Enforeability of Precontractual Agreements in Illinois: The Need for a Middle Ground

Mark K. Johnson
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MARK K. JOHNSON**

INTRODUCTION

A common pattern exists in commercial life in Illinois: two parties agree on the general terms of a transaction, and one or both execute a precontractual agreement detailing the settled terms, while anticipating further negotiations.1 At this point, many business persons consider themselves “bound,” if not legally, at least morally or ethically.2 Often the parties contemplate future execution of a formal contract document.3 Frequently, however, the further negotiations stall and one party decides not to conclude the transaction. The disappointed party then sues, seeking legal enforcement of the precontractual agreement.4

Precontractual agreements5 used in this context have many names: e.g., “letters of intent,” “agreements in principle,” “memoranda of intent,” and “agreements to agree.”6 Some Illinois courts have noted that the title of the agreement implies a preliminary as opposed to final agreement.7 Business persons also infer non-enforceability from such titles,

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3. See Knapp, supra note 2, at 682-84. The parties in a “formal contract contemplated” situation usually have differing notions on whether they are in any way “bound” before the execution of the formal document.
5. The term “precontractual agreement” is somewhat of a misnomer, as it infers a preliminary stage of negotiation before contracting, which would thus be non-binding. This Note uses the term for any of the various types of agreements used by parties before execution of a final formal written contract. In this sense, precontractual agreements may or may not be binding depending on the myriad factors discussed herein.
6. See generally RALPH B. LAKE & UGO DRAETTA, LETTERS OF INTENT AND OTHER PRECONTRACTUAL DOCUMENTS 6, 7 (1990). Lake & Draetta define a “Letter of Intent” as a “precontractual written instrument that reflects preliminary agreements or understandings of one or more parties to a contract.” Id. at 5.
7. Id. at 7, n.17 (citing Chicago Inv. Corp. v. Dolins, 481 N.E.2d 712 (Ill. 1985) (court stated
desiring to unilaterally bind the other party while retaining complete freedom for themselves to withdraw from the precontractual agreement with impunity. The commercial reality of modern business often dictates that transactions go forward in these imperfect contractual settings, even if the parties must make substantial expenditures or partially perform before formal contract execution. Consequently, when a court applies the traditional "all or nothing" logic to a disputed precontractual agreement, uncertainty regarding enforceability can then produce an inequitable result.

Prominent contract law commentators have strongly urged courts to recognize the enforceability of precontractual agreements. Professor Charles Knapp advocates enforcement of certain agreements called "contracts to bargain," which occur in the intermediate stage of contract formation between preliminary negotiations and final contract execution. Professor E. Allan Farnsworth (Co-Reporter for the Restatement (Second) of Contracts and author of a leading contract law treatise) also advocates judicial recognition of intermediate regimes, which he claims already exist in contract law. Farnsworth disdains Knapp's idea that a "contract to bargain" is needed as a separately enforceable entity. Instead, Farnsworth suggests that courts first recognize the intermediate regimes and then decide the enforceability of each particular precontractual agreement by imaginatively applying traditional contract principles. In any event, both commentators call upon courts to abandon the rigid "all or nothing" approach to contract adjudication, and to adopt a more flexible theory of precontractual liability based on an obligation of

that "letter of intent" title of document suggests preliminary negotiations as opposed to final contract). But see Harris v. American Gen. Fin. Corp., 368 N.E.2d 1099, 1103 (Ill. App. Ct. 1977) (court stated that the legal effect of a document is not determined by its label). To avoid this distinction, this Note uses "precontractual agreement" to refer to an instrument executed by the parties during the "twilight zone" between preliminary negotiation and formal written contract.

8. See infra note 178 and accompanying text.
9. See infra note 96 and accompanying text.
11. See generally Knapp, supra note 2. Professor Knapp was one of the first to introduce this "middle ground" concept, and many commentators have cited Knapp in further developing the "contract to bargain" theme. See, e.g., E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L. Rev. 217, 218 n.2, 267 n.209 (1987); Temkin, supra note 10, at 127 n.10.
12. See generally Farnsworth, supra note 11. See also infra notes 57-60 and accompanying text.
13. Id. at 220.
14. Id.
good faith in the negotiating process.\textsuperscript{15}

In Part I, this Note traces the background of the traditional "all or nothing" contract doctrine as it applies to precontractual agreements and discusses the application of various more flexible theories, including the obligation to negotiate in good faith.\textsuperscript{16} The Illinois courts have not enthusiastically embraced these alternative theories, although the current trend in other jurisdictions is to enforce precontractual agreements in certain limited factual situations.\textsuperscript{17} Generally, enforceability turns on whether the parties intended to be bound by the agreement.\textsuperscript{18} Following established contract doctrine, determination of intent is an objective exercise.\textsuperscript{19} Some jurisdictions have adopted a set of "factors" to assist in determining the parties' intent.\textsuperscript{20} In Part II, this Note examines the factors that Illinois courts consider relevant to the enforceability of precontractual agreements,\textsuperscript{21} and canvases how courts applying Illinois law have dealt with the obligation of good faith in negotiation.\textsuperscript{22}

The basic business purpose of a precontractual agreement is to record any terms that the parties have agreed upon and to provide a framework for further negotiations.\textsuperscript{23} Other uses include obtaining financing,\textsuperscript{24} inducing subcontractors to commit,\textsuperscript{25} and obtaining regulatory agency approval of a transaction.\textsuperscript{26} The precontractual agreement is a useful device in the business arena, but courts and commentators disagree whether legal enforcement of these agreements will aid or hinder business transactions.\textsuperscript{27} Business persons also disagree, believing that legal system participation in negotiations is unnecessary and that economic reasons make honoring promises essential in most business con-

\textsuperscript{15} See also Temkin, supra note 10, at 141-61.
\textsuperscript{16} See infra notes 31-102 and accompanying text.
\textsuperscript{17} See Temkin, supra note 10, at 153.
\textsuperscript{18} See Lake & Draetta, supra note 6, at 30-32. For the Illinois Supreme Court's interpretation of intent to be bound, see Quake Constr. Co. v. American Airlines, Inc., 565 N.E.2d 990 (Ill. 1990) (discussed infra at notes 161-205 and accompanying text).
\textsuperscript{19} Id.
\textsuperscript{20} See infra notes 39, 40 and accompanying text.
\textsuperscript{21} See infra notes 103-60 and accompanying text.
\textsuperscript{22} See infra notes 146-48 and accompanying text.
\textsuperscript{23} See Lake & Draetta, supra note 6, at 11.
\textsuperscript{26} See, e.g., Reprosystem, B.V. v. SCM Corp., 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984). SCM's 10-K report, filed with the SEC, referred to the sale of a corporate division to Reprosystem via an "agreement in principle," but also stated that SCM made "no assurance that the transaction would be completed." 727 F.2d at 260.
\textsuperscript{27} See infra notes 206-39 and accompanying text.
texts.28 In Part III, this Note discusses the possible business consequences of legal enforcement of precontractual agreements,29 and makes recommendations for drafting precontractual agreements under Illinois law depending upon the desired binding effect.30 In Part IV, the Note concludes by recommending that the Illinois courts accept an intermediate, flexible regime of enforceable precontractual agreements, which will better reflect the actual intentions of business users of such agreements.

I. BACKGROUND

A. Traditional Contract Law

Most courts decide precontractual agreement litigation on traditional contract law principles.31 Under the traditional “all or nothing” approach, courts determine whether a precontractual agreement is a binding contract by first deciding whether the parties intended to be bound.32 Next, the courts search for definite terms, enforcing precontractual agreements only when sufficiently definite terms are present.33 Sometimes principles of consideration affect enforcement.34 In most cases, however, courts using the “all or nothing” approach strive to find a contract when the parties evidence intent to be bound by a precontrac-

28. LAKE & DRAETTA, supra note 6, at 11 n.29 (citing Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 63 (1963)).
29. See infra notes 240-47 and accompanying text.
30. See infra notes 248-76 and accompanying text.
31. Temkin, supra note 10, at 131.
32. Id. Courts and commentators interpret the many “intent factors” differently. See, e.g., Borg-Warner Corp. v. Anchor Coupling Co., 156 N.E.2d 513 (Ill. 1958) (discussed infra at notes 103-09 and accompanying text); see also Farnsworth, supra note 11, at 257, 273 (future contract contemplated usually indicates no intent to be bound). But see LAKE & DRAETTA, supra note 6, at 93 (presence of all essential terms might indicate intent to be bound, even when parties contemplate future formal contract).
33. See LAKE & DRAETTA, supra note 6, at 90-93 (collecting cases indicating that completeness of terms in the precontractual agreement may be the most important factor in enforceability decisions). But see Pearson Bros. Co. v. Pearson, 113 B.R. 469, 476-77 (Bankr. C.D. Ill. 1990) (district court refused to enforce “agreement to agree,” which bankruptcy magistrate found complete as to essential terms, because the agreement was still too indefinite for the court to fashion a remedy). Cf. U.C.C. § 2-305 cmt. 1 (rejecting in sales transactions the notion that “an agreement to agree is unenforceable” for “indefiniteness” because it includes an open price term; instead recognizing that the dominant intention of the parties to be bound to the deal prevails).
34. See, e.g., Channel Home Ctrs. v. Grossman, 795 F.2d 291 (3d Cir. 1986) (finding consideration in contract to negotiate shopping mall store lease in good faith was provided by “value” of letter of intent: tenant conferred value in exchange for mall owner’s promise to negotiate in good faith; mall owner used letter of intent to obtain financing for mall); see also LAKE & DRAETTA, supra note 6, at 36-37 (general consideration discussion); Farnsworth, supra note 11, at 246 (describing how inclusion of too many conditions precedent in preliminary agreements may make the ultimate agreement illusory and thus unenforceable); Temkin, supra note 10, at 154-55 (negotiating parties’ “withdrawal from market” provides consideration in corporate acquisition “agreements in principle”).
tual agreement. 35 Similarly, courts are loath to enforce precontractual agreements when binding intent is not absolutely certain. 36

Under traditional contract principles, the parties must objectively manifest their intent to be bound. 37 Subjective intent by one party to bind the other is insufficient to form a contract. 38 "All or nothing" courts have developed objective factors to aid in assessing the parties' objective intent. 39 Some of the factors are: express statements reserving binding effect until execution of subsequent contract; any partial performance; agreement on all essential terms; and the complexity of the underlying transaction. 40 Frequently courts frame the issue in terms of ambiguity, 41 focusing on the express language of the precontractual agreement. 42 Under this approach, courts confine themselves to the "four-corners" of the document and prohibit any extrinsic evidence relating to interpretation. 43 Other courts look to the surrounding circumstances and conduct of the parties for manifestations of intent. 44 Some

35. Temkin, supra note 10, at 131. Temkin also says that when courts are convinced that the parties intended to be bound by a precontractual agreement, they will read enough terms into the agreement to overcome any completeness problem, if a basis for remedy exists. Id.

36. Lake & Draetta, supra note 6, at 35. See, e.g., Teachers Ins. & Annuity Ass'n v. Tribune Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987) (stating that courts' primary concern is not to trap parties into "surprise" binding agreements).


38. Skycom, 813 F.2d at 815.


40. Lake & Draetta, supra note 6, at 90 n.24. For factors used by courts interpreting Illinois law, see Chicago Inv. Corp. v. Dolins, 481 N.E.2d 712 (Ill. 1985); see also Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc., 500 N.E.2d 1 (Ill. 1986) (discussed infra at notes 137-41 and accompanying text).


42. In Interway, 407 N.E.2d at 620, the express language said "we have agreed," but also said "subject to a definitive . . . contract." In Quake, 565 N.E.2d at 996, the language said "[w]e have elected to award," but also said "reserves the right to cancel;" see also infra notes 161-96 and accompanying text.

43. See, e.g., Rakowski v. Lucente, 472 N.E.2d 791 (Ill. 1984); see also infra notes 151-60 and accompanying text.

44. See, e.g., Itek Corp. v. Chicago Aerial Indus., Inc., 248 A.2d 625, 629 (Del. 1968) (citing Borg-Warner Corp. v. Anchor Coupling, Inc., 156 N.E.2d 513 (Ill. 1958), as authority that the trier of fact "of necessity" must look at the surrounding circumstances and conduct of the negotiating parties to determine whether an enforceable agreement exists). For a discussion of Borg-Warner, see infra notes 103-09 and accompanying text. Farnsworth says any court inquiry into fair dealing is incomplete unless the court looks at the surrounding circumstances to determine the parties' expectations. Farnsworth, supra note 11, at 272.
commentators consider partial performance by either party as the strongest indicator of an intent to be bound.\textsuperscript{45}

The contract law commentators argue that courts viewing precontractual agreements in the traditional “all or nothing” approach confine themselves to artificial “pigeon holes” to decide enforceability.\textsuperscript{46} Illinois courts have steadfastly retained the “all or nothing” approach in contract cases, particularly in precontractual agreement cases.\textsuperscript{47} Thus confined, Illinois courts must strain to find “contract” or “no contract,” when justice instead would mandate an intermediate finding.\textsuperscript{48} Contract law in Illinois, therefore, needs an intermediate position to more fairly decide enforceability of precontractual agreements. This intermediate position is called the “contract to bargain.”

\textbf{B. The “Contract to Bargain”}

Several contract law commentators advocate variations of the “contract to bargain” as the needed intermediate position.\textsuperscript{49} Courts enforcing a “contract to bargain” would legally recognize what many business persons already feel—that precontractual agreements are morally or ethically binding.\textsuperscript{50} Enforcement of “contracts to bargain” would lend predictability to an otherwise unstable area of contract law and would provide remedies for disappointed parties wronged during incomplete transactions.\textsuperscript{51}

As in traditional contract law, the objective intent of the parties is paramount when the binding effect of a “contract to bargain” is ques-

\textsuperscript{45} See, e.g., Frank Horton & Co. v. Cook Elec. Co., 356 F.2d 485 (7th Cir. 1965), cert. denied, 384 U.S. 952 (1966) (court found that letter of intent was binding even though parties contemplated later contract because letter contained all essential terms and the party seeking enforcement had commenced performance); Holmes, supra note 10, at 782 (stating that partial performance supplanted even expressed intent); see generally Lake & Draetta, supra note 6, at 103-12. But see Farnsworth, supra note 11, at 273 (behavior of parties and state of negotiations at time of breach are most important surrounding circumstances).

\textsuperscript{46} See, e.g., Knapp, supra note 2, at 677. Courts define precontractual agreements as “agreement to agree” or “formal contract contemplated” cases, to avoid the polar extremes of “mere negotiation” or “complete contract.”

\textsuperscript{47} See infra notes 103-42 and accompanying text.

\textsuperscript{48} See Knapp, supra note 2, at 715 (criticizing Borg- Warner, 156 N.E.2d 513, as an example of judicial fiction required when a judge is concerned with justice for the parties but must use structured “all or nothing” contractual analysis to decide enforceability of a precontractual agreement).

\textsuperscript{49} See generally Dugdale & Lowe, supra note 10 (“contract to negotiate”); Farnsworth, supra note 11 (“agreement to negotiate” and “agreement with open terms”); Knapp, supra note 2 (“contract to bargain”); Temkin, supra note 10 (“agreement in principle”).

\textsuperscript{50} Knapp, supra note 2, at 679-84 (discussing the extent business persons consider themselves “bound” in various precontractual settings).

\textsuperscript{51} Knapp, supra note 2, at 726-28. See also Farnsworth, supra note 11, at 259-60 (stating that no area of contract law is less predictable).
tioned.\textsuperscript{52} If the parties have clearly manifested such an intent, courts should not ignore it just because the precontractual agreement falls into a traditionally unenforceable “pigeon hole.”\textsuperscript{53} Conversely, courts should also honor the expectations of both parties clearly \textit{not} intending to be bound by a precontractual agreement, even if the agreement is otherwise contractually complete.\textsuperscript{54} In Illinois precontractual agreements, the intent of the parties is controlling.\textsuperscript{55} Yet Illinois courts have not recognized enforcement of “contracts to bargain” as a method to effectuate this intent. Judicial recognition of “contracts to bargain” would allow courts to more narrowly tailor their decisions to the parties’ true intent.\textsuperscript{56}

In his very thorough treatment of precontractual liability, Professor Farnsworth expands this idea to four regimes: the initial polar regime of “negotiation” (unenforceable); the intermediate regimes of “agreement to negotiate” and “agreement with open terms” (sometimes enforceable); and the opposite polar regime of “ultimate agreement” (always enforceable).\textsuperscript{57} A separately recognized “contract to bargain” is thus superfluous, because courts can readily recognize the parties true intent by enforcing precontractual agreements under these regimes within the traditional contract law sphere.\textsuperscript{58} Farnsworth’s “agreements with open terms” and “agreements to negotiate” impose a duty of fair dealing between the parties.\textsuperscript{59} The next hurdle for courts considering enforceability of precontractual agreements is to define this duty, also called the obligation to negotiate in “good faith.”\textsuperscript{60}

\textbf{C. The “Good Faith” Doctrine}

All contracts carry an implicit obligation of good faith performance.\textsuperscript{61} This obligation currently may not extend to parties in precon-

\begin{itemize}
  \item \textsuperscript{52} See generally Lake & Draetta, \textit{supra} note 6, at 38-41; Temkin, \textit{supra} note 10, at 132-33.
  \item \textsuperscript{53} Temkin, \textit{supra} note 10, at 135.
  \item \textsuperscript{54} \textit{Id}.
  \item \textsuperscript{55} See infra note 167 and accompanying text.
  \item \textsuperscript{56} Temkin, \textit{supra} note 10, at 142.
  \item \textsuperscript{57} See Farnsworth, \textit{supra} note 11, at 220.
  \item \textsuperscript{58} \textit{Id}.
  \item \textsuperscript{59} See generally id. The difference is that the “agreement with open terms” imposes the duty of fair dealing only with regard to the negotiation of the open terms, whereas the “agreement to negotiate” imposes a general duty of fair dealing with regard to the entire negotiation regime. \textit{Id} at 263.
  \item \textsuperscript{61} Compare Restatement, \textit{supra} note 37, \S 205 (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”) \textit{with} U.C.C. \S 1-203 (1978) (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”).
\end{itemize}
tractual negotiations. Some courts have confused the obligations of
good faith in negotiation with "best efforts" in performance. Difficulty
in defining "good faith" has prevented courts from enforcing a precon-
tractual obligation to negotiate in good faith.

Good faith in contractual relations is thus a fertile topic for com-
mentators. Professor Robert Summers defines good faith as an "ex-
cluder," ruling out various forms of bad faith conduct. Others oppose
recognition of any such inchoate obligations. But Professor Knapp ar-

gues that recognition of "contracts to bargain" would enable courts to
consider bad faith as breaching conduct, allowing them to concentrate
instead on the critical good faith question: "Why did the [recalcitrant
party] refuse to go through with the [deal]?" Traditional "all or noth-
ing" principles constrict the courts to two extremes: finding a complete
contract where the parties intended only a "contract to bargain," or find-
ing no contract at all and ignoring any bad faith conduct by the breach-
ing party.

Some case law examples from other jurisdictions illustrate these ex-
tremes. The decision of the Delaware Supreme Court in Itek Corp. v.
Chicago Aerial Industries, Inc. is an early application of Illinois law
recognizing the precontractual obligation to negotiate in good faith. The
principal stockholders of Chicago Aerial Industries ("CAI") negotiated
for the sale of their controlling stock to Itek Corp., while concurrently
enticing a third party to reopen bidding for the same stock. When the

62. See Farnsworth, supra note 11, at 269 (citing Restatement (Second) of Contracts § 205 cmt. e (1981), which notes that its "section on 'good faith,' like the comparable section of the Uniform Commercial Code, 'does not deal with good faith in the formation of a contract'"). But see Lake & Draeltt, supra note 6, at 159 (stating that Restatement § 205 cmt. e, supra, may permit actions based on bad faith in negotiation).

63. See, e.g., Lake & Draeltt, supra note 6, at 160 n.39 (citing Channel Home Ctrs. v. Grossman, 795 F.2d 291 (3d Cir. 1986)).

64. See, e.g., Reprosysten, B.V. v. SCM Corp., 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984) (discussed infra at notes 76-81 and accompanying text); see also Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1223 (7th Cir. 1988) (stating that disagreement between parties is not "bad faith"). Farnsworth, however, disagrees that courts can't define fair dealing in negotiation. Farnsworth, supra note 11, at 268.

65. See generally Lake & Draeltt, supra note 6, at 123-25, 158-71; Farnsworth, supra note 11, at 268-86; Summers, supra note 60, at 195; Temkin, supra note 10, at 141-61.

66. Summers, supra note 60, at 232-43.

67. See generally Andrew R. Klein, Comment, Devil's Advocate: Salvaging the Letter of Intent, 37 Emory L.J. 139 (1988) (recommending that letters of intent be non-binding in corporate acquisition settings and not impose an ill-defined obligation to negotiate in good faith). See also id. at 148-49 (criticizing Temkin's recommendation that courts should impose a duty of good faith in negotiation of corporate acquisitions).

68. Knapp, supra note 2, at 727.

69. Id. at 716 (discussing Borg-Warner, 156 N.E.2d 513).

70. Id. at 727.

71. 248 A.2d 625 (Del. 1968).
third party bid higher, CAI terminated negotiations with Itek, even though Itek agreed to all the additional terms proposed by CAI, including price adjustments and other concessions.72 The Delaware Supreme Court reversed the trial court’s summary judgment for CAI73 and remanded the case to the trial court with directions to consider whether defendant had acted in bad faith.74 Although decided in Delaware, Itek held that under Illinois law parties could obligate themselves to negotiate in good faith toward a formal agreement.75

The opinion of the federal district court in Reprosystem, B.V. v. SCM Corp.76 contains an extensive discussion of the obligation to negotiate in good faith.77 Reprosystem concerned failed negotiations for the purchase of SCM’s European copier business. After lengthy negotiations which culminated in an “agreement in principle,” the deal fell through. One of the provisions of the purchase was that SCM operate the European subsidiary in Reprosystems’ behalf after the parties had agreed to the basic transaction, but while the final contract was being negotiated. In the interim, SCM changed management teams. When the new management discovered that the subsidiaries were more profitable than SCM previously realized, SCM backed out of the deal. Reprosystem sued for enforcement of the “agreement in principle,” alleging breach of contract, promissory estoppel, and failure to negotiate in good faith.78 The district court found for Reprosystem based on SCM’s breach of the duty to negotiate in good faith.79 The Second Circuit reversed,80 however, recognizing that a duty to negotiate in good faith existed, but concluding that under New York law the duty was too indefinite to enforce.81

72. Id. at 628.

73. Id. at 630. The court held that language of the precontractual agreement such as “we have agreed to work towards . . .,” “reasonable efforts to agree upon and prepare contract,” and “parties under no further obligation” created an issue of fact precluding summary judgment. Id. at 629.

74. Id. The court directed the trial court to examine entire circumstances of negotiations and conduct of principles to determine if an enforceable precontractual agreement existed.

75. Interestingly, despite the widespread judicial and commentary citation of Itek to support this Illinois law “good faith” principle (see, e.g., Farnsworth, supra note 11, at 265 (calling Itek “the leading example”)), on remand the trial court found that the parties had not entered an enforceable agreement. Itek Corp. v. Chicago Aerial Indus., Inc., 274 A.2d 141 (1971).


77. Temkin, supra note 10, at 149.

78. See generally id. at 149-53.


81. 727 F.2d at 264. The court also concluded that no enforceable contract existed between the parties, and thus no implied obligation to negotiate in good faith could arise. Temkin suggests that the court reverted to the traditional “all or nothing” approach, thus precluding the good faith issue. Temkin, supra note 10, at 152.
More recently, in *Channel Home Centers v. Grossman*, the Third Circuit held that under Pennsylvania law a letter of intent created a mutually enforceable agreement obligating the parties to negotiate in good faith. In *Channel Home*, a shopping mall owner and major tenant disputed a precontractual agreement. The parties executed the agreement to reserve mall space for the tenant during formal lease negotiation. The tenant alleged that the agreement bound the parties to negotiate in good faith, and that the mall owner had breached the agreement by terminating negotiations with the tenant and then entering into a lease agreement with another party. The Third Circuit remanded, directing the trial court to consider whether the owner acted in bad faith.

One commentator considers the *Channel Home* decision significant because it recognized the enforceability of the “contract to bargain” apart from the actual transaction that the parties were negotiating. The *Itek*, *Reprosystem*, and *Channel Home* cases show the different approaches that the courts outside Illinois have taken when faced with bad faith issues in precontractual negotiating. Three approaches used by the courts are summarized as follows: (1) the court could find that an unjustified withdrawal is a breach of the duty to negotiate in good faith, irrespective of finding an enforceable contract to complete the ultimate transaction; (2) the court could find that a separate duty to negotiate in good faith exists, but consider the duty too indefinite to enforce; or (3) the court could revert to the “all or nothing” approach, even while acknowledging the duty of good faith. The courts applying Illinois law since *Itek* have been slow to adopt this obligation of good faith, usually reverting to the “all or nothing” approach. By ignoring fair dealing in the intermediate regimes, the Illinois courts also ignore the harder questions of what constitutes a breach of good faith and how to apportion damages for such a breach. The last obstacle confronting courts that otherwise might enforce precontractual agreements is fashioning reme-

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82. 795 F.2d 291 (3d Cir. 1986).
83. *Id.* at 299.
84. *Id.* at 296.
85. *Id.* at 300.
86. *Lake & Draetta*, supra note 6, at 164. Lake and Draetta also note that the *Channel Home* court used the “all or nothing” contract factors to require that the contract to bargain must be a complete contractual agreement. But the court did not require that the contract to bargain must be complete with respect to the desired ultimate transaction. *Id.* at 163.
87. *See* Temkin, supra note 10, at 148-49.
88. *E.g.*, *Itek*, 248 A.2d at 629; *Channel Home*, 795 F.2d at 299.
89. *E.g.*, *Reprosystem*, 727 F.2d at 264.
90. *See, e.g.*, supra note 81.
91. *See infra* notes 116-42 and accompanying text.
dies when the agreements are breached.\textsuperscript{92}

\textbf{D. Remedies}

Courts struggling with the remedy question for breaches of precontractual agreements have not yet agreed on the appropriate measure of recovery.\textsuperscript{93} Various contract law commentators have advocated reliance damages,\textsuperscript{94} expectation damages,\textsuperscript{95} restitution,\textsuperscript{96} unjust enrichment, and even specific performance.\textsuperscript{97} One court awarded full expectation damages in a case involving actual work performed under a breached precontractual agreement.\textsuperscript{98} But most parties may have to forego expectation

\textsuperscript{92} Temkin, \textit{supra} note 10, at 153.

\textsuperscript{93} See \textit{id.} at 161. Temkin explains that because breach of a duty to negotiate in good faith is a fairly recent legal development, the case law of remedies for such breaches has been slow to develop. Also, most reported cases involving precontractual agreements are appeals of trial court dismissals. When the appellate court holds that a cause of action exists and remands, the parties often settle out of court. This trend prevents establishment of any conclusive precedent illustrating judicial remedies for breach of precontractual agreements. \textit{Id.}

\textsuperscript{94} Farnsworth, \textit{supra} note 11, at 264. In an “agreement to negotiate” setting, the court cannot tell what ultimate agreement the parties would have negotiated, thus expectation damages are inappropriate. Farnsworth explains that parties generally enter “agreements to negotiate” to protect their reliance interests in the event one party withdraws. This strengthens the argument that reliance damages for breach of a precontractual agreement should include “lost opportunities,” as opposed to the expectation element of lost profit from the never-defined ultimate agreement. \textit{Id.}

\textsuperscript{95} \textit{Id.} at 255. In an “agreement with open terms” the court can fashion a definite expectation remedy, because the essential terms of the ultimate agreement are present. \textit{Id.} Thus, expectation damages may be an appropriate remedy for an “agreement with open terms,” but not appropriate for other precontractual agreements that do not include the essential terms of the ultimate agreement. See \textit{infra} note 99 and accompanying text.

\textsuperscript{96} See generally S.N. Ball, \textit{Work Carried Out in Pursuance of Letters of Intent—Contract or Restitution?}, 99 \textit{LAW Q. REV.} 572 (1983). Ball actually prefers a flexible remedy between the “black” of contract and the “white” of restitution, especially in cases where work has been performed under a precontractual agreement. \textit{Id.} at 587. This flexibility would more accurately reflect the commercial expectations of the parties. Reliance damages in contract heavily favor the breaching party by preventing any expectation damages, and restitution unfairly favors the performing party by denying the breaching party any protection of the terms of the putative agreement. See \textit{id.} at 582-90.

\textsuperscript{97} See Knapp, \textit{supra} note 2, at 724-25. A court might award damages in unjust enrichment when a defendant has breached a contract to bargain for the sale of an asset which it then sells to a third party. The plaintiff may be entitled to the defendant’s unjust profits from the third party sale. \textit{Id.} at 724. Specific performance of a contract to bargain is usually not appropriate, but if the material terms of the ultimate agreement are in place, a court could decree specific performance. \textit{Id.} at 725.

\textsuperscript{98} Frank Horton \& Co. v. Cook Elec. Co., 356 F.2d 485 (7th Cir. 1965), \textit{cert. denied}, 384 U.S. 952 (1966). In \textit{Horton}, bad faith clearly was a factor. In a letter of intent, the defendant directed the plaintiff to prepare for performance by moving equipment to the jobsite at substantial cost, while concurrently negotiating with a third party for the same work. The defendant ultimately terminated negotiation with the plaintiff, using the plaintiff’s delay in signing an agreement with the national union as an excuse to award the job to the third party. The court found that the letter of intent formed a contract because it contained all the essential terms and the plaintiff had commenced performance. \textit{Id.} at 490. The court then awarded expectation damages, using the plaintiff’s own cost estimates as a basis for calculating its lost profits. \textit{Id.} at 492.
damages in order to prevail on a "contract to bargain" action.\textsuperscript{99} The lower court opinion in Reprosystem\textsuperscript{100} illustrates the difficulty of assessing damages for breach of a precontractual agreement in a complex, incomplete transaction.\textsuperscript{101} Recognizing enforceability of precontractual agreements actually should aid courts in determining damages, especially when the agreement supplies the major "essential" terms.\textsuperscript{102}

This background of case law and commentary touches on a few of the divergent paths that the courts have taken to decide the enforceability of precontractual agreements. Illinois law is firmly rooted in the traditional "all or nothing" contract doctrine, but other jurisdictions have adopted more flexible, intermediate approaches. Though the "all or nothing" approach still dominates, some courts will recognize a "contract to bargain" when appropriate factors are present. The obligation to negotiate in good faith is making inroads into decisions on precontractual agreements. Also, courts can apportion damages with specificity when precontractual agreements are breached. The next section discusses the development and current status of these areas of Illinois law regarding enforceability of precontractual agreements.

\section{II. ILLINOIS LAW}
\subsection{A. Borg-Warner and Progeny}

The "modern" law of precontractual liability in Illinois originated in 1958 in \textit{Borg-Warner Corp. v. Anchor Coupling Co.}\textsuperscript{103} The parties exchanged letters of intent defining the proposed terms of Borg-Warner's

\textsuperscript{99} See \textsc{Lake & Draetta}, \textit{supra} note 6, at 164 (discussing Channel Home Ctrs. v. Grossman, 795 F.2d 291 (3d Cir. 1986)). Full expectation damages are only available if the precontractual agreement is complete as to the ultimate transaction, not just as a contract to negotiate. \textit{Id}.


\textsuperscript{101} See Temkin, \textit{supra} note 10, at 151 nn.112-14. The \textit{Reprosystem} court based its remedy on restitution and unjust enrichment, a scheme which proved most difficult to implement. The court also rejected reliance damages and promissory estoppel. The court apparently denied expectation damages because Reprosystem failed to prove that it could have completed the transaction financially. \textit{Id.} at 151 n.114. \textit{But see Pearson Bros. Co. v. Pearson}, 113 B.R. 469 (Bankr. C.D. Ill. 1990) (finding that an "agreement to agree" failed for indefiniteness, but nevertheless awarding reliance damages in promissory estoppel). The \textit{Pearson} court cited case law examples, and \textsc{E. Allan Farnsworth}, \textit{Contracts} § 3.3, at 209 (1982), to support the proposition that reliance damages are available when a contract fails for indefiniteness. \textit{Pearson}, 113 B.R. at 479.

Defining reliance damages is also a problem for courts. \textit{See, e.g.}, Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 426 (7th Cir. 1989) (stating that the cost of negotiating, investigating, and reviewing a target business are normal precontractual expenditures and not "reliance damages" when the deal fails through).

\textsuperscript{102} Knapp, \textit{supra} note 2, at 723-24. \textit{See also} Farnsworth, \textit{supra} note 11, at 267 (courts generally require less certainty to prove reliance damages).

\textsuperscript{103} 156 N.E.2d 513 (Ill. 1958).
corporate acquisition of Anchor. The acquisition was conditional upon a survey of Anchor's assets and satisfactory arrangements for continued employment of one of Anchor's directors. Borg-Warner conducted the survey in reliance on Anchor's letter. After completing the survey, Borg-Warner assented to the sale, but one of Anchor's directors balked because the continued employment condition had not been satisfied. Borg-Warner then sued for specific performance. The trial court dismissed the case, however, finding that the parties had not reached a complete agreement.\footnote{104}

The Illinois Supreme Court reversed and remanded, holding that contemplation of a future formal written contract does not preclude enforcement of a preliminary agreement containing the essential material terms.\footnote{105} The court also stated that once the parties reach agreement on the material terms, they are obligated to attempt to settle the remaining minor details in good faith.\footnote{106} Professor Knapp criticized Borg-Warner as an example of the judicial fiction of using "all or nothing" reasoning to decide the enforceability of a precontractual agreement.\footnote{107} Nevertheless, Borg-Warner established that Illinois courts could enforce a precontractual agreement containing the essential terms of a transaction, notwithstanding "conditions" remaining for future agreement and recitation that formal written contract execution would follow.\footnote{108} As always, the threshold inquiry is the intent of the parties to be bound by the precontractual agreement.\footnote{109}

Courts dutifully followed Borg-Warner in developing the early Illinois doctrine regarding precontractual liability.\footnote{110} Many of the important decisions were by courts in other jurisdictions applying Illinois law.\footnote{111} These courts expanded the doctrine to include situations of partial performance,\footnote{112} good faith,\footnote{113} and consideration of all relevant sur-

\footnote{104. Id. at 516.} \footnote{105. Id. at 518.} \footnote{106. Id. at 517.} \footnote{107. See Knapp, supra note 2, at 714-16.} \footnote{108. See generally Richard F. Zehle, Letters of Intent: The Present State of Illinois Law, ILL. B.J., January 1979, at 286 (tracing development of Illinois "letter of intent" doctrine from Borg-Warner through Terracom Dev. Group, Inc. v. Coleman Cable & Wire Co., 365 N.E.2d 1028 (Ill. App. Ct. 1977) (discussed infra at notes 116-20 and accompanying text)).} \footnote{109. Borg-Warner, 156 N.E.2d at 516. The actual holding in Borg-Warner was that the parties' letters were ambiguous as to their intent to be bound, thus the trial court should not have granted defendant's motion to dismiss because intent is an issue for the trier-of-fact. Id. at 518.} \footnote{110. See Zehne, supra note 108, at 287.} \footnote{111. See, e.g., Frank Horton & Co. v. Cook Elec. Co., 356 F.2d 485 (7th Cir. 1965), cert. denied, 384 U.S. 952 (1966); Evans, Inc. v. Tiffany & Co., 416 F. Supp. 224 (N.D. Ill. 1976); Itek Corp. v. Chicago Aerial Indus., Inc., 248 A.2d 625 (Del. 1968).} \footnote{112. See, e.g., Horton, 356 F.2d 485; see also supra notes 44, 45 and accompanying text.} \footnote{113. See, e.g., Itek, 248 A.2d 625; see also supra notes 71-75 and accompanying text.}
Thus, the circumstances of negotiation and conduct of the parties can be important issues, especially when the precontractual agreement contains language limiting any binding effect.115

The Illinois Appellate Court narrowed the Borg-Warner doctrine in Terracom Development Group, Inc. v. Coleman Cable & Wire Co.116 In Terracom, the court held that a detailed disclaimer in offer/counter-offer letters for the sale and leaseback of real estate unambiguously indicated as a matter of law that the parties intended not to be bound until they executed a formal agreement.117 Terracom and Coleman had exchanged several modifications of their offer and counter-offer letters. Coleman’s controlling counter-offer contained a disclaimer stating: “This letter of intent is not binding upon us in any way nor is the conditional offer contained herein binding upon us except to the extent that it reflects our intent to enter into a definitive written agreement . . . .”118 The parties continued negotiation and eventually agreed on all the essential terms of the transaction and the satisfaction of the conditions, but never signed the required definitive agreement. Coleman withdrew and Terracom sued. The court focused on the unambiguous language of the disclaimer, even though the parties had agreed upon all the essential terms of the underlying transaction.119 The Terracom decision, although difficult to reconcile with Borg-Warner, indicated that Illinois courts will honor one party’s express disclaimer of binding intent, despite the presence of other factors indicating intent to be bound.120

The Illinois Appellate Court further narrowed the Borg-Warner doctrine in Interway, Inc. v. Alagna.121 After negotiating for several months, the parties had executed a precontractual agreement for the sale of stock by Alagna to Interway. On the next business day, Alagna decided not to proceed with execution of a formal contract. Interway sued

114. See, e.g., Evans, 416 F. Supp. at 224; Itek, 248 A.2d at 625.
115. See, e.g., Itek, 248 A.2d at 629 (language of “if parties fail to agree” not a valid disclaimer when bad faith is involved); see also supra notes 44, 45 and accompanying text.
Recently, courts have placed more weight on such disclaimers, especially if the other “factors” show ambiguity regarding intent to be bound. See infra notes 121-33 and accompanying text.
117. Id.
118. Id. at 1029-30 (emphasis supplied). The letter also included language about express conditions, mutual satisfaction of counsel, and a deadline for executing the written agreement. Id.
119. Id. For a thorough discussion of the Terracom holding, see Zehlne, supra note 108, at 288.
for specific performance, claiming that the parties intended the precontractual agreement to be binding. The court stated that the agreement was unenforceable as a matter of law because limiting language indicated that execution of a subsequent contract was a condition precedent to any binding effect. The court then affirmed dismissal of the enforcement action because no factual question existed as to the parties' intent. The court reasoned that the ambiguous language, which indicated both binding and non-binding intent, conclusively showed that the precontractual agreement was too tentative to be binding. The questionable language included terms such as "subject to," "confirm our agreement," and "we have agreed." The court also pointed out that because Alagna withdrew on the next day after signing the precontractual agreement, no partial performance factors were present. Thus, the Interway court established that even vague disclaimers can be effective in negating binding intent.

The same court then seemed to relent in Chicago Investment Corp. v. Dolins. Although citing its decision in Interway, the appellate court reversed a trial court dismissal and remanded, because similar language in a letter of intent for a real estate sale was ambiguous as to binding intent. The letter of intent was complete as to payment terms, mortgage details, and description of the real estate parcels, but included language requiring the final contract to be acceptable to the parties' attorneys. The letter of intent also referred to future events that would occur upon execution of the contract. Because the letter of intent was otherwise complete, the appellate court held that factual issues of intent were present which precluded trial court dismissal. The court also stated that the "letter of intent" label on the precontractual agreement

122. Id. at 618 (citations omitted). The precontractual agreement (prepared by Interway) specifically stated: "Our purchase is subject to a definitive Purchase and Sale Contract to be executed by the parties." Id. at 617 (emphasis added). Ironically, the court strictly construed this disclaimer against Interway—which presumably drafted the disclaimer to protect itself—even though Alagna then used the disclaimer to back out of the deal.

123. See id.

124. Id. at 620.

125. Id. at 620-21. The court distinguished Interway from Borg-Warner, Itek, and Evans, because in those cases one party had taken substantial action based on having a binding agreement. Thus "detrimental reliance" was a factor evidencing a binding precontractual agreement. Id. at 621.

126. See Lake & Draetta, supra note 6, at 99. This reading of Interway (that vague disclaimers usually are effective to negate precontractual liability) is no longer so certain in Illinois. See infra notes 127-33 and accompanying text.


128. See id.

129. Id.
was only one element to be considered in judging intent. The Illinois Supreme Court reversed the appellate court holding and affirmed the trial court dismissal, however, reiterating the principle that contemplation of formal contract execution can be a condition precedent precluding enforcement of an otherwise complete precontractual agreement. The Supreme Court cited the opposite Borg-Warner and Terracom theories before concluding that the specific language referring to formal contract execution in the letter of intent was controlling. The Interway and Dolins results seem harsh in view of later decisions, which have remanded for factual determination of intent on less ambiguous language.

Subsequent decisions have applied this “condition precedent doctrine,” often while ignoring other strong factors of intent to be bound. In Ebert v. Dr. Scholl’s Foot Comfort Shops, the Illinois Appellate Court decided that a putative contract formed by various writings and proposed leases exchanged by the parties was contravened by “plain language” giving binding effect only “upon the execution and delivery” of the lease. The Ebert court affirmed summary judgment against finding a contract because of the condition precedent formed by the plain language. In Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc., the Illinois Supreme Court denied enforcement of an oral lease agreement because the parties made numerous references to a future formal contract during negotiations. In Ceres, Illinois Scrap set up an extensive scrap processing operation on Ceres property in anticipation of a formal lease execution. The parties never executed the lease, and when Illinois Scrap refused to vacate the property, Ceres sued for injunctive relief. The court

130. Id. at 63.
131. 481 N.E.2d 712 (Ill. 1985). The Illinois Supreme Court agreed with the trial judge that the intent of the parties not to be bound was shown by the “manifest weight of the evidence.” Thus the appellate court reversal was improper. Id. at 716.
132. See id. at 715. The language in Dolins stated: “The final contract shall be in form and substance acceptable to attorneys for buyer and seller.” No contract was ever signed. Id.
135. Id. at 1184.
136. See id. at 1185-86. The court also used the familiar “all or nothing” analysis (offer + counter-offer + modifications = no acceptance) to explain why the precontractual agreements between the parties never formed an enforceable contract. Id. at 1184-85.
137. 500 N.E.2d 1 (Ill. 1986).
138. Id.
139. See id. Illinois Scrap made rent payments under the oral lease agreement while the parties’ attorneys negotiated the formal lease. Illinois Scrap requested and received permission from Ceres to begin operation. Ceres’ employees even assisted Illinois Scrap in construction of the scrap processing machinery. Id.
listed several factors relevant in determining whether the parties intended to reduce the agreement to writing: whether the agreement is a type usually written; what details the agreement contains; whether a large or small amount of money is involved; whether a formal writing is required to fully express the entire agreement; and whether the parties indicated that a formal written contract would follow at the end of negotiations.\textsuperscript{140} The \textit{Ceres} court applied the last factor to hold that the parties' express references to formal execution of the lease created a condition precedent, which overrode any effect of the substantial performance by Illinois Scrap.\textsuperscript{141}

Illinois courts thus place great emphasis on the condition precedent doctrine when determining the enforceability of precontractual agreements, even in the face of substantial performance by both parties. One federal court called this reliance on the condition precedent doctrine a "legal talisman," which allows Illinois courts to avoid determination of true intent.\textsuperscript{142} The next section details federal court application of Illinois law to precontractual agreements.

\textbf{B. Federal Jurisdictions}

The federal courts have faced similar problems regarding the enforceability of precontractual agreements under Illinois law. Some federal decisions have not been as restrictive as the Illinois cases in framing the legal issue of whether the parties intended to be bound by a precontractual agreement. Instead, some federal courts make the intent resolution a factual issue, which depends on the surrounding circumstances.\textsuperscript{143}

\textsuperscript{140} \textit{Id.} at 5. These factors originated in W.T. Grant Co. v. Jaeger, 224 Ill. App. 538, 546 (1922), and are the same factors cited in \textit{Dolins}, 481 N.E.2d at 714. The \textit{Dolins} court applied the factors as an objective factual test to determine party intention. \textit{Lake & Draetta, supra} note 6, at 90 n.24. \textit{See also} Quake Constr., Inc. v. American Airlines, Inc., 565 N.E.2d 990, 994 (Ill. 1990) (citing \textit{Ceres} factors as "determining whether the parties intended to reduce their agreement to writing") (emphasis added). This test would inquire whether the parties intended the formal writing to be a condition precedent to any binding effect of a precontractual agreement. The \textit{Dolins} court appeared to use the factors to assess overall intent of the parties, not just to assess a condition precedent to a formal writing.

\textsuperscript{141} The court also noted that even if a binding agreement existed, enforcement of the oral lease was barred by the Statute of Frauds. The court remarked that both parties were represented by counsel and thus should have known that an oral lease agreement would be unenforceable. \textit{Ceres}, 500 N.E.2d at 7.

\textsuperscript{142} A/S Apothekernes Laboratorium v. I.M.C. Chem. Group, Inc., 678 F. Supp. 193, 195 (N.D. Ill. 1988) [hereinafter \textit{Apothekernes I}], aff'd, 873 F.2d 155 (7th Cir. 1989) [hereinafter \textit{Apothekernes II}].

\textsuperscript{143} \textit{See}, e.g., \textit{Apothekernes I}, 678 F. Supp. at 195. \textit{Apothekernes I} contains a complete discussion of the Illinois decisions from \textit{Borg-Warner} through \textit{Interway}. 678 F. Supp. at 196-97. The case concerned the proposed acquisition of various I.M.C. assets by Apothekernes. The parties executed a letter setting forth the terms of the transaction, including issues resolved as well as those requiring further negotiation. The letter made the deal "subject to" the approval of the parties' boards of
Other federal courts have held that explicit language can create conditions precedent to binding intent. The Seventh Circuit recognizes that Illinois law permits parties to approach agreements in non-binding stages without fear of being unintentionally bound by an immature precontractual agreement.

The federal courts have been more receptive to the obligation of good faith in negotiation. One court has declared that the Illinois Supreme Court would recognize the obligation in light of Borg-Warner—although the same court then chronicles the post-Borg-Warner Illinois decisions, which are devoid of any concept of good faith in precontractual negotiating. The Seventh Circuit has clearly limited the good faith obligation to precontractual agreements that unambiguously show the parties' intent to be bound. The Seventh Circuit also has developed an approach to determining ambiguity in precontractual agreements that appears to conflict with some Illinois Appellate Court decisions.

C. Ambiguity

The Illinois Appellate Courts are split on whether extrinsic evidence
may be used to determine ambiguity in precontractual agreements. In *Rakowski v. Lucente*, the Illinois Supreme Court held that a court must determine the intent of the parties to an unambiguous agreement from the "face of the document" without the aid of extrinsic evidence. *Rakowski*, however, did not hold specifically that extrinsic evidence is inadmissible first to show whether the document is ambiguous.

Because the Illinois Appellate Courts have not followed *Rakowski* uniformly, the Seventh Circuit has expanded determination of precontractual agreement ambiguity beyond the "four corners" of the document. Judge Posner illustrated the concept of "intrinsic" and "extrinsic" ambiguity, which courts may use in assessing the parties' intent. Intrinsic ambiguity refers to uncertainty within the plain meaning of the document itself, while extrinsic ambiguity refers to uncertainty of the document's meaning to those cognizant of the commercial setting. Until the Illinois Supreme Court resolves this conflict, in some courts extrinsic evidence is admissible to determine if ambiguity exists (and hence whether extrinsic evidence is thus inadmissible to determine the meaning of the agreement). This extrinsic ambiguity concept corresponds with the federal courts' willingness to consider all of the surrounding circumstances of negotiation in determining the enforceability of precontractual agreements, in contrast to considering only the express language. While the current law in Illinois regarding precontractual agreements thus appears "settled," many divergent undercurrents still run beneath the surface. Some of these undercurrents are examined in the following section.

151. *See* Metalex Corp. v. Uniden Corp. of Am., 863 F.2d 1331, 1335 (7th Cir. 1988) (collecting split Illinois Appellate Court cases; stating that Seventh Circuit interprets "Illinois law [as] allowing a court to consider extrinsic evidence in determining whether a contract is ambiguous"); see also *Federal Depositors*, 877 F.2d at 621 (7th Cir. 1989) (Judge Posner discussing split).

152. 472 N.E.2d 791 (Ill. 1984).

153. *Id.* at 794.

154. *See* Harris Bank Naperville v. Morse Shoe, Inc., 716 F. Supp. 1109 (N.D. Ill. 1988) (trial court memorandum detailing and attempting to reconcile the Illinois and Seventh Circuit decisions on ambiguity and use of extrinsic evidence to determine parties' intent to be bound); see also *Metalex*, 863 F.2d at 1335.


157. *See id.*


159. *See supra* note 143 and accompanying text.

D. Quake v. American Airlines

1. The Facts

A recent Illinois case involving a precontractual agreement is Quake Construction, Inc. v. American Airlines, Inc.\textsuperscript{161} Quake alleged that American's general contractor, Jones Brothers Construction Corp. ("Jones") had orally informed it that Jones would award Quake a contract for expansion of certain American maintenance facilities at O'Hare Airport. Jones requested information about Quake's subcontractors, but Quake replied that it could not enter agreements with its own subcontractors without first receiving a signed contract from Jones. Jones instead sent Quake a "letter of intent" awarding Quake the contract, referencing \textit{inter alia} the scope of work, various bid documents, and the lump-sum price of $1,060,568.\textsuperscript{162} The letter directed Quake to begin performance almost immediately with formal written contract execution to follow "shortly."\textsuperscript{163} Quake began preparing to perform by awarding subcontracts, obtaining office space, and hiring additional personnel. The following week, however, Jones abruptly terminated Quake's participation in the project. The letter of intent stated "[w]e have elected to award the contract for the subject project to your firm," but also stated "[w]e reserve the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract."\textsuperscript{164} Based on this cancellation clause, the trial court dismissed the action.\textsuperscript{165} The appellate court reversed and remanded, holding that the conflicting language of "award" and "cancel" indicated factual ambiguity in the parties' intent to be bound, which the trial court could not decide as a matter of law.\textsuperscript{166} The Illinois Supreme Court affirmed, agreeing that the language was ambiguous, yet limited its holding to the issue that the parties' intent was controlling.\textsuperscript{167}

The \textit{Quake} decisions appear to explore no new ground, because the Supreme Court specifically limited its holding to confirmation that the parties' intent was ambiguous.\textsuperscript{168} In addition, the court cautioned that each precontractual agreement case must be decided on its own particu-
lar set of facts.\textsuperscript{169} But a closer examination of the various Quake opinions indicates the mind-set of the Illinois justices when faced with a precontractual liability question. The extensive dicta in the Quake opinions, notwithstanding the Supreme Court's caveat,\textsuperscript{170} thus comprises a judicial treatise on the current state of precontractual liability in Illinois.

2. The Appellate Dissent

The Illinois Appellate Court followed a rather vanilla "all or nothing" approach in its analysis of the facts.\textsuperscript{171} On the other hand, the dissent exhibited some disturbing judicial pronouncements.\textsuperscript{172} First, the dissent decided that the conflict between "award" and "cancel" was \textit{not} ambiguous.\textsuperscript{173} The precontractual agreement language in the cases cited, however, did not include any examples of languageauthorizing a contractor to proceed with work.\textsuperscript{174} Next, the dissent attempted to find a condition precedent in the reference to the formal contract to follow "shortly."\textsuperscript{175} The dissent also claimed that the Jones letter of intent did not include all the essential terms of a complete agreement.\textsuperscript{176} Finally, and most disturbingly, the dissent proclaimed that a precontractual agreement \textit{can} authorize a subcontractor to proceed with work, while \textit{not}

\begin{quote}
\textsuperscript{169} \textit{Id.} (citing Borg-Warner, 156 N.E.2d at 518). The court here warned that the presence or absence of particular language will not ensure that a precontractual agreement is not ambiguous. This warning tends to advise that attempts to generalize about cases involving "intent to be bound" may not bear fruit. Nevertheless, the following sections of this Note attempt to do this, not to develop a set of positive catch-all rules, but to illustrate the reasoning which Illinois Appellate and Supreme Court Justices might apply to similar situations.

\textsuperscript{170} \textit{See supra} note 169.

\textsuperscript{171} \textit{See generally} Quake I, 537 N.E.2d 863. The court followed the established "intent" routine: completeness; language; ambiguity; condition precedent. The court hung its hat on the "ambiguity" peg. The court remanded because the determination of intent was a factual question, and the trial court should have admitted parol evidence to resolve the ambiguity, thus dismissal was improper. \textit{Id.} at 867.

\textsuperscript{172} \textit{See Quake I,} 537 N.E.2d at 868-71 (McNamara, J., dissenting).

\textsuperscript{173} \textit{Id.} at 869 (McNamara, J., dissenting) (citing cases where courts held language similar to the Quake cancellation clause to unambiguously show that the parties did \textit{not} intend to be bound by precontractual agreements).


\textsuperscript{175} \textit{Quake I,} 537 N.E.2d at 869-870 (McNamara, J., dissenting). But the language in the cases cited included either express provisions for a future contract, \textit{see, e.g.}, Terracom, 365 N.E.2d at 1028, or express disclaimers of binding effect, \textit{see, e.g.}, Feldman, 850 F.2d at 1217.

\textsuperscript{176} \textit{Quake I,} 537 N.E.2d at 870 (McNamara, J., dissenting). But the "terms" reserved for future agreement concerned details of affirmative action requirements and subcontractor performance bonding. \textit{Id.} at 867. In a $1 million construction contract, such terms can hardly be considered "deal breakers" that a court could not supply. \textit{See also infra} note 244.
binding the issuer.\textsuperscript{177} Thus, the dissent condoned the notion that issuers of precontractual agreements can “have their cake and eat it, too,” a misuse of such agreements decried in the concurring opinion of Supreme Court Justice Stamos.\textsuperscript{178} The dissent concluded that enforcement of the \textit{Quake} agreement would deprive negotiating parties of all benefit of precedent as guidance in drafting precontractual agreements.\textsuperscript{179}

3. The Supreme Court Majority Opinion

The Illinois Supreme Court majority in \textit{Quake} followed much the same “all or nothing” approach as the court below.\textsuperscript{180} The court added an analysis of “factors” that may be considered to determine whether the parties intended to reduce their agreement to writing.\textsuperscript{181} The inclusion of these factors indicated that an Illinois court should examine the entire context of the negotiation process when determining the parties’ intent.\textsuperscript{182} The court dwelled on the cancellation clause, finding its presence

\textsuperscript{177.} \textit{Quake I}, 537 N.E.2d at 870 (McNamara, J., dissenting) (citing S.N. Nielsen Co. v. National Heat & Power Co., 337 N.E.2d 387 (Ill. App. Ct. 1975)). In \textit{Nielsen}, the appellate court affirmed trial court judgment in favor of defendant subcontractor finding that letter of intent was not enforceable. Interestingly, the \textit{Nielsen} court reached a result opposite \textit{Quake} in a similar factual setting. In \textit{Quake}, plaintiff subcontractor sought enforcement of a letter authorizing it to proceed. In \textit{Nielsen}, plaintiff general contractor sought enforcement against subcontractor wishing not to proceed. Hence, Justice McNamara cited \textit{Nielsen} for the proposition that a letter authorizing subcontractor to proceed can be non-binding. \textit{Quake I}, 537 N.E.2d at 870 (McNamara, J., dissenting). But the \textit{Nielsen} court reached its result because the plaintiff general contractor had accepted defendant subcontractor’s low bid knowing that the defendant had made a mistake and could not perform the work for the bid price. The parties had agreed to the essential terms of the contract via a letter of intent. When the subcontractor discovered its error and refused to sign the formal contract, the general contractor attempted to enforce the letter of intent as a binding contract. \textit{See generally Nielsen}, 337 N.E.2d 387. The inequity of the \textit{Nielsen} situation readily distinguishes it from \textit{Quake} and thus Justice McNamara’s citing of \textit{Nielsen} here appears misplaced. The majority did not adequately address this important distinction between \textit{Quake} and \textit{Nielsen}. \textit{See Quake II}, 565 N.E.2d at 998-99.

\textsuperscript{178.} \textit{Quake II}, 565 N.E.2d at 1006 (Stamos, J., specially concurring). This idea of the unilateral binding effect of precontractual agreements is common in business settings. \textit{Lake & Draetta}, supra note 6, at 220 (calling this objective a “hidden agenda” in many precontractual agreements).

\textsuperscript{179.} \textit{Quake I}, 537 N.E.2d at 869 (McNamara, J., dissenting). Commentators suggest that the opposite result may actually occur. The cases cited by the dissent appear to offer very definite guidelines. \textit{See infra} notes 225-39 and accompanying text.

\textsuperscript{180.} \textit{See generally Quake II}, 565 N.E.2d 990.

\textsuperscript{181.} \textit{Id.} at 994 (citing Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc., 500 N.E.2d 1, 5 (Ill. 1986), and \textit{Apothekernes I}, 678 F. Supp. 193, 195-96). The factors are: whether the agreement is a type usually in writing; what details the agreement contains; whether a large or small amount of money is involved; whether a formal writing is required to fully express the entire agreement; whether the parties indicated that a formal written contract would follow at the end of negotiations; at what stage the parties abandoned negotiation; the reasons they abandoned negotiation; the extent of assurances given by the party now claiming no contract; and the other party’s reliance thereon. \textit{Quake II}, 565 N.E.2d at 994. \textit{See supra} notes 137-41, 143 and accompanying text (discussion of \textit{Ceres}, and \textit{Apothekernes I} & II).

\textsuperscript{182.} The court did not state that a finding of ambiguity is a threshold question before the factors are examined. The court thus appears to disregard its “four-corners” ruling in \textit{Rakowski} v. Lucente, 472 N.E.2d 791 (Ill. 1984). \textit{See supra} note 152.
ambiguous in itself.\textsuperscript{183} The court decided that the absence of certain terms also indicated an intent not to be bound.\textsuperscript{184} The court then discussed the appellate court dissent at length, refuting Justice McNamara's arguments that the \textit{Quake} letter of intent was unambiguously not binding.\textsuperscript{185} It then distinguished the cases relied on by Jones, using each to support the ambiguity finding.\textsuperscript{186} Finally, the court concluded by instructing the trial court on remand to admit "other" evidence to determine whether the letter of intent was a binding contract.\textsuperscript{187}

4. The Special Concurrence

The special concurrence criticized the Supreme Court majority for so readily finding ambiguity in the letter of intent language.\textsuperscript{188} Justice Stamos disapproved of using precontractual agreements to "fudge" the underlying contract issues.\textsuperscript{189} He quibbled over the exact language of the

\textsuperscript{183} \textit{Quake II}, 565 N.E.2d at 997, 999-1001 (stating that the parties would not need to provide for cancellation if the letter did not have some binding effect). But the court did not conclude that the parties were bound, only that the cancellation clause was further proof of ambiguity. \textit{Id}. But see Inland Real Estate Corp. v. Christoph, 437 N.E.2d 658, 660 (Ill. App. Ct. 1981) (clause stated that parties would be bound only by execution of formal contract, at which time letter of intent is null and void).

\textsuperscript{184} \textit{Quake II}, 565 N.E.2d at 997. Here the court side-stepped the issue of whether the terms were "deal breakers" and thus avoided the application of \textit{Borg-Warner} (that contemplation of a future contract does not render agreed upon terms mere negotiation if all of the otherwise essential terms are present). The court only said that "certain terms" were absent. \textit{Id}. The letter did include terms fixing price, schedule, specifications, drawings, insurance, and affirmative action employment goals. \textit{Id}. at 993. The court said that defendant's arguments about essential missing items such as payment terms, damages, and termination merely supported the ambiguity holding. \textit{Id}. at 997. The court never addressed whether these "open terms" could be supplied by a court.

\textsuperscript{185} See \textit{Quake II}, 565 N.E.2d at 996-97.

\textsuperscript{186} \textit{Id}. at 997-1001 (analyzing \textit{Dolins} and \textit{Nielsen}); \textit{Id}. at 1001-04 (analyzing \textit{Interway} and \textit{Terracom}).

\textsuperscript{187} \textit{Id}. at 1001. The court followed the "all or nothing" approach to the end. This extensive analysis of the precedent cases did nothing to expand the inquiry into whether the letter of intent between the parties could instead be considered a "contract to bargain" (i.e., that the letter of intent bound the parties to continue to attempt to execute the contemplated formal contract under an obligation of good faith). For the same reasons that Professor Knapp criticized the \textit{Borg-Warner} decision, see supra note 107, the \textit{Quake} majority steadfastly adhered to the contract/no-contract dichotomy in a situation where an intermediate regime might have been more appropriate. Justice Stamos in his special concurrence came closer to expounding this intermediate position. See infra notes 188-96 and accompanying text.

\textsuperscript{188} \textit{See generally Quake II}, 565 N.E.2d at 1005-10 (Stamos, J., specially concurring). Justice Stamos wrote separately because he felt that any construction of the letter of intent which would result in an enforceable construction contract was much less plausible than the majority implied. He also felt that the language of the letter was only marginally ambiguous. \textit{See id}. at 1006 (Stamos, J., specially concurring).

\textsuperscript{189} \textit{Id}. at 1006 (Stamos, J., specially concurring). Here Justice Stamos accused those who misuse precontractual agreements of "wishing to have their contractual cake and eat it too." \textit{Id}. This may have been true of Jones, which seemingly wished to authorize \textit{Quake} to proceed without Jones incurring any liability for not executing a contract. But Justice Stamos' characterization would unfairly categorize \textit{Quake} as an opportunistic subcontractor who jumped the gun before properly
letter, and stretched the timing to suggest that the parties could have executed the final contract before Quake proceeded with any work. Then Justice Stamos alluded to a possible crack in Illinois’ "all or nothing" armor by suggesting that the letter of intent might have been a "contract to negotiate." This theory is supported by one interpretation of the cancellation clause. Justice Stamos related other possible purposes of the cancellation clause (e.g., condition precedent, waiver, offer and acceptance, mutuality of obligation, and manifestation of assent) before deciding that the better view is simply to consider the letter of intent an unenforceable "agreement to negotiate." Justice Stamos noted that Quake did not actually perform in reliance on the letter, but only prepared to perform. The special concurrence concluded with a discussion of business uses for precontractual agreements, warning drafters to use care in avoiding ambiguity about whether the parties intend to be bound.

signing a written contract. Parties to precontractual agreements, however, commonly begin performance in anticipation of the formal contract. See, e.g., Ball, supra note 96, at 572.

190. Id. at 1006 (Stamos, J., specially concurring). Here Justice Stamos differentiated between the letter's "elected to award" and a true contractual "award," comparing the former to the shopper who initially decides to buy an item, and the latter to the subsequent purchase. Thus Jones' "election" did not constitute an actual "award" to Quake. Id.

191. The letter of intent was dated April 18, 1985, and work was scheduled to begin the week of April 22, 1985. See id. at 992-93. Justice Stamos agreed with Jones' argument that a formal contract could have been fully prepared in the intervening four days, as evidenced by the letter's statement that the contract would be available for Quake's signature "shortly." Id. at 1006 (Stamos, J., specially concurring). On the other hand, the letter of intent required Quake to complete the entire $1 million project by August 15, 1985. Id. at 993, 998. Justice Stamos did not address whether this time frame (less than four months for completion of such a complex construction project) might have indicated that time was of the essence and thus required Quake to proceed immediately in advance of signing the formal contract.

192. Id. at 1007 (Stamos, J., specially concurring) (citing Knapp's "contract to bargain" and Farnsworth's "agreement with open terms" and "agreement to negotiate"). This is the first reference in the Quake opinions to any such intermediate regime of precontractual liability. Justice Stamos also cited Evans, Inc. v. Tiffany & Co., 416 F. Supp. 224 (N.D. Ill. 1976), as authority that the letter of intent obligated the parties to good faith efforts at executing a construction contract including the agreed-upon terms in the letter. Quake II, 565 N.E.2d at 1007 (Stamos, J., specially concurring).

193. Id. at 1007-08 (Stamos, J., specially concurring). The presence of the clause would then make more sense because it allows the parties to cancel the negotiations if the final contract is not executed, rather than allowing the parties to cancel a construction contract that hasn't been executed. Id.

194. See generally id. at 1008-09 (Stamos, J., specially concurring).

195. Id. (emphasis added). Thus, Justice Stamos apparently felt that Quake was not as clear-cut as Horton, where plaintiff subcontractor Horton incurred substantial expenses preparing to perform, and defendant general contractor Cook's conduct in allowing Horton to proceed manifested Cook's intent to be bound. See Frank Horton & Co. v. Cook Elec. Co., 356 F.2d 485 (7th Cir. 1966), cert. denied, 384 U.S. 952 (1966); see also supra note 98. But see infra note 201.

196. Quake II, 565 N.E.2d at 1010 (Stamos, J., specially concurring). Justice Stamos likewise warned recipients of precontractual agreements to beware of the possibility that the instruments are not enforceable. Id.
5. The "Settled" Law

What is the "settled" Illinois law on enforceability of precontractual agreements as narrated in the various Quake opinions? The lengthy analyses of "contract or no contract" indicate that the "all or nothing approach" is alive and well in Illinois. Despite its narration of the "factors" available for analyzing intent,\textsuperscript{197} the Supreme Court majority focused primarily on the express language of the precontractual agreement while only briefly touching on the surrounding circumstances. For example, the majority only mentioned briefly the Apothekernes factors that question the circumstances of the negotiations at the time of abandonment and the reasons for abandonment.\textsuperscript{198} Thus, the majority did not deal with the possibility that bad faith was involved.\textsuperscript{199} The majority also did not address whether the essential terms of a contract were included in the precontractual agreement,\textsuperscript{200} or whether Quake's reliance on the agreement was detrimental.\textsuperscript{201} The majority thus neatly sidestepped these topics with its limited intent/ambiguity holding.

The Quake courts appear to "pigeon hole" a complex case much the same as the Borg-Warner court did thirty years earlier.\textsuperscript{202} A better approach would be for the Illinois courts to recognize the "contract to negotiate" that Justice Stamos mentioned in his special concurrence.\textsuperscript{203} Had Quake pleaded existence of a binding "contract to negotiate," the trial court instead could have directed its attention to the reason for Jones' breach of the "contract to negotiate," rather than to the reason that a full construction contract did not mature. This intermediate position would place greater emphasis on the business expectations of the parties and would acknowledge that in reality the parties to precontractual agreements intend for some obligations to attach.\textsuperscript{204} Illinois courts, however, have resisted enforcing these intermediate agreements for pol-

\textsuperscript{197} See supra note 181.
\textsuperscript{198} See supra note 181.
\textsuperscript{199} The Quake cases never address why Jones canceled the award. Knapp maintains that this is the more important issue. See supra notes 48, 69 and accompanying text.
\textsuperscript{200} The majority only referred in passing to the missing affirmative action employment guidelines and defendant's argument that other major terms were missing. See Quake II, 565 N.E.2d at 997; see also supra note 184.
\textsuperscript{201} See, e.g., supra note 125 (discussing the Interway court's distinguishing of Borg-Warner, Itek, and Evans on the basis of the parties' substantial reliance on a precontractual agreement). Here Quake's reliance likewise appeared substantial. Quake prepared for performance by hiring personnel, acquiring additional office space, and engaging subcontractors. Quake II, 565 N.E.2d at 1005.
\textsuperscript{202} See supra notes 103-09 and accompanying text. Justice was somewhat served in that Quake avoided outright dismissal. But to recover, Quake must still convince the trial court that a full-blown construction contract with Jones ensued. See supra note 168.
\textsuperscript{203} See supra notes 192-93 and accompanying text.
\textsuperscript{204} Ball, supra note 96, at 587.
The policy considerations of precontractual agreement enforcement are discussed in the following section.

III. THE BUSINESS EFFECT OF ENFORCEABILITY

A. Policy Considerations

Illinois courts permit parties to an agreement to proceed in stages without fear that a preliminary agreement will bind them prematurely and prevent any further disagreement on specifics. The courts recognize this procedure as a “valuable method of doing business,” and predict that enforcing such precontractual agreements, based on anything but the clearest objective intent of the parties, would deal a “devastating blow” to business. Thus, as a policy matter, Illinois courts look skeptically on any claims that precontractual agreements are binding.

Some of the business disadvantages of enforcing precontractual agreements are outlined in *Skycom Corp. v. Telstar Corp.*, where the Seventh Circuit refused to enforce an "agreement in principle." Judge Easterbrook explained that the business practice of entering non-binding intermediate agreements works to the advantage of all concerned. The intermediate stages permit more careful planning of complex transactions and allow the parties to fix precisely the stage at which they become bound. Transactions would be riskier if any rule of law could bind the parties in the midst of uncertain negotiations. The worst consequence would be that the parties might become subject to the random determination of a court. Many transactions would become cumbersome while some beneficial transactions might be foregone.

The courts have also recognized that the purpose of precontractual agreements is to provide an initial framework in which the parties can work toward an ultimate agreement. In this sense, the federal district court in *Teachers Insurance & Annuity Ass'n v. Tribune Co.* found that

205. See infra notes 213-24 and accompanying text.
207. Id. at 426.
208. Id. at 425.
209. 813 F.2d 810 (7th Cir. 1987).
210. See id.
211. Id. at 815. See also Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1221 (7th Cir. 1988).
212. *Skycom*, 813 F.2d at 815. The transactions would become cumbersome because parties would avoid committing intermediate steps to paper or would insert exhaustive disclaimers to avoid binding themselves. Id.
213. See, e.g., Feldman, 850 F.2d at 1221; Runnemede Owners, Inc. v. Crest Mortgage Corp., 861 F.2d 1053, 1056 (7th Cir. 1988).
a "binding preliminary commitment" to a loan agreement obligated the parties to negotiate the customary additional terms in good faith. The court stated that enforcing such a precontractual agreement serves a "valuable function in the marketplace." The Seventh Circuit in Feldman v. Allegheny International, Inc. also recognized this value, finding that a letter of intent bound the parties to negotiate exclusively with each other. The underlying business reasons narrated by the Feldman court concerned the cost of a complex transaction—that the costs may be too high without assurances that the negotiations will culminate in a contract and that potential buyers will reflect this uncertainty in lower bids. Thus, a binding precontractual agreement benefits both parties.

The Illinois Supreme Court also noted similar business concerns in Quake, but declined to change the law of precontractual agreements to favor the party claiming non-enforceability. The appellate court dissent in Quake voiced concerns that lack of precedent would inhibit business users of precontractual agreements, and the special concurrence characterized an enforceable precontractual agreement as a "misuse." Thus, the Illinois Supreme Court endorsed only the policy that business is best served by honoring the negotiating parties' clear, objective intent.

215. Id. at 498-99. In Teachers v. Tribune, defendant borrower Tribune Co. reneged on a loan commitment letter from plaintiff lender Teachers Insurance. Tribune claimed an impasse in negotiation of loan terms. The court said that the existence of these open terms was not fatal, because the parties had clearly shown an intent to be bound by the "binding preliminary commitment." But the parties were not bound to a final conclusion; good faith disagreements could still prevent the ultimate agreement. Id. at 496. The court, however, found that Tribune Co. had not negotiated in good faith (desiring to renege because interest rates had changed unfavorably), and thus breached the loan commitment letter. Id. at 507. The court applied the "factors" analysis of the New York courts to determine that the parties had intended to be bound. Id. See also supra note 39 and accompanying text.


217. 850 F.2d 1217 (7th Cir. 1988).

218. Id. at 1221. The seller also has the same incentive to lower the transaction costs, because many of the seller's costs are also duplicated by dealing with multiple buyers. Id.

219. Id. The Feldman court held that the defendant had not breached its obligation to negotiate in good faith, and thus the letter of intent was satisfied. The court rejected the plaintiff's claim that the letter of intent bound the parties to concluding the deal, and accepted only that it bound them to negotiate. No breach occurred because the parties had negotiated to a valid impasse; such impasse or other disagreement does not automatically signify bad faith. Id. at 1223-24. See also supra notes 61-70 and accompanying text.


221. Id. at 997-98. Jones had argued that finding letters of intent enforceable would discourage issuers from including detailed terms, thus inhibiting recording details of the pending transaction and defeating the purpose of letters of intent. Id.

222. Quake I, 537 N.E.2d at 869 (McNamara, J., dissenting).

223. Quake II, 565 N.E.2d at 1006 (Stamos, J., specially concurring).

224. "Our decision here follows the settled law in Illinois concerning letters of intent: The intent of the parties is controlling." Id. at 1001.
The contract law commentators also favor a policy that best honors the parties' intent, especially because most business persons intend that precontractual agreements have some binding effect.\footnote{See generally Farnsworth, supra note 11; Knapp, supra note 2; Temkin, supra note 10.} Farnsworth says that courts fear discouraging negotiation by limiting complete freedom to negotiate.\footnote{See Farnsworth, supra note 11, at 221; see also Holmes, supra note 10.} The courts could actually encourage negotiation and quicken development of precontractual liability law, however, by more liberally awarding lost opportunity and reliance damages in precontractual agreement cases.\footnote{Farnsworth, supra note 11, at 228.} Farnsworth also cautions that court imposition of a duty of fair dealing might "chill" negotiations or "accelerate" parties too soon toward the polar regime of "ultimate agreement."\footnote{Id. at 242-43.} Thus, the intermediate agreement regimes would best serve the commercial reality that most business deals are binding long before execution of the formal contract documents.\footnote{The enforceable regimes of "agreement to negotiate" and "agreement with open terms." See supra notes 57-59 and accompanying text.}

Precontractual agreements with some "binding" effect are important to business persons.\footnote{See Ball, supra note 96, at 580.} Judicial inflexibility in not enforcing precontractual agreements will discourage their use, thus not reflecting the commercial reality of modern business.\footnote{Id.} Professor Harvey Temkin echoes this "commercial reality" theme.\footnote{Id. at 131 n.24, 147.} He believes that the resulting uncertainty of the "all or nothing" approach actually hinders business negotiators.\footnote{Temkin, supra note 10, at 130.} He also predicts that more certain damage awards for breaches of "contracts to negotiate" will benefit even potential breachers, who can thus more accurately predict whether their economic interests are better suited by breaching or continuing to negotiate.\footnote{Id. at 146-47 n.93 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 88-89 (2d ed. 1977)). But see LAKE & DRAETTA, supra note 6, at 170 (arguing that a general imposition of good faith in a precontractual agreement as a "contract to negotiate" may also create the same type of judicial uncertainty as decisions dealing with precontractual agreements as complete contracts). Thus Lake & Draetta feel that recognition of an enforceable intermediate regime with an obligation of good faith in negotiation will not lead to greater predictability than the "all or nothing" approach. Id. at 218.} Temkin advocates enforcement of precontractual agreements with reliance-based remedies. These remedies will avoid uncertain obligations and the unfairness of "all or nothing" awards, thus encouraging more transactions and ultimately benefitting business shareholders.\footnote{Temkin, supra note 10, at 169.}
closely effectuate what the courts' goal should be—honoring the actual intent and commercial expectations of parties to be bound by precontractual agreements.236

Professor Knapp maintains that recognition of the precontractual "contract to bargain" will enhance the quality of judicial decision-making and thereby lend more certainty to business decision-making.237 The appropriate remedy then would be the only real uncertainty, whereas without the "contract to bargain" the wronged party usually lacks any remedy.238 Knapp disagrees that the "all or nothing" approach offers more certainty and discounts the inevitable "floodgates" argument against enforcement of precontractual agreements.239

Should Illinois courts enforce precontractual agreements? The Quake decision indicates that a "middle ground" is needed in Illinois.240 The facts strongly suggest that both parties intended to be bound by Jones' letter of intent to Quake even though open terms remained.241 But in the Supreme Court majority's view, the ambiguity of the cancellation clause effectively negated that intent.242 Both of Farnsworth's intermediate regimes could easily apply to the Quake situation: the parties may have entered an "agreement to negotiate," whereby they were bound to continue negotiation in good faith; or they may have entered an "agreement with open terms," whereby they were bound to the complete ultimate transaction, with the court supplying the missing terms. In the first regime, the court could look to the real reason that Jones canceled the deal and compensate Quake for its reliance expenditures if Jones acted in bad faith.243 In the second regime, the court could deal with the missing terms while honoring the parties' intent to be bound to an ultimate agreement.244 Both parties would be protected against an inequitable "all or

236. Id. at 170.
237. See generally Knapp, supra note 2, at 726-28.
238. Id.
239. Id. at 726. Knapp claims that most commercial disputes are settled out of court anyway, and will continue to be settled there even if courts routinely enforce the "contract to bargain." Id.
240. See Quake II, 565 N.E.2d 990; see also infra notes 241-47 and accompanying text.
241. Id. at 996-97.
242. Id.
243. Jones could also make an accurate business decision: if its "bad faith" was receiving another bid lower than Quake's, Jones could decide whether the savings of accepting the lower bid would offset the cost of breaching (i.e., paying Quake for relying on the canceled letter of intent). The opposite analysis would take place in a corporate acquisition setting: the defendant seller could decide whether the penalty it would pay to the plaintiff buyer for the "bad faith" of receiving a higher bid is less than the profits it would realize by sale to the higher bidder. In either case, the transaction goes to the party that values it more, and the wronged party is compensated for its reliance expenditures and lost opportunities.
244. In a case like Quake, the court would decide whether the missing terms were "deal breakers," or just minor details. The court would then supply the missing terms only if the other essential
nothing” result: the harshness of finding “no contract” where Quake actually detrimentally relied on the precontractual agreement and Jones acted in bad faith; or the harshness of finding a “complete contract” where truly significant open terms remain. Either inequitable result is possible on remand in Quake and current Illinois law provides no intermediate regime to mitigate these extremes.\(^{245}\) As the Seventh Circuit said in Empro,\(^{246}\) “[s]o long as Illinois preserves [unenforceable precontractual agreements], court[s] . . . must send the disappointed party home empty-handed.”\(^{247}\)

Thus, Illinois law presents many uncertainties and little guidance to parties negotiating precontractual agreements. The next section details recommendations to drafters of such agreements in Illinois.

### B. Drafting a Precontractual Agreement

Despite uncertainty over enforceability in Illinois, the use of precontractual agreements in various contexts is a valuable business tool.\(^{248}\) The usual purpose is to memorialize the settled terms of a transaction prior to preparation of a formal contract.\(^{249}\) Drafters of such precontractual agreements can guard against surprise results by precisely defining the desired effect of the precontractual agreement.\(^{250}\) The threshold question, for the drafter as well as the courts, is whether the parties intend to be bound.\(^{251}\)

The parties to a precontractual agreement may intend one of four possible effects: (1) complete enforceable agreement on the underlying transaction; (2) agreement creating obligation to negotiate in good faith; (3) partially enforceable agreement; and (4) unenforceable preliminary

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\(^{245}\) Justice Stamos alluded to the “contract to negotiate” in his Quake special concurrence, but did not state whether the Illinois courts would enforce such an agreement. See Quake II, 565 N.E.2d at 997. The schedule requirement of immediate preparation for performance by Quake, combined with Jones’ authorization to proceed, reflects the commercial reality common to this type of precontractual agreement. See Lake & Draetta, supra note 6, at 103-12.

\(^{246}\) Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423 (7th Cir. 1989).

\(^{247}\) Id. at 426.

\(^{248}\) Id.

\(^{249}\) Thomas L. Bryan, Letters of Intent, in BUSINESS ACQUISITIONS 45 (J. Herz and C. Baller eds., 1974).

\(^{250}\) See Lake & Draetta, supra note 6, at 217-35; see also Holmes, supra note 10, at 783 (The best way for drafters to preserve flexibility for the parties to withdraw from negotiations before becoming bound is to combine express conditions with non-binding-effect language.).

\(^{251}\) Lake & Draetta, supra note 6, at 220.
agreement. Drafters of precontractual agreements must first ascertain the exact intent of the negotiating parties. Drafters can then ensure any of these possible intended effects by careful wording of the precontractual agreement.

As seen from the Illinois precontractual agreement cases, the intent of the parties is controlling. The precontractual agreement must therefore explicitly annunciate the objective intent of the parties in language that a court will not consider ambiguous. If the parties intend the agreement to be a complete enforceable contract, or alternatively to be unenforceable, the language should unequivocally state that intent. Clear, explicit language detailing the exact binding effect of the agreement should suffice.

The precontractual agreement must also clearly indicate any conditions precedent to enforceability. Drafters should not include any reference to a future contract in a precontractual agreement that the parties intend to be non-binding. Drafters intending binding effect should likewise be wary of such future references. Courts do not consistently interpret the effect of conditional language. Courts usually honor clear disclaimers of binding effect, but courts regard formal contractual language coupled with vague disclaimers as ambiguous. And

252. Id. at 218-19.
253. Id. at 220.
254. See supra notes 103-60 and accompanying text.
255. See, e.g., Quake II, 565 N.E.2d at 1001.
256. Id. at 1010 (Stamos, J., specially concurring).
257. LAKE & DRAETTA, supra note 6, at 220. See also Teachers Ins. & Annuity Ass'n v. Tribune Co., 670 F. Supp. 491, 499 (S.D.N.Y. 1987) ("[A] party that does not wish to be bound . . . can very easily protect itself by not accepting language that indicates a 'firm commitment' or 'binding agreement'.")
258. See, e.g., Borg-Warner Corp. v. Anchor Coupling Co., 156 N.E.2d 513 (Ill. 1958) (court held agreement enforceable, despite reference to future contract execution, because agreement was otherwise complete); see also supra notes 103-09 and accompanying text.
259. See, e.g., Interway, Inc. v. Alagna, 407 N.E.2d 615 (Ill. App. Ct. 1980) (held that reference to future contract made precontractual agreement unenforceable as a matter of law); see also Chicago Inv. Corp. v. Dolins, 481 N.E.2d 712 (Ill. 1985) (held that language "final contract in form acceptable to attorneys for seller and buyer" showed parties' intent not to be bound); Ebert v. Dr. Scholl's Foot Comfort Shops, 484 N.E.2d 1178 (Ill. App. Ct. 1985) (held that language "upon execution of lessor and lessee" was condition precedent); supra notes 121-33 and accompanying text.
260. See, e.g., Interway, 407 N.E.2d 615 ("subject to" language indicated non-binding effect). But see Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989) (cautioning that Interway does not make "subject to" language "magic words" dispositive in every case; agreement may still be enforceable per Borg-Warner doctrine); supra notes 143-45 and accompanying text.
261. See, e.g., Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1219 (7th Cir. 1988) (holding that precontractual agreement was not enforceable because it stated "this is not a binding agreement and the obligations and rights of the parties shall be set forth in the definitive agreement executed by the parties"); see also supra note 144.
262. See, e.g., Quake II, 565 N.E.2d 990 (language of "elected to award" with "reserve the right to cancel" and contract to follow "shortly" held ambiguous). But see Interway, 407 N.E.2d 615
drafters may not be able to disclaim implied "good faith" obligations in certain situations. Thus, drafters including conditions precedent in precontractual agreements must use particular care to avoid inconsistent judicial interpretation of ambiguous language.

Additional problems occur when parties intend to bind themselves by an intermediate precontractual agreement that imposes an obligation to negotiate in good faith. Drafters of such agreements must clearly define the negotiation framework. Defining the framework serves two purposes: setting the standards of good faith negotiation (usually by enumerating what would constitute "bad faith"); and providing for the parties' autonomy (by defining the parties' freedoms and limitations during negotiation). Besides defining the negotiation framework, the precontractual agreement should specify a remedy for breach, a basis for fashioning a remedy if practicable, and any agreed compensation for reliance expenditures.

Illinois courts have not widely accepted the intermediate agreement concept. One federal court in Illinois has recognized possible enforcement of a properly defined agreement of this type, and an Illinois Supreme Court justice has alluded to such a "contract to negotiate." Thus, because of the tendency of Illinois courts to reject intermediate (language of "confirm our agreement" and "we have agreed" with "subject to" created no factual issue of intent; non-binding as matter of law); supra notes 121-26 and accompanying text.

263. See Lake & Draetta, supra note 6, at 170-71. Separate disclaimers of good faith obligations in otherwise enforceable agreements may not be effective. The obligations of good faith performance of sales contracts are mandatory under UCC § 1-102(3), and some courts have analogized this principle to apply to other non-sales agreements. Id. But cf. Farnsworth, supra note 11, at 242 (noting judicial tolerance for claiming most precontractual liability, including good faith obligations, by parties to aleatory negotiations).

264. See Lake & Draetta, supra note 6, at 232-35.

265. Id. at 130. Farnsworth includes negotiation parameters such as exclusivity, duration, disclosure, and confidentiality, and also cautions that no drafter should ever leave such definitions of "good faith" to a court. Farnsworth, supra note 11, at 272-73.

266. Farnsworth, supra note 6, at 224-26.

267. See Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1225 n.3 (7th Cir. 1988) (stating in dicta that cause of action for breach of precontractual agreement obligation to negotiate in good faith might hold promise, but the agreement at bar was ambiguous as to definition of the scope of such obligations).

agreements on the "all or nothing" analysis,\textsuperscript{270} enforceable precontractual agreements of this type must be explicit as to all contractual elements.

Precontractual agreements authorizing partial performance present unique drafting problems. Parties wishing to bind themselves and begin performance in advance of formal contract execution must provide for resolution of any disputes that might prevent consummation of the formal contract.\textsuperscript{271} The precontractual agreement must clearly specify the intent of the parties to be bound.\textsuperscript{272} A suggested format is the "authority to proceed" contract, which obligates both parties to perform while awaiting formal contract execution and provides for compensation to the performing parties.\textsuperscript{273} The "authority to proceed" contract would terminate when the parties execute the formal contract, thus protecting both parties in the interim without the danger that a unilaterally issued "letter of intent" would be misinterpreted by a court.\textsuperscript{274} Parties issuing such a contract could freely negotiate the formal contract without fear of unintended obligations and parties proceeding under such a contract would be assured of compensation for their efforts.\textsuperscript{275} The \textit{Quake} parties needed just such an "authority to proceed" contract.\textsuperscript{276}

In Illinois, parties wishing to create binding obligations at an intermediate stage between negotiation and ultimate contract must clearly express their intent to do so. Even under the traditional "all or nothing" approach, Illinois courts will likely honor clear, mutual intentions expressed without ambiguity. Parties desiring to expand these intermediate obligations must precisely draft precontractual agreements to include items such as compensation for partial performance and requirements for good faith negotiation. Further, drafters must satisfy all traditional contract law requirements such as mutual obligation, consideration, and essential terms, thus allowing courts to find complete agreements and fashion appropriate remedies for breach. In this manner, drafters of explicit precontractual agreements can ensure that Illinois "all or nothing" courts will enforce even "unenforceable agreements to agree."

\textsuperscript{270} \textit{See supra} notes 116-41 and accompanying text.
\textsuperscript{271} \textit{See Lake} \& \textit{Draetta}, \textit{supra} note 6, at 230-31.
\textsuperscript{272} \textit{See, e.g., Quake II}, 565 N.E.2d at 1001 (holding that ambiguous intent of parties created factual issue for trial court to decide).
\textsuperscript{273} \textit{See Lake} \& \textit{Draetta}, \textit{supra} note 6, at 231.
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} An additional danger for a party issuing a precontractual agreement directing another party to proceed with work is that the other party's performance in reliance thereon will negate even clear non-binding intention. Parties wishing to ensure non-binding effect must do so with clear language and explicit conditions precedent. \textit{See Holmes}, \textit{supra} note 10, at 783.
\textsuperscript{276} \textit{See supra} notes 202-04 and accompanying text.
IV. Conclusion

The settled law of enforceability of precontractual agreements in Illinois is rooted in the “all or nothing” approach of traditional contract law. Currently, parties to disputed precontractual agreements must prove that their objective manifestations showed either an intent to be bound to a complete contract or an intent that no binding obligations accrued whatsoever. The Illinois courts have been slow to accept any “middle ground” regime of precontractual agreement that binds the parties to negotiate toward an ultimate agreement, with or without an obligation of good faith. The Illinois courts have hidden behind a facade of conditions precedent, ambiguity, and indefiniteness to deny enforcement of precontractual agreements. The “all or nothing” approach directly causes this reluctance to enforce intermediate precontractual agreements in Illinois.

Other jurisdictions, including the federal courts in Illinois, recognize the intermediate regime of the enforceable “contract to bargain” when the other traditional contract elements are present. The “contract to bargain” more readily mirrors the commercial reality that certain obligations can accrue at some point during business negotiations. Enforcement of such precontractual agreements in Illinois, even under the “all or nothing” approach, will lend some certainty to a most uncertain area of contract law. By enforcing precontractual agreements, Illinois courts will encourage business persons to enter negotiations knowing that well defined mutual obligations of fair dealing and good faith will be judicially enforced and that remedies will be available to parties wronged during negotiation. Business persons who clearly manifest an intent to enter such a regime should feel secure that courts will honor their intent and uphold their commercial expectations. This security will no doubt foster increased business negotiations, thus increasing the overall level of economic activity in Illinois. The “all or nothing” approach should not stand in the way.