

Letters Of Intent: Binding Or Not?

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Be careful, your Letters of Intent may be binding unless drafted properly. That's the message from a 2011 case [*First National Mortgage Co. v. Federal Realty Investment Trust*](#), 631 F.3d 1058 (February 1, 2011).

Companies often use Letters of Intent to document their intention to enter into an agreement and do business together. But Letters of Intent are generally intended to be expressions of intent only and usually include a provision that they are not binding agreements. In fact, even if such a provision is not included in the Letter of Intent it is often the general understanding of the parties that the Letter of Intent is not legally binding but merely an "agreement to agree".

This does not mean that Letters of Intent are always short and lacking detail. Letters of Intent often serve as blueprints for agreements to follow and may be many pages long and cover virtually all important deal points and many less important points as well. They can serve as early drafts of final agreements, an opportunity for the parties to set down markers as to their expectations with respect to the agreement that may follow.

Of course, sometimes Letters of Intent state that they are fully binding, which seems contrary to their purpose. But even in this case, courts have sometimes found that they are merely "a deal to make a deal" and allowed parties to change their minds and not move forward, or jettison the other party who signs the Letter of Intent in favor of a new party offering better terms.

But consider the [*First National Mortgage*](#) case referenced above, in which a jury decision awarding the full benefit of a proposal's terms was affirmed by the Ninth Circuit. *First National Mortgage* involved a mortgage company that owned a commercial property and had entered into a one page "Final Proposal" with a real estate investment trust that wanted to control the property.

The one page Final Proposal provided for a monthly lease of \$100,000 with 3% annual increases but did not include a lease term. The Final Proposal also stated "the above terms are hereby accepted by the parties subject only to approval of the terms and conditions of a formal agreement."

The language above was not sufficiently clear to determine whether the parties meant the Final Proposal to be binding or not, thus leading to jury consideration of the issue. In the end, the Ninth Circuit agreed with the trial court decision that "there was conflicting evidence as to whether the Final Proposal was meant to be binding" and let the verdict stand.

The moral of this story is to avoid unclear or conflicting language when drafting a Letter of Intent. If you want a Letter of Intent to be non-binding, with each party having the right to walk away without legal consequence, state so unequivocally. Statements that "the above terms are hereby accepted" or are "subject only to . . . a formal agreement" won't necessarily cut it.

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