

Presenting a live 90-minute webinar with interactive Q&A

Real Estate Loan Commitment Letters and Terms Sheets: Negotiating Key Terms

Structuring Binding Finance Commitments and Balancing Interests of Both Lenders and Borrowers

THURSDAY, APRIL 17, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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REAL ESTATE LOAN COMMITMENT LETTERS AND TERM SHEETS: NEGOTIATING KEY TERMS

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Introduction: Contracts 101

Redux!

THERE WILL BE A TEST!

LUCY V. ZEHMER

A JOKE THAT COSTS THE FARM

- Farm owner wants his “friend” to admit he doesn’t have \$50k
- Writes contract on bar receipt for sale of farm for \$50k
- Court finds mutual assent, “I was joking!” is established as a bad defense.

FINAL EXAM

- B and L discuss a deal for B to purchase Blackacre
- L circulates an LOI* containing all but 2 terms
- LOI has several estimates and is “non-binding”
- Interest rates spike
- L uses unrelated open item to leverage an interest rate increase from 8% to 18%
- State has implied good faith duty to negotiate
- B refuses and sues, DISCUSS:

*Note that we use “LOI” as a shorthand to describe Letters of Intent, Letter of Interest, Term Sheets, Prenegotiation Agreements and other preliminary agreements

DISCUSSION: BARBRI- REDUX

(AKA THE LAW WE FORGOT TO TEACH IN CONTRACTS REDUX)

Overview:

- Standards for Mutual Assent
- Good Faith Duties to Negotiate (SIGA)
- Binding Effect of E-mails
- The Lingering Effect of LOIs Post-Close

Standards for Mutual Assent

4-5 Factor Test (New York) (based loosely off Restatement (Second) of Contracts)

1. Whether there is express non-binding language
2. Whether all essential terms are in the LOI
3. Whether there is any partial performance
4. Whether the transaction is type that a formal, final contract would normally be expected
5. Whether the context of negotiations make it seem like a formal, final contract would normally be expected

Standards for Mutual Assent

Elements Test (California)

1. Is there mutual assent? (Determined based on a totality of all circumstances)
2. Are all essential terms present in the LOI?

Standards for Mutual Assent

Express Language

- LOI says it's Binding. See Hajdu-Nemeth v. Zachariou
- LOI is Silent. See Bed, Bath & Beyond v. Ibex Construction
- LOI says it's Non-Binding. **The General Rule:** Let parties contract as they please. See R.G. Group, Inc. v. Horn & Hardart Co.; Aksman v. Xiongwei Ju; 168th & Dodge, LP v. Rave Review Cinemas;

Standards for Mutual Assent Express Language

EXCEPTIONS to the General Rule:

- Oral Agreement Prior to Distribution of an LOI with Express Non-Binding Language. See United Intern. Holdings v. Wharf (Holdings)
- Oral Agreements After Distribution of an LOI with Express Non-Binding Language. See Lamle v. Mattel, Inc.
- Other Bad Words and Conduct: See Texaco Inc. v. Pennzoil Co. and Turner Broadcasting Sys. v. McDavid

Standards for Mutual Assent

Express Language

Texaco:

- Pennzoil plans to merge with Getty Oil and execute a non-binding Memorandum of Agreement
- Parties issue press releases with decisive language and focusing more on the “when” than the “if”
- Texaco makes a better offer, and Getty backs out
- Pennzoil sues for contractual interference
- Court analyzes using factor test
- Jury awards a \$10.7 Billion judgment (reduced to \$3 Billion)

Standards for Mutual Assent

Express Language

Turner Broadcasting Sys.:

- TBS enters into an LOI with McDavid
- LOI has a non-binding provision and expiration
- Parties continue to negotiate past expiration
- Court looks at internal e-mails, press release, and fact that non-binding provision didn't survive expiration to uphold \$281 Million verdict

Standards for Mutual Assent

Essential Terms

- The “Established View”: If not all essential terms are present in the LOI, the LOI is not enforceable. See Pillar v. Marsam Realty 13th Ave., LLC; Bear Stearns Inv. Prods. v. Hitachi Auto. Prods. (USA)
 - Remember CA views this as separate condition. See Ablett
- The “Modern Trend”: If not all essential terms are present in the LOI, the court can help settle open items. See Okun v. Morton; Patel v. Liebermensch, Turner Broadcasting Systems

Standards for Mutual Assent

Essential Terms

What is an Essential Term?

Parties, Loan Amount, Collateral, Interest Rate,
Fees, Guaranties, Financial Covenant, Default Provisions,
Affirmative and Negative Covenants

Essential	Not Essential

Standards of Mutual Assent:

Partial Performance, Contract Type, Context

- Partial Performance: where evidence of partial performance is abundant, it can be very persuasive that one party believed there was a contract. See Viacom International Inc. v. Tandem Productions.
- Contract Type: Does the amount, complexity or term of the subject agreement necessitate a formal contract? See R.G. Group
- Context: e.g. Does the relevant professionals in the group attribute binding authority to an agreement without it being reduced to formal writing?

Good Faith Duty To Negotiate

- There is no good faith duty to negotiate unless the parties agree to such term. See Feldman v. Allegheny International, Inc.
- A good faith duty to negotiate is merely an unenforceable agreement to agree. See Giverny Gardens, L.P. v. Columbia Hous. Ptnrs.
- The LOI has to give a framework for assessing what constitutes a breach of good faith. See 2004 McDonald Ave. Realty, LLC v. 2004 McDonald Ave. Corp.
- A good faith duty to negotiate can be used to force parties to come together on any open terms. See Teachers Ins. & Annuity Asso. v. Tribune Co.

Good Faith Duty to Negotiate

SIGA Techs., Inc. v. Pharmathene, Inc.: The Facts.

- SIGA Develops Small Pox Antiviral but needs cash
- PharmAthene wants merger but will settle for a licensing agreement based upon agreed to unexecuted, non-binding term sheet
- Parties enter into merger and loan each with a Good Faith Duty to Negotiate provision if merger terminates
- SIGA gets “Seller’s Remorse” coincidentally when they get financially healthy from government grants
- SIGA terminates the merger and tries to negotiate terms in LOI (i.e. \$6MM upfront payment to \$100MM)
- PharmAthene brings suit

Good Faith Duty to Negotiate

SIGA: the Result.

- The Bad: SIGA’s drastic changes to LOI did constitute a breach of its good faith duty to negotiate
- The Worse: Court indicated that for “Type II preliminary agreements” parties could obtain expectation damages if a court found that but for the breaching parties failure to negotiate in good faith, the deal would have been consummated.

E-mails

- If e-mail creates mutual assent, it's binding. *See Forcelli v. Gelco Corp.*
- Manually entered electronic signatures can be binding where the e-mail sets forth circumstances indicating an intent to be bound. *See Cunningham v. Zurich Am. Ins. Co.*
- BUT, caveats and disclaimers work. *See Dhillon v. Zions First Nat'l Bank*

The Lingering Effect of LOIs Post-Close

- Thrifty Payless, Inc. v. The Americana at Brand, LLC:
 - LOI provides Tenant's share of "estimated" taxes, insurance and common area expenses
 - All dollar amounts are clearly indicated as estimates, and this was confirmed in later e-mails
 - Tenant enters into a lease (with an integration clause) based on ratio of floor area of the shopping center (excluding other stores and other non-retail portions)
 - LOI says Landlord can allocate the ratio
 - Tenant's actual share comes in about 3x higher
 - Could Tenant rely on estimates in the non-binding LOI to establish fraud and rescind the integrated contract?

FINAL - FINAL EXAM

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