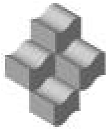

McNichols Randick O'Dea & Tooliatos LLP

BRIEFLY SPEAKING

June 2001

LETTERS OF INTENT: Valuable Tool or Trap

By Steve McNichols

Letters of intent are often used during negotiations for major real estate and business contracts. Parties often prepare and sign these documents to identify in writing, which issues are settled and which are still open for negotiations. Reducing these points to writing has many benefits. It forces parties to give more thought to the state of the negotiations, to state their understanding of the agreed and open issues clearly and it helps to avoid misunderstandings. Letters of intent can prevent re-negotiation of agreed upon issues and expedite the process of preparing a formal written agreement.

However, these documents can also be a source of litigation when one party renounces the terms of the letter of intent, abandons negotiations, refuses to execute the definitive agreement or insists on conditions that do not conform to the letter of intent. The litigation generally revolves around the issue of whether the letter of intent is a binding contract or merely an agreement to agree.

The general legal rule applied in this situation is that a letter of intent is a binding contract if the parties intend it to be binding. Because the test is one of intent, the cases are highly fact specific and somewhat unpredictable. This, of course, enhances the chances of litigation.

A letter of intent should clearly, unequivocally and expressly states whether or not the parties intend the document to be binding. If the parties intend the letter of intent to be a binding contract, the document should state that the parties intend to be immediately bound by the letter of intent and that the enforceability of the letter is not contingent upon the

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In the Law

By Phil Vermont

May a realtor who was sued for negligent disclosure of defects in real property obtain equitable indemnity (in other words, contribution) from a home inspection company that allegedly breached its duty to the purchaser to discover and disclose the same defects? The answer is yes.

In Leko v. Cornerstone Building Inspection Service, a January 2001 decision of the California Court of Appeal, a realtor was sued for negligent disclosure of defects in real property. In response, the realtor cross-complained for indemnity and contribution from a home inspection company hired by the buyer. Additionally, the realtor sought indemnity and contribution from a prior home inspection company who had prepared its report for a different prospective purchaser in connection with a previous transaction involving the same property.

The Court in Leko stated that so long as the home inspection company intended or knew with substantial certainty that its report would be used in subsequent transactions involving the same property, it could be sued for indemnity and contribution.

In short, the Court of Appeal found that the success of the realtor's claim for indemnity depends on whether a home inspection company and a realtor may be jointly and severely liable for the failure to disclose defects to a purchaser of residential real property. The Court found that when the negligent acts of two parties are both a cause of an indivisible injury, those parties are jointly and severely liable for that injury.

The Court, in reaching its conclusion, emphasized that the duties of home inspection companies and realtors are not co-extensive. The failure to disclose a particular defect may violate either duty or both depending on the particular circumstances of the case. Ultimately, when a purchaser of residential real property is damaged by the nondisclosure of a defect that both the inspector and the realtor were obligated to discover and disclose, it is fair to apportion the damages between the two (or in this case, both home inspection companies and the

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parties entering into a formal agreement. If a binding contract is desired, the parties should set out in detail not only the deal points of their agreement, but also the purpose and objectives of the agreement, and the circumstances under which the agreement was made. Comprehensive recitals can prove very useful if legal action is necessary to enforce or interpret the letter of intent. It is also advisable to provide an alternative dispute resolution procedure.

If, on the other hand, the parties do not intend the letter to be binding, they should expressly say so. In California, parties who sign documents must be careful because virtually anything in writing, signed by a party sought to be charged, may be found to be a binding agreement. To avoid this result, the parties should expressly state that the letter of intent is not a binding contract and does not create a binding obligation until a formal agreement is signed by all parties.

Parties should also be careful that the letter of intent does not contain language which creates an ambiguity as to whether the contract is binding or not. For example, parties sometimes place language in letters of intent requiring the parties to negotiate in good faith to come to an agreement on the formal contract. Another similar provision prohibits the parties from negotiating with or entering into agreements with others regarding the subject matter of the letter of intent for a specific period of time. The effect of such provisions is unsettled under California law. As a result, this type of provision, although ostensibly well meaning, can create ambiguity that results in further litigation.

Given all of these risks, some parties are reluctant to use letters of intent at all, or use them only when all of the major points have been finally settled. By taking this overly cautious approach, these parties miss out on the obvious benefits of using letters of intent. Carefully drawn letters of intent serve a valuable purpose. The best strategy is to use this valuable tool, but to make sure that it contains a clear and concise statement of the purpose and effect of the document.

EPICUREAN DELIGHT
VARIATIONS ON A MIDWESTERN STAPLE

By Bob Randick

In 1845 industrialist, inventor and philanthropist Peter Cooper obtained the first patent for a gelatin dessert. Today, over 400,000,000 packages of Jell-O® gelatin dessert are produced annually, and you can find at least one package in every kitchen in Iowa. The following are time-tested recipes, straight from the heartland.

DUMP SALAD

1 lg. carton large-curd cottage cheese
1 can crushed pineapple, drained
1 can mandarin oranges, drained
1 (3 oz.) pkg. orange Jell-O®
1 carton Cool Whip®

Drain cottage cheese. Place into bowl and pour dry Jell-O® over cottage cheese; mix well. Add rest of ingredients; mix well. Cool 3 to 4 hours before serving.

THELMA'S CRANBERRY SALAD

6 oz. cherry Jell-O®
2 cups hot water
1 can whole cranberry sauce
½ cup finely-diced celery
2 T. salad dressing
2 cups Cool Whip®

Mix Jell-O® and hot water until dissolved. Add cranberry sauce which has been mixed up with a fork, along with the celery. Pour all into a 9 x 13 inch pan. Let stand until firm. Combine salad dressing and Cool Whip®; spread over firm Jell-O®. Sprinkle a few nuts on top. This salad keeps several days in the refrigerator.

Announcements

McNichols Randick O'Dea & Tooliatos, LLP

IS PLEASED TO ANNOUNCE THAT

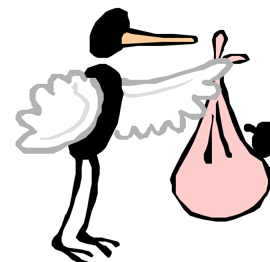
EVERITT BEERS

Formerly a partner of Oppenheimer Wolff & Donnelly, LLP, has become *Of Counsel* to the firm. Mr. Beers will continue his practice in Patent and Intellectual Property Litigation and Transactions, with an emphasis in the areas of computer science, computer engineering, computer software and hardware, and online technologies.

Mr. Beers is a Patent Attorney registered to practice before the United States Patent and Trademark Office.

LESLIE A.BAXTER

Congratulations to Leslie Baxter and her husband, David Hovey, on the birth of their second daughter, Lauren Celeste. Born April 17, 2001, Lauren weighed in at 10 lbs. 1 oz. and 22 inches in length.



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realtor).

The Court of Appeal has also made a recent ruling, in January of 2001, which significantly modifies the eviction action for nonpayment of rent in a commercial property context.

In Levitz Furniture v. Wingtip Communications, Inc., the Court considered whether a commercial lessor's Three-Day Notice to Quit or Pay Rent, which included a demand for rent unpaid for more than a year before the notice was served, can support an action for unlawful detainer. Modifying statutory law in effect since approximately 1863, the Court concluded that inclusion of rent due for over a year does not cause the unlawful detainer action to fail, if the notice also includes a demand for payment of rent within a year of the notice and when the notice specifically indicates that it is an "estimated" rent notice.

In this case, Levitz Furniture Company subleased property in a shopping center to Wingtip Communications, Inc. Levitz served a Three-Day Notice to Pay Rent or Quit on Wingtip. The notice stated that rent was due in a "reasonably estimated sum." In the notice, on its face, Levitz included rent for December 1997, more than one year before the notice was served.

Just prior to trial, Wingtip moved for summary judgment, asserting that Levitz's inclusion of the December 1997 rent invalidated the Three-Day Notice and precluded Levitz's pursuit of an unlawful detainer action based on the defective notice. The Trial Court agreed based on longstanding law and granted Wingtip's motion.

The Court of Appeal reversed the decision of the Trial Court. The Court analyzed the potential impact of California Code of Civil Procedure §1161.1 (the 1990 statute in which the legislature allowed estimated rent notices in the commercial property context). Specifically, the Court compared the impact of C.C.P. §1161.1, on certain provisions of C.C.P. §1161 (the original 1872 statute governing unlawful detainer or eviction actions). Section 1161 applies to all eviction actions where the Three-Day Notice to Pay Rent is not "estimated". That section requires that the Three-Day Notice not include any rent more than one year old.

The Court conceded that under C.C.P. §1161 a notice that seeks rent in excess of the amount due (i.e., over a year old) is invalid. However, the Court found that §1161.1 liberalized the notice provisions of C.C.P. §1161, allowing a commercial landlord to estimate rent. So long as the estimated amount represents a sum that is less than 20% of the total sum due within one year, the Court found that the notice was valid.

Essentially, this decision is pro-landlord. So long as the landlord properly estimates the rent due within 20% of the actual sum due, the landlord can now ask for rent more than one year old.

In a split decision, the Supreme Court of California affirmed the decision of the Court of Appeal.

Book Corner
Horatio Hornblower

By Michael E. Kyle

"Yo Ho Ho and a bottle of rum." I recently indulged some childhood imaginings by "rediscovering" the Horatio Hornblower series written by C. S. Forester. What I thought might be childhood level storytelling turned out to be one of the best series of books I have ever had the pleasure to read. There are 11 novels in all. The series follows the central character, Horatio Hornblower, from his first rank shipboard, Midshipman, through his rise to Lordship and Admiral of the Fleet. More than just adventure stories, Horatio's character is well developed by the author from young manhood to adulthood.

The series takes place over the period from the late 17th century through the end of the Napoleonic Wars in the first quarter of the 18th century. The books are replete with details of life aboard British Navy sailing vessels of the period. Tough! Reading the books also gave me a better understanding of the ebb and flow of the Napoleonic Wars on the European continent and just what a crucial role the British Navy played in the final outcome. At about the time that I finished reading the series, the PBS program on Napoleon was broadcast, and I felt more enriched by having read the Hornblower series.

If you're interested, I suggest the Backbay Books softcover edition published by Little Brown & Company. If nothing else, the book backs are numbered making it more difficult to read the books out of order! I became so engrossed in the adventures that I read the 11 books in little less than three weeks' time. I shared my experience with a book-loving friend, and I sent one or two in the series to him as a birthday present. His response was gratifying in that he said it was some of the best reading he had experienced in a long while. He said because he enjoyed the books so much, he was reading them slowly to just savor them. He is depressed by the prospect that he will finish the series shortly. A gourmet's approach as opposed to an outback Survivor! Take your pick.

For those who follow my suggestion to investigate the Hornblower saga, there is one additional item I recommend strongly: purchase a copy of the *The Hornblower Companion* by C. S. Forester. I

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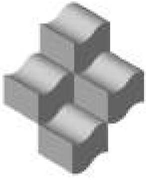

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Horatio Hornblower – By Michael E. Kyle

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found this book in softcover. It is printed by the Naval Institute Press, Annapolis, Maryland. 1964. The book includes commentary by Forester with maps of each of the areas involved in the novels. It follows the novels in sequence and includes maps depicting the routes of the individual ships in battle. If you are a visual learner like me, you will find this book invaluable. You also are afforded an opportunity to "get inside" Forester's mind as in the last part of the book he shares some of his thought processes while writing the novels.

Recently, there have been two broadcasts based on the Hornblower series on the A&E channel. These are "… frightfully well done 'ol boy…", but for reasons known only to the producers, they do not follow the storylines exactly. Rather – and I suspect in an effort to heighten excitement – they blend episodes from two and three individual books into a single show. Nevertheless, the settings are marvelous, and it appears that the filming is done on authentic sailing ships.

The only Horatio Hornblower movie I have seen starred Gregory Peck, and the settings gave the appearance of having been filmed on a Hollywood sound stage. However, it did follow the storyline more closely. It is based on the sixth book in the series (*Beat to Quarters*, C. S. Forester, 1938.) which deals with Hornblower's assigned task of sailing to South America to aid a rebel force opposing the occupying Spanish forces. Communications weren't what they are today, and people in the western hemisphere were constantly unsure of the current alignment of "friends" and "foes" on the European continent. During the Napoleonic Wars, Spain was at times a foe of England and at other times an ally. At any rate, Hornblower's activities amongst the "natives" of South America make exciting reading.

Though he is best known for the Hornblower series, the English born C. S. Forester worked for a time in Hollywood as a screenwriter. Rumor has it that he returned to England somewhat hastily only two steps ahead of a threatened paternity suit. His other writings include books about figures in World War I (*Rifleman Dodd, The General*). He also wrote *African Queen* which all moviegoers know as the story behind the Hepburn and Bogart movie.

There is a saying that imitation is the best form of flattery. The Hornblower series seems to have spawned a whole host of imitators. The best known example today are the Patrick O'Brian books. I began reading the first in the O'Brian series and couldn't get through it. In my opinion, there is no acceptable duplicate of the original. Pick up *Midshipman Hornblower* and have yourself a great read.