."); *California Food Service Corp.*, *supra*, 130 Cal.App.3d 892; *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158, 39 U.C.C. Rep. Serv. 46 (1984) ("*Seaman's Direct Buying Service, Inc.*") (overturned on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 88, 44 Cal. Rptr. 2d 420, 900 P.2d 669 (1995)).

8. *First National Mortgage Co., supra*, 631 F.3d 1058.
9. *Id*. at 1065.
10. *Id*. at 1066, quoting *Gavina v. Smith*, 25 Cal. 2d 501, 504, 154 P.2d 681 (1944).
11. *Id*.
12. See e.g. *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 P. 689 (1897); *Apablasa v. Merritt & Co.*, 176 Cal. App. 2d 719, 1 Cal. Rptr. 500 (2d Dist. 1959); see also Civ. Code, §1598.
13. *California Lettuce Growers v. Union Sugar Co.*, 45 Cal. 2d 474, 481, 289 P.2d 785, 49 A.L.R.2d 496 (1955); see also *Etco Corp. v. Hauer*, 161 Cal. App. 3d 1154, 208 Cal. Rptr. 118 (1st Dist. 1984).
14. *Ablett v. Clauson*, 43 Cal. 2d 280, 284-285, 272 P.2d 753 (1954), quoting 1 Williston, Contracts (rev. ed 1936) 131, §45.
15. *Id*. at 287.
16. *Okun v. Morton*, 203 Cal. App. 3d 805, 250 Cal. Rptr. 220 (2d Dist. 1988) (2d Dist. 1988) ("*Okun*").
17. *Id*., quoting 1 Corbin on Contracts (1963) §95, p. 400.
18. *Sterling v. Taylor*, 40 Cal. 4th 757, 767, 55 Cal. Rptr. 3d 116, 152 P.3d 420 (2007) ("*Sterling*").
19. *First National Mortgage Co., supra*, 631 F.3d at 1067.
20. *Okun, supra*, 203 Cal.App.3d 805.
21. *Id*. at 812.
22. *Id*. at 819.
23. *Patel v. Liebermensch*, 45 Cal. 4th 344, 86 Cal. Rptr. 3d 366, 197 P.3d 177 (2008).
24. *Id*. at 349.
25. *King v. Stanley*, 32 Cal. 2d 584, 197 P.2d 321 (1948) (disapproved of by, Patel v. Liebermensch, 45 Cal. 4th 344, 86 Cal. Rptr. 3d 366, 197 P.3d 177 (2008)).
26. *Id*. at 351.
27. *Id*. at 347.
28. Civ. Code, §1624.
29. Civ. Code, §1624.
30. *Sterling, supra*, 40 Cal. 4th at 766; see also *Franklin v. Hansen*, 59 Cal. 2d 570, 574, 30 Cal. Rptr. 530, 381 P.2d 386 (1963).
31. *Id*. at 767; see also *Seaman's Direct Buying Service, Inc., supra*, 36 Cal.3d at 763.
32. *Seaman's Direct Buying Service, Inc., supra*, 36 Cal.3d at 763.
33. *Id*.
34. *Id*. at 763.
35. *Id*. at 1067, quoting *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 69 Cal. Rptr. 561, 442 P.2d 641, 40 A.L.R.3d 1373 (1968).
36. *First National Mortgage Co., supra*, 631 F.3d at 1067.
37. *Id*. at 1067-1068.
38. *Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 117 Cal. Rptr. 2d 875 (2d Dist. 2002).
39. *Id*.

40. *Id*. at 879.
41. *Id*. at 880.
42. *Id*.
43. *Id*.
44. *Id*. at 885.
45. *Id*.

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