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# Letters of Intent in an Acquisition Setting

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# Letters of Intent

## Roadmap

- + Using Letters of Intent
- + Advantages and Disadvantages
- + Binding and Non-Binding Provisions
- + Specific LOI Provisions
- + Obligations During LOI Phase
- + Damages
- + Exiting a Letter of Intent

# Letters of Intent

- + Do I need a letter of intent?
- + Aren't they just a waste of time?
- + Primary Purpose: set out the principle terms of a transaction without binding parties to consummate a deal
- + Desired effects:
  - (1) identifying the asset to be purchased or sold
  - (2) addressing material economic terms,
  - (3) identifying primary conditions to consummation, and
  - (4) preventing parties from spending excessive time, energy and money
- + How do you decide which deals require one and which deals do not?

# Advantages of Signing a Letter of Intent

## + Business, Legal and Psychological

- From all parties' perspective
  - If complex deal, opportunity to agree on terms, identify "deal breakers"
  - Negotiating style, commitment, response time, etc.
- From Acquiror's perspective
  - Information
  - Exclusivity and other covenants
- From Target's perspective
  - Strongest negotiating position pre-LOI execution
  - Distraction
  - Off Market

# Disadvantages of Signing a Letter of Intent

- + Never all-inclusive
- + Minimal legal effect
- + Public Disclosure



*Important for both parties to never  
assume it's a "done deal"*

# LOI Provisions: The Basics



- + Asset, Price, form of payment, structure of transaction
- + Due diligence and exclusivity periods
- + Conduct of Business, Conditions to Close, Consents
- + Non-compete or employment arrangements

# Example: The Exclusivity Period

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applied towards the aggregate Purchase Price or otherwise returned to Buyer if Buyer is not

**6. Exclusivity.** For a period of sixty (60) days following the full execution of this letter (the "**Exclusivity Period**"), Seller agrees that it shall not, nor permit any of its shareholders, officers, directors, employees, representatives, agents, advisors or affiliates to, directly or indirectly, initiate, solicit, negotiate, encourage or discuss with any third party any inquiry, proposal or offer relating to the acquisition of the Purchased Assets or any portion thereof, whether by merger, purchase of assets or stock or other transaction. During the Exclusivity Period, Seller will operate its business only in the ordinary course and in accordance with past practices.

and, subject to paragraphs \_\_\_\_\_ below, the Earnest Money will be non-refundable.

6. Exclusivity. For a period of sixty (60) days following the full execution of this letter (the "Exclusivity Period"), Seller agrees that it shall not, nor permit any of its shareholders, officers, directors, employees, representatives, agents, advisors or affiliates to, directly or indirectly, initiate, solicit, negotiate, encourage or discuss with any third party any inquiry, proposal or offer relating to the acquisition of the Purchased Assets or any portion thereof, whether by merger, purchase of assets or stock or other transaction. During the Exclusivity Period, Seller will operate its business only in the ordinary course and in accordance with past practices.

**7. Conditions to Closing.** Closing on the purchase of the Purchased Assets would be subject to the following additional conditions:

- (a) the completion of a physical inspection of Seller's inventory with Buyer oversight;
- (b) The Buyer will have purchased the Purchase Assets from the Seller free and clear of all liens and encumbrances pursuant to the Buyer / Seller Purchase Agreement;
- (c) The Buyer and the Seller shall have entered into a mutually acceptable purchase agreement (the "Purchase Agreement"), which will include, among other things, the mutual terms contained herein, appropriate representations and warranties, indemnifications, covenants and covenants, and such other agreements, disclosures and commitments that the Buyer reasonably determines are reasonable or desirable in connection with the Transaction.

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# LOI Provisions: The Problem Areas

- + The “unclear” provision
  - “Baskets” and “Caps”
- + The “unsaid” issue
  - Indemnification
- + The “undisclosed” term
  - Shareholder Approval

# Binding & Non-Binding Provisions

## + The Purpose

- Why are some provisions binding and some not?
- Why it is better that way?

## + The Pitfalls

- Failing to draft the language the right way may bind you when you don't want to be bound

# Binding & Non-Binding Provisions: General Rule

## + Express your **INTENT** clearly & concisely

- *Language* is the most reliable indicator of the parties' intent
- Don't want anyone looking "outside the four corners" of the LOI, *Quake Construction, Inc. v. American Airlines, Inc* (Ill. 1990)



# Example: Non-Binding Provision

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\_\_\_\_\_, 20\_\_

(d) the absence of any injunctions, restraints or illegality in connection with the closing,

8. **Non-Binding.** Except as set forth in Paragraph \_\_\_\_, this Offer is not binding and will neither obligate the parties to negotiate exclusively with one another nor to consummate the purchase and sale of the Purchase Assets; provided, however, that the provisions of Paragraphs \_\_\_\_ through \_\_\_\_ will be binding on Seller and will survive the expiration or termination of this Offer and the sale of the Purchased Assets by Seller to any party other than Buyer.

9. **Termination.** Subject to paragraphs \_\_\_\_ above, Buyer may only terminate this Offer prior to the expiration of the Due Diligence Period by delivering a written termination notice to Seller. ~~IF Due Diligence Period is not specified, the Due Diligence Period shall be 10 business days.~~

**8. Non-Binding.** Except as set forth in Paragraph \_\_\_\_, this Offer is not binding and will neither obligate the parties to negotiate exclusively with one another nor to consummate the purchase and sale of the Purchase Assets; provided, however, that the provisions of Paragraphs \_\_\_\_ through \_\_\_\_ will be binding on Seller and will survive the expiration or termination of this Offer and the sale of the Purchased Assets by Seller to any party other than Buyer.

\_\_\_\_\_  
same instrument. Facsimile signatures will be considered original signatures.

If these terms are acceptable, please arrange to have an authorized representative of Seller sign and return a copy of this Offer by facsimile to my attention at \_\_\_\_\_ by \_\_\_\_\_, 20\_\_. If a signed copy is not received by this date, this Offer is null and void. If you have any questions regarding the terms of this Offer, please do not hesitate to contact me at \_\_\_\_\_ or our counsel, \_\_\_\_\_ of the firm \_\_\_\_\_ of at \_\_\_\_\_.

Sincerely, ACCEPTED AND AGREED:  
[Buyer] [Seller]

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# Duty to Negotiate in Good Faith: Illinois Law

- + Duty May Include Preventing a Party From:
  - Renouncing the Deal
  - Abandoning Negotiations
  - Insisting on Unreasonable Conditions
  
- + Duty Does Not Limit Ability to Negotiate in Self-Interest



# Damages

## + Common Breaches of LOIs

- Duty to Negotiate in Good Faith
- Confidentiality
- Exclusivity
- Operating in Ordinary Course

## + Remedies Available

- Types of Damages
- Calculating Damages

# If the Deal Dies

- + The termination letter
- + What else can or should I do?
  - Send a formal termination letter
  - May have to pay a breakup fee
  - If set up virtual data room, terminate passwords to prevent dissent
  - Send letter to all those who have checked out documents
  - Reminder of post-termination obligations such as confidentiality or return of company information



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