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HALFWAY DEALS: OR, WHEN IS A NON-CONTRACT A CONTRACT?

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I. INTRODUCTION

Sometimes, it happens that one party to a negotiation thinks that a contract has formed from incomplete negotiations, while the other party equally believes that there is no contract.[1] And sometimes courts fashion contracts out of ambiguous expressions of assent.[2] In some of these cases, one might say that these courts have correctly interpreted puzzling expressions as well-formed, intentional contracts that are denied only out of a resisting party's later motivations.[3] Or, in the same cases, one might conclude that the courts have improperly used a kind of judicial alchemy to make incomplete deals into unintended binding expressions.[4]

There are several common situations in which halfway deals become contracts. Although a deal, whatever the term means, is not necessarily a contract, sometimes what the parties call "a deal" becomes a contract in the holding of a court. For example, a document may expressly say that it is not a contract, but later events can be interpreted as showing agreement, and this combination may enable a court to make the non-contractual document and its aftermath into a real contract.[5] Or, a court may interpret a document titled as a Letter of Understanding (LOU), or captioned by a similar name,[6] as a completed contract in spite of its tentative expression.[7] Disputes about the conduct of auctions, which are a frequent means of disposing of valuable business property and goods, can also produce puzzling kinds of halfway deals.[8] Additionally, a court might hold that an agreement to negotiate—one that obviously is not a final contract—is a binding agreement to negotiate in good

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1. *See, e.g.*, *infra* Section II.A (discussing Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. 1987), in which this kind of disagreement occurred).

2. *See infra* Section II.A.

3. *See infra* Section II.B (discussing cases involving Letters of Understanding, which often are found to be legitimate contracts).

4. *See infra* Section II.A (critiquing such a case).

5. *See generally* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. 1987), discussed *infra* Section II.A.

6. *See, e.g.*, *infra* Section II.B, discussing Letters of Intent (LOIs).

7. *See infra* Section II.B.

8. *See infra* Section II.C.

faith and exclusively, and allow damages for breach of that contract.[9] And finally, incomplete negotiations claimed as contracts usually produce garden-variety cases about offer and acceptance, but sometimes they produce more esoteric decisions that depend on the shifting line between contract and non-contract.[10]

This Article explores halfway deals that become contracts. Section II of the Article analyzes cases disclaiming contractual status that courts interpret as binding contracts on the basis of later informal expressions. Section II, Part A considers express non-contracts that ripen into contracts. Part B covers ambiguous LOUs. Part C covers auctions that produce disputed contracts. Part D analyzes incomplete agreements that courts sometimes treat as exclusive-negotiation contracts. Finally, Part E considers halfway deals in which courts find contracts in incomplete negotiations.

Then, Section III advises attorneys about a method for memorializing points of agreement during drawn-out negotiations while avoiding having their incomplete expressions interpreted as contracts. That Section also counsels lawyers about making on-the-spot agreements final and binding when this result is desired. An example of the need for this kind of resolution might involve a mediation in which agreement occurs well after midnight, following an exhausting day of hard bargaining. A final Section contains the author's conclusions, which include the idea that documents saying they are not contracts should not be combined with later vague and informal expressions to make them into contracts.

II. HALFWAY DEALS THAT BECOME CONTRACTS

Halfway deals can become contracts, sometimes legitimately and sometimes not. There are many circumstances that can give rise to this possibility. This Section covers five of the most common and most troublesome situations.

A. Documents Expressly Styled Non-Contracts That Nevertheless Become Contracts

1. A Famous Example: Texaco, Inc. v. Pennzoil Co.

The litigation between Texaco and Pennzoil is a case for the ages. *Texaco, Inc. v. Pennzoil Co.*[11] resulted in a judgment for more than $10 billion[12]

9. *See infra* Section II.D.

10. *See infra* Section II.E.

11. 729 S.W.2d 768 (Tex. App. 1987). The author was one of many appellate attorneys for Texaco.

12. *Id.* at 784.

after proceedings in which lawyers often forgot the "b" and mistakenly said "million" instead of billion.[13] *Texaco* actually began with a different set of parties, concerning negotiations between Pennzoil and a third party called Getty Oil Company.[14] It finally ended with a settlement in which Texaco reportedly agreed to pay Pennzoil a sum rumored to be around $3 billion.[15]

It all started with a non-contract: a halfway deal. Getty tentatively agreed to merge with Pennzoil in a document that seemed to disclaim a contract.[16] It expressly stated that it was subject to a later written final agreement.[17] The appellate court said, however, that the disclaimer of contract was "not so clearly expressed" as to negate a contract as a matter of law.[18] But in any event, Getty's and Pennzoil's executives held a press conference, announced an "agreement in principle," and celebrated with champagne toasts.[19] Pennzoil offered testimony to the effect that "when business people use 'agreement in principle,' it means that the parties have reached a meeting of the minds with only details left to be resolved."[20]

Meanwhile, Texaco also wanted to buy Getty.[21] Likely because the document that Getty and Pennzoil had signed expressly stated that it was subject to a definitive written agreement, which did not exist, Texaco went forward with a merger with Getty.[22] This decision proved later to be an unwise one.

Pennzoil eventually sued Texaco in a state court.[23] Joseph (Joe) D. Jamail, a lawyer originally made famous by personal injury verdicts, represented plaintiff Pennzoil.[24] The claim was for intentional interference with contract—that is, Texaco's interference with Pennzoil's asserted contract with Getty.[25] For this claim to succeed, Pennzoil had to convince a jury that

13. The author personally observed this kind of mistake and made it himself.

14. *Texaco*, 729 S.W.2d at 784–87 (detailing negotiations between Pennzoil and the "Getty entities").

15. Appellate counsel, including the author, were cautioned that the amount was undisclosed and the author never precisely observed any document setting out this final settlement amount; this sentence expresses the word-of-mouth information that followed. *See* Debra Whitefield, *Settles Dispute Over Purchase of Getty Oil: Texaco Agrees to Pay Pennzoil $3 Billion*, L.A. TIMES (Dec. 20, 1987, 12:00 AM), https://www.latimes.com/archives/la-xpm-1987-12-20-mn-30200-story.html.

16. *Texaco,* 729 S.W.2d at 785.

17. *Id.* at 788.

18. *Id.* at 790.

19. *Id.* at 786.

20. *Id.* at 791.

21. *Id.* at 786.

22. *See Texaco,* 729 S.W.2d at 786.

23. *Id.* at 784.

24. *See* Robert D. McFadden, *Joe Jamail, Flamboyant Texas Lawyer Who Won Billions for Clients, Dies at 90*, N.Y. TIMES (Dec. 23, 2015), https://www.nytimes.com/2015/12/24/business/joe-jamail-flamboyant-texas-lawyer-dies-at-90-won-penn-zoils-10-5-billion-award-against-texaco.html.

25. *Texaco*, 729 S.W.2d at 784.

there was, indeed, such a contract. The court parsed the Pennzoil-Getty agreement and their announcement to find the meaning of several phrases, including "agreement in principle," and found that all of them were properly resolved by the jury.[26] Thus, the aftermath of a halfway deal, which expressly negated a contract, had created a binding contract.

Pennzoil also had to prove something even more difficult: that Texaco had known that there was a contract when it agreed to merge with Getty. Texaco, of course, denied this assertion, pointing to the expression in the key document that said that it was not a contract.[27] Pennzoil countered with evidence about its announcements and champagne toasts,[28] as well as testimony from Pennzoil executives to the effect that "we had a deal" and were "ready to go."[29]

Joe Jamail treated Texaco as if it were a criminal. His final argument bristled with moral indignation:

> What you decide is going to set the standard of morality in business for America for years and years to come.
>
> Now, you can turn your back on Pennzoil and say, "Okay, that's fine. We like that kind of deal. That's slick stuff.
>
> "Go on out and do this kind of thing. Take the company, fire the employees, lose the pension fund." . . . [O]r you can say: "No. Hold it, hold it, hold it now. That's not going to happen.
>
> "I have got a chance. Me. Juror.
>
> "I have got me a chance.
>
> I can stop this. And I am going to stop it.
>
> "And you [Texaco] might pull this on somebody else, but you are not going to run it through me and tell me to wash it for you.
>
> "I am not going to clean that dirty mess for you."
>
> It's you. Nobody else but you. Not me. I am not big enough. Not . . . anybody. Not the judge. Only you, in our system, can do that.
>
> Don't let this opportunity pass you. Do not. . . .

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26. *Id.* at 796–805 (discussing documents available to Texaco and other indicia of Texaco's knowledge and concluding that this evidence was sufficient to support the jury's verdict).
27. *Id.* at 787–88.
28. *Id*. at 797–98, 800–01.
29. *See id.* at 838.

> The evidence is clear. Punitive damages [are] meant for one reason, to stop this kind of conduct. . . .
>
> And the reason is that you can send a message to corporate America, [to the] business world, because it's just people who make up those things.
>
> And you can tell them that you are not going to get away with this. . . .
>
> I know you are going to do the right thing.
>
> You are people of morality and conscience and strength.
>
> Don't let this opportunity pass you.[30]

The composition of the jury was odd. It consisted of people who could sit through a four-month trial without excessive hardship.[31] Thus, one can infer that the jury would not have included professionals or businesspeople; the jurors themselves would have been made up of only lower-level employees of large institutions that could have continued to pay them and keep them in their jobs. So, perhaps the jury membership was not so odd. How many people can take six months out of their normal activities to hear a complex and contested factual pattern? Students can understand this problem by asking themselves what the loss of this extended period of time, coming as it would unpredictably in the middle of a semester, would do to their plans for the future.

The jury brought back a verdict concluding that, yes, Pennzoil and Getty had a contract providing what Pennzoil had alleged, and yes, Texaco had knowingly interfered with the contract.[32] For damages, the jury adopted Jamail's figure.[33] The Texas court of appeals affirmed.[34] And thus, a halfway deal, set out in a document that said it was subject to a final written agreement, together with what has been described as a "handshake," supplied all the terms of what became a contract and supported damages for more than $10 billion.[35]

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30. Excerpts from Jury Arguments in *Pennzoil Co v. Texas, Inc.*, No. 84-05095, 151st Dist Ct. Harris Cy., Tex., July 10, 1985, *referenced in* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 654 (7th ed. 2019), https://caplaw.com/sites/cp7 (choose "Litigation Document Example 10.2: Jury Argument, Charge, and Objections, Featuring the Litigation in *Pennzoil Co. v. Texaco Inc.*").

31. *See generally* Stephan Landsman, *The Civil Jury in America*, *in* WORLD JURY SYSTEMS 381, 392–93 (Neil Vidmar ed., 2000) (questioning lay jury participation in a complex litigation, such as the seventeen-week litigation in *Texaco*).

32. *Texaco*, 729 S.W.2d at 784.

33. *Id.*

34. *Id.* at 795 ("The record as a whole demonstrates that there was legally and factually sufficient evidence to support the jury's finding . . . that the [parties] intended to bind themselves to an agreement with Pennzoil . . . on January 3, 1984.").

35. *See* Chalker Energy Partners III, LLC v. Le Norman Operating LLC, 595 S.W.3d 668, 669 (Tex. 2020).

2. Texaco's Life Continues

The *Texaco* decision, and its fallout, has survived to guide other jurisdictions. It has been cited by courts in New York,[36] Connecticut,[37] and in 2022, Tennessee,[38] although not always about non-contracts that become contracts. A Westlaw search produced 282 cases that have cited *Texaco*.

One of the Connecticut cases, *Waste Conversion Technologies, Inc. v. Midstate Recovery, LLC*,[39] is particularly on point. There, Waste Conversion Technologies, Inc. ("Waste") had a contract with Warren Recycling, Inc. ("WRI") that called for Waste to deliver construction debris to a landfill and required WRI to unload the delivery railcars within seventy-two hours.[40] If WRI did not do so timely, Waste would lose revenue under a separate contract.[41] The contract between Waste and WRI also prohibited WRI from making any similar contract with an entity within fifty miles.[42] Regus, an affiliate of Midstate that was located within fifty miles and a direct competitor of Waste, then induced WRI to unload its cars first.[43] Waste lost revenue and sought to recover damages.[44] In summary, the contract between Waste and WRI was more definitely established than the ambiguous Pennzoil-Getty agreement in *Texaco*.

Waste then sued Midstate for intentional interference with a contract.[45] Subsequently, Midstate moved for summary judgment.[46] The intentional-interference claim, said the Connecticut court, depended upon a showing of a particular kind of conduct by the interfering party, as well as proof of a contract prohibiting that conduct.[47] A showing that the defendant had knowingly interfered and had caused loss was not enough.[48] The Connecticut court cited *Texaco* for the proposition that the defendant, here Midstate, must have

36. Peckham Rd. Corp. v. Town of Putnam Valley, 631 N.Y.S.2d. 172, 174 (App. Div. 1995) (citing to a different branch of the case and finding no deprivation of civil rights).

37. Waste Conversion Techs., Inc. v. Midstate Recovery, LLC, No. AANCV044000948, 2008 WL 5481231, at *21 (Conn. Super. Ct. Dec. 3, 2008) (deciding claim for intentional interference with contract); *see also* G & L Capasso Restoration, Inc. v. W. Haven Hous. Auth., No. CV98-00636525, 1999 WL 1207149, at *11 (Conn. Super. Ct. Nov. 29, 1999) (deciding about halfway contract).

38. Tarver v. Tarver, No. W2022-00343-COA-T10B-CV, 2022 WL 1115016, at *4 (Tenn. Ct. App. Apr. 14, 2022) (addressing a recusal issue).

39. 2008 WL 5481231.

40. *Id.* at *1.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Waste Conversion*, 2008 WL 5481231, at *2.

46. *Id.*

47. *Id.* at *21–24.

48. *Id.* at *21.

actively "persuaded" the other contracting party, WRI, to breach its contract with the plaintiff, Waste.[49] The court denied summary judgment because fact issues remained about this and other issues.[50]

Texas courts have also cited the *Texaco* decision and have done so frequently. In *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*,[51] the Texas Supreme Court observed that "[a]n agreement as to many things can be oral, sealed by a handshake, even a $10.53 billion handshake"[52] and cited *Texaco* for this proposition, with apparent approval, even as it refused to find a completed contract in the case before it.[53]

3. What Should Courts Do in Such Cases?

The solution to cases such as these is simple. If a document expressly says that it is not a contract, or that it requires a definitive written agreement before anything within it is binding, it ought not to become a contract. Furthermore, it should form no part of a contract, nor should it be combined with later expressions to make a contract. In other words, *Texaco v. Pennzoil* is wrongly decided.[54]

Halfway documents, such as that in *Texaco*, are useful for several reasons, none of which has to do with a maverick party claiming a binding agreement. First, a halfway document can memorialize the results of lengthy negotiations after a long period of due diligence: a kind of due diligence, verifying the facts on the ground, that would be too expensive to conduct without a memorandum of incomplete but near agreement. Obviously, this purpose does not support the finding of a contract, because the very reason for due diligence investigations is to prevent the making of a final agreement if the investigation turns up negative information.

Second, a halfway deal can memorialize agreements that otherwise would be oral, so that negotiations interrupted by long periods away, perhaps months away, can be remembered accurately. Third, a halfway document can serve as a framework for completing details of issues that the non-contract did not resolve. Fourth and finally, this kind of halfway document can allow the parties to announce the partial deal to the world, as they did in *Texaco*, in a way that creates advantages for both parties.

After this kind of incomplete agreement, parties will likely think, and express, that they have "a deal" or an "agreement in principle," as Pennzoil

49. *Id.*
50. *Id.* at *7.
51. 595 S.W.3d 668 (Tex. 2020).
52. *Id.* at 669.
53. *Id.* at n.1. However, the court reached a result opposite from that in *Texaco*. *Id.* at 677.
54. *See supra* Section II.A.1.

and Getty did in *Texaco*.[55] Their personnel will address each other in more friendly terms than the guarded and secretive words that they used during negotiations. In this period between a non-contract document and a definitive written agreement, they will say to each other words that imply agreement, as the parties did in *Texaco*.[56] In fact, they intend, or at least hope, to finalize their deal. Businesspeople ought to be able to have these natural kinds of exchanges without fearing that they have committed fatal errors. In short, *Texaco* is a signpost in the wrong direction.

A halfway document that says that it is not a contract should form no part of a contract cobbled together with later informal expressions. It should remain a halfway deal, one that is useful even if it is not a complete agreement. The treatment of this situation should not be left to the vagaries of a jury, but, rather, it should be a matter of law.

4. How Should Attorneys Address These Issues?

A lawyer who helps a client prepare a halfway document should take care in writing the disclaimer of contract. In addition to stating that the document is subject to a definitive written agreement, it should flatly say that it is not a contract. Language should also be inserted saying that it "is not an agreement to negotiate." Furthermore, the document should expressly say, "This document cannot be made part of any contract expressed through informal communications or any other indicia of agreement, except for a definitive written contract signed by both parties." And the lawyer should caution executives to avoid communications or acts that express finality or celebrate a "deal." Finally, the lawyer could consider the form of a "Status Letter," similar to that appearing later in this Article,[57] because it is more forceful. While this particular document may sound too hostile in its whole, given that the parties do want to move toward a final agreement, parts of it may be useful.

In many cases, however, this advice will not be workable. In the first place, an agreement that later expressions cannot make the halfway document a contract, as suggested, may not be effective to avoid that result. Parties to a partial agreement can always change it, even orally. The clause may serve as evidence against a later-claimed contract, and so even if it is not fully effective, the clause may be useful. But it may not be definitive.

These suggestions are likely often to be impractical for another reason: there is a limit to the value of disclaimers if the parties really want to reach an agreement, as they usually do. Repeated and vigorous denials of agreement may hinder the course toward that desirable final contract. They may even be

55. *See supra* notes 17–22 and accompanying text.
56. *See* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 794 (Tex. App. 1987).
57. *See infra* Section III.A.

interpreted by celebratory partners as rudeness of a kind no one wants to confront. In other words, too much fuss over disclaimers of a contract may impede progress toward a contract.

B. Letters of Understanding That Ripen into Contracts

Letters of Understanding (LOUs) perform somewhat the same function as the document in *Texaco*, but they often are written in terms that sound closer to final agreement than the non-contract in that case. They may be titled in other ways, such as Letters of Intent (LOIs).[58] LOUs are surprisingly common, even though they often are not intended to be binding contracts and yet are easily claimed as binding.

Sometimes, LOUs are written without disclaimers of contract. In that case, with the parties agreeing in a Letter of Understanding to the essential terms of agreement, and expressing no reason not to find agreement, the courts can correctly hold that there is a contract.[59] After all, a mutual "understanding" does sound like a contract. The trick for judges is to recognize final contracts in cases in which LOUs express final contracts and to withhold that recognition when they do not, a decision that frequently will require fact-based determinations.

1. An Example of the LOU Problem: Mowery v. City of Carter Lake

Mowery v. City of Carter Lake[60] is a recent case in which an ambiguous LOU became a contract. There, the LOU expressed a putative agreement between the City Clerk, Mowery, and the City for severance pay if she were to be terminated.[61] The LOU was signed by Mowery and by the City's mayor, and it contained the following provisions:

> 1. Employee [Mowery] was appointed to serve as the City Clerk . . . .
>
> 2. Employee is an employee-at-will . . . . This is not a contract for employment.
>
> . . . .
>
> 6. If the Employee's services are terminated by the Employer, during the five-year term of this agreement, the Employee will be granted [twelve] months' severance pay. Severance package to include full pay,

58. *See* Vendome v. Oldenberg, 152 N.Y.S.3d 569, 569 (App. Div. 2021).
59. *See infra* Section II.B.1.
60. 961 N.W.2d 739 (Iowa Ct. App. 2021).
61. *Id.* at 742–43.

> reimbursement for unused vacation and sick pay and complete benefits of health, dental, vision and life insurance.
>
> . . . .
>
> 8. This Letter of Understanding contains all of the terms of employment between the parties.[62]

The City refused to reappoint Mowery at the beginning of a new term of office.[63] She sued, claiming that the LOU was a contract.[64] The City defended by arguing that the LOU was not a contract and that Mowery was not terminated; instead, she simply was not reappointed.[65]

The trial court found the document ambiguous enough to submit these questions to a jury, which found in favor of Mowery.[66] There was extensive testimony from various witnesses about the intentions of the parties, both pro- and anti-contract, including repeated statements of opinion by City personnel.[67] The appellate court affirmed a judgment for Mowery to recover more than $200,000.[68] The outcome was largely determined by fact issues submitted to the jury.

2. Considerations for Lawyers and for Negotiating Parties

The *Mowery* case serves as an indication of the dangers lurking in LOUs for those who do not intend them as final agreements. LOUs often are halfway deals, not intended to be binding, but are expressed in ways that easily can be construed as final contracts. In fact, in *Mowery*, the City's mayor expressed his "dislike" of LOUs, saying that the City should not use them.[69] Given the outcome in *Mowery*, he seems to have been correct. Evidence in the *Mowery* case included various kinds of partisan testimony supporting each side.[70] For example, the former mayor who had signed the LOU testified that its "purpose" was to ensure Mowery's right to her severance package, and there was a great deal of other opinion testimony and circumstantial evidence.[71]

A plaintiff claiming a contract, it can be assumed, will generally be able to find some evidence of this kind. As for the City's argument that the LOU said that it was "not a contract," the court said that indeed, it was not a contract

62. *Id.* at 743–44.
63. *Id.* at 742.
64. *Id.* at 741–42.
65. *Id.* at 742.
66. *Mowery*, 961 N.W.2d at 749.
67. *Id.* at 747–49.
68. *Id.* at 759.
69. *Id.* at 747.
70. *Id.* at 745–49.
71. *Id.* at 747.

"for employment," as the LOU also provided; but instead, it was a contract for severance pay.[72] The jury's finding that it was a contract for severance was supported by substantial evidence.[73] Expressions such as that the LOU "contains all of the terms of employment"[74] presumably bolstered the jury's and the court's conclusion. Foolish use of merger clauses like this one, when the brief document does not and cannot provide a complete resolution of all issues "of employment," is too common.

The meat of the coconut[75] here is that parties to tentative agreements should not express their hopes and dreams in Letters of Understanding. The LOU label on the document itself conveys mutual "understanding"—and therefore implies agreement. Instead, if the parties intend not to agree to a final contract, in an appropriate situation, they should consider the terms of partial agreement in something like the form provided later in this Article, which safeguards, as well as possible, the non-contractual nature of the document.[76] On the other hand, if two parties do intend to form a contract, they should write "Contract" as the caption of their document, not "Letter of Understanding," and follow the advice given later in this Article.[77]

3. Considerations for the Courts

LOUs will often require courts to undertake extended proceedings to determine whether a particular LOU is or is not a contract.[78] Sometimes, one can conclude, the matter can be resolved on summary judgment, and perhaps the judges in the *Mowery* case could have chosen that pathway. But often, as in *Mowery*, the document is ambiguous, and there is evidence, opinion, and just plain gossip that points in opposite directions.[79] And this kind of evidence may make it best for a court, probably reluctantly, to put the issue to a jury, as the court did in *Mowery*.[80]

In the case of a deed for real property, canons of construction include the proposition that, when one of two alternative interpretations is unambiguous, the court should select the unambiguous alternative.[81] In *Ferriter v.*

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72. *Mowery*, 961 N.W.2d at 755.
73. *Id.* at 756.
74. *Id.* at 744.
75. The author practiced before a judge who used this expression and has always favored it.
76. *See infra* Section III.A.
77. *See infra* Section III.B.
78. *See Mowery,* 961 N.W.2d at 745–49 (recounting extensive testimony).
79. *See id.* at 755.
80. *See id.* at 742.
81. *See* Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983) ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.").

Bartmess,[82] the court set this rule out: "Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite . . . does not frustrate the conveyance, but it is to be construed by the first mentioned particulars."[83] This rule could be extended to the construction of contracts, too, and it especially could be used in cases involving halfway expressions such as LOUs. Jury trials are a scarce resource.[84] Perfection is impossible. One reason there are so few jury trials today is that courts cannot provide more under the current rules.[85] It would help if cases in which parties have intentionally chosen sloppy devices, such as LOUs, could be disposed of on matter-of-law grounds.

This approach, of course, opposes one of the most important canons, which is to the effect that a court should follow the intent of the parties.[86] It is an effort simply to conserve judicial resources, in recognition that divining the intent of the parties is often elusive. In any event, a rule favoring the unambiguous interpretation would not resolve all cases. Courts and parties often would still have to wade through extensive pretrial proceedings.

C. Auctions

1. Disputes about Contract Formation in Auctions

An auctioneer stands in an unusual and uncomfortable position. The auctioneer owes duties both to the client and to contracting parties who buy the client's property.[87] One should not think of auctions as unimportant or infrequent events consisting only of works of art or other wares; instead, auctions can be conducted to sell entire businesses or complex business properties. Then, the issues expand.

For example, *WTG Gas Processing, L.P. v. ConocoPhillips Company*[88] was a case about an auction agreement that produced a claim for breach of contract by a potential buyer. ConocoPhillips ("Conoco") wished to sell one of its facilities and set up a process, including an online information center, enabling potential bidders to make offers of purchase.[89] WTG Gas Processing

82. 931 P.2d 709 (Mont. 1997).

83. *Id.* at 712 (using this approach to resolve a claim of ambiguity).

84. *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Verdicts in a System Geared to Settlement,* 44 UCLA. L. REV. 1, 1–6 (1996).

85. *See* David Crump, *A Response to the Jury Default Proposal: Court Dockets, Jury Trials, and Finding the Best Solution*, 38 REV. LITIG. 239, 240 (2019).

86. *See Coker*, 650 S.W.2d at 393.

87. *See* Cristallina S.A. v. Christie, Mason & Woods Int'l, Inc., 502 N.Y.S.2d 165 (App. Div. 1986) (holding that an auctioneer has a fiduciary duty).

88. 309 S.W.3d 635 (Tex. App. 2010).

89. *Id.* at 637.

("WTG") made an offer and was informed that it was the successful bidder.[90] The testimony revealed that Conoco's lead negotiator telephoned his counterpart at WTG, stating:

> ConocoPhillips had decided to "go forward with" WTG; ConocoPhillips and WTG had a "deal," ConocoPhillips had some "immaterial" changes—"wording" issues—to WTG's draft [purchase and sale agreement]; the parties would "proceed to get it signed"; and ConocoPhillips would forward a revised version the next day or at least by December 15.[91]

The contract of purchase and sale had been proffered by Conoco, and it required bidders to make open, binding offers, whereas Conoco was not bound during the contested bidding time.[92] Conoco's agents sent repeated, signed emails indicating that an agreement had been reached with WTG, and that all that remained was the execution of a signed document, which would be done quickly.[93] In their emails, Conoco's agents had treated the signing ceremony as a formality.[94] But then Conoco sold the facility to a third party.[95]

WTG sued on the theory that the dealings between the parties formed a contract.[96] With equal voice, Conoco denied that there was a contract and pointed to language in the bidding procedure that allowed it to refuse an offer "for any reason or for no reason at all" and to conduct negotiations with multiple bidders.[97] The bid procedures also provided that no contract was to be formed without a definitive written agreement, called a purchase and sale agreement (PSA).[98] The trial court held that there was no contract between Conoco and WTG, and the court of appeals affirmed.[99]

The appellate court held that Conoco had neither waived its bid procedures nor created a contract when its agents orally and in emails told WTG that they had "a deal."[100] In particular, said the court, Conoco had the right to insist on the requirements in its bid provisions requiring a signed PSA.[101] Likewise, Conoco did not create a contract by promising to sign a final agreement.[102] The court pointed out that Conoco had "reserved the right to pursue the most favorable bid until execution of a PSA" and had specified it could

90. *Id.* at 638.
91. *Id.* at 638–39.
92. *Id.* at 638.
93. *Id.* at 640–41.
94. *See WTG Gas Processing*, 309 S.W.3d at 640–41.
95. *Id.* at 641.
96. *Id.*
97. *Id.* at 637–38.
98. *Id.* at 638.
99. *Id.* at 637.
100. *WTG Gas Processing*, 309 S.W.3d at 643.
101. *Id.* at 643–44.
102. *Id.*

entertain a bid until such a PSA was signed.[103] Specifically, Conoco's bid procedures stated that "it could entertain a bid at any time, negotiate with any prospective purchaser at any time, and negotiate with multiple parties at the same time."[104]

One criticism of the court's reasoning was that the bidding process designed by Conoco literally required a bidder to bind itself to the contract it offered to accept while allowing Conoco to deny its existence, even after selecting the bidder as successful.[105] A supporter of the result, however, might perhaps say that this is a feature of auctions. Or a supporter might say it is a feature of *options*, which bids at auction superficially resemble.[106] In any event, the state supreme court later cited *WTG Gas Processing* with approval in *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*.[107]

Auctions create many other kinds of issues because they create what are expressly halfway deals, subject to better bids. For example, in *Cristallina S.A. v. Christie, Mason & Woods International, Inc.*,[108] a New York appellate court upheld a claim about inadequate publicity before an auction of artwork.[109] The court pointed out many flaws in Christie's pre-auction conduct, including misrepresentations, withholding of required information, statements of conflicting prices, and advertisements of lesser works while neglecting the best.[110] Among other justifications, the court held that an auction house has a fiduciary duty to customers seeking contracts of sale, and evidence showed that Christie's had violated this duty.[111]

However, in *Sveaas v. Christie's Inc.*,[112] the Second Circuit upheld a New York appellate court's dismissal of a superficially similar claim.[113] Sveaas's complaint said that Christie's had inadequately advertised the auction, with mainly its own catalogues, so that "many of the lots . . . either failed to sell or sold significantly below market value," despite their "extreme desirability."[114] The court pointed out that section 2.7 of the auction contract provided:

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103. *Id.* at 649.
104. *Id.*
105. *See id.* at 637–38.
106. An option, similarly, provides that the optioner hold open its offer while the optionee does not. *See* DAVID CRUMP ET AL., PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES 181 (4th ed. Press 2020). But an option requires mutual consideration. *Id.* WTG received no consideration, and it normally is not paid in an auction.
107. 595 S.W.3d 668, 674 (Tex. 2020).
108. 502 N.Y.S.2d 165 (App. Div. 1986).
109. *Id.* at 171.
110. *Id.*
111. *Id.*
112. 452 F. App'x 63 (2d Cir. 2011).
113. *Id.* at 67.
114. *Id.* at 65.

> Christies . . . shall have complete discretion as to (i) the manner in which such sale is conducted [and] . . . , (ii) the illustration, if any, and the description of the Property in our catalogues and other literature . . . .
>
> The Seller hereby authorizes Christies . . . to take such action as Christie's . . . deem[s] reasonable in order to build interest in the Property . . . including, without limitation, . . . to publicize the property and the sale.[115]

The court distinguished New York's earlier *Cristallina* decision on the ground that this language limited the duty that the auction house owed to its clients in forming future contracts of sale.[116]

2. Implications for the Courts

Courts should not be quick to dismiss claims about auction contracts or grant summary judgment against them. If, as in *Sveaas*, the auction process contains language that limits the auctioneer's liability or grants discretion in negotiations among many potential buyers, there still are possibilities of violations of the auctioneer's duty. In other words, there are possible claims in the *WTG Gas Processing*, *Chalker*, and *Sveass* situations. The auctioneer presumably still has some residual degree of fiduciary duty or requirement of good faith and fair dealing in these cases, even if the contract provides for discretion, and the courts should look to see whether there is evidence of any violation of such a duty.[117] For example, if an auctioneer with discretion did nothing to pursue the goals of the contract, unreasonably favored a particular bidder, conducted the auction in a voice so weak that bidders could not hear, or failed in other ways to act as a reasonable auctioneer, the claim of a disappointed client may be valid.

At the same time, the courts should rigorously enforce contractual limits on the auctioneer's duty. Language providing for complete discretion in the auctioneer is valid and should be the basis of dismissal or summary judgment in proper cases. The question remains whether the discretion encompasses the auctioneer's particular conduct: that is, whether the limit on liability created by provisions for discretion excludes the particular claim under the circumstances. For example, the provision in *Sveaas* provided only for "reasonable" discretion in creating publicity.[118] The court's scrutiny of evidence in such a case should be bottomed on whether the discretion exercise was, in fact, reasonable. In *Sveaas* itself, the evidence may not have supported this possibility, and the case is probably correctly decided.

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115. *Id.*
116. *Id.* at 66–67.
117. *See id.* at 66 (even if there is discretion, "there is a promise not to act arbitrarily or irrationally in exercising that discretion").
118. *Sevaas*, 452 F. App'x at 65.

3. Implications for Attorneys

Lawyers advising auctioneers should lard the auction procedures with multiple, reinforcing references to discretion on the part of the auctioneer. Language like that in *WTG Gas Processing* might also be helpful to the auctioneer as provisions to insert.[119] And language like that in *Sveaas* could also be added.[120] Evidently, Christie's learned from its loss in *Christallina*, inserted the language limiting its duties in *Sveaas*, and at last prevailed.[121] Finally, language such as that suggested later in this Article could advantageously be modified to fit an auction process.[122]

A client or buyer at auction, on the other hand, should look to whether the auction process contains limitations of liability by way of broad discretion and should exercise care about even bidding in, or agreeing to, the auction in such circumstances. The client should watch the auctioneer's conduct of the pre-auction and sale process, even if the auctioneer has broad discretion, and should protest any disadvantageous action. The bidder should put a time limit on the offer, if it is practical, to avoid its being strung along or used excessively as a bargaining tool.

Both clients and bidders should attempt, if practical, to include language that softens the limitation of the auctioneer's duty, such as "discretion shall be reasonably exercised," "reasonable discretion," or language to similar effect. But these kinds of tinkering with the auctioneer's duty may be impractical, for reasons having to do with the auctioneer's control of the bid procedure, and in that event, the only defense may be to consider carefully whether to participate in the particular auction at all.

D. Agreements to Negotiate

One can find many cases stating that mere agreements to negotiate are not contracts.[123] But other courts have concluded that agreements to negotiate, if they require exclusivity or good faith, are enforceable as just that—agreements to negotiate exclusively or in good faith.[124] After all, a contract can cover any goods, services, or courses of conduct that are not illegal,[125] including exclusive or good-faith negotiations. And courts have so held, despite that

119. *See* WTG Gas Processing, L.P. v. ConocoPhillips Co., 309 S.W.3d 635, 637–38 (Tex. App. 2010).

120. *See Sveaas*, 452 F. App'x at 65.

121. *See id.* at 66.

122. *See infra* Section III.A (status letter).

123. *E.g.*, Brown Enters., Inc. v. Hockman, 50 Va. Cir. 237 (1999) (holding that "an agreement to negotiate in the future . . . is not a contract").

124. *See infra* notes 127–149 and accompanying text.

125. *See* Hairston v. Hill, 87 S.E. 573, 575 (Va. 1916) (stating that a "legal subject-matter" can make a contract).

these agreements to negotiate are not final contracts binding the parties to the object of the negotiations.[126]

Recognizing agreements to negotiate is appropriate. A faithless negotiator who improperly sells to a third party can cause serious losses to the other negotiator. In one case, the court affirmed a judgment for $113 million in damages caused by breach of an agreement to negotiate.[127] A particular deal may mean a great deal of labor in complying with the other party's conditions precedent to negotiations. Or it may mean significant expense of due diligence in verifying or evaluating the other party's property at issue, as well major costs in complying with requirements of offer and acceptance. Furthermore, it may mean overlooked offers that were in second place, such as offers that appeared to be lesser than the faithless negotiator's offer and that would otherwise have been desirable to accept. These are good reasons for courts to enforce agreements to negotiate and to award these kinds of damages.

For example, in *Cox Communications, Inc. v. T-Mobile US, Inc.*,[128] plaintiff Cox sued to enforce an agreement that settled two patent infringement lawsuits.[129] The settlement agreement provided for terms to be mutually agreed upon by the parties in the future, whereby Cox would become a mobile virtual network operator (MVNO) reselling wireless mobile services from T-Mobile's predecessor, a mobile network operator (MNO).[130] The key language, in section 9(e), was as follows:

> [Before providing services], the Cox Wireless Affiliate will enter into a definitive MVNO agreement with [T-Mobile's predecessor] identifying the [predecessor] as a "Preferred Provider" of the Wireless Mobile Service for the Cox Wireless Affiliate, on terms to be mutually agreed upon between the parties for an initial period of 36 months (the "Initial Term").[131]

"Preferred Provider" was defined in the second sentence to mean "an *exclusive* partner with Cox in the MVNO business."[132]

This language did not expressly provide for exclusive negotiations or even negotiations in good faith.[133] Probably because of this omission, Cox ceased relations with T-Mobile and instead partnered with Verizon.[134] T-Mobile followed by claiming that Cox had breached the settlement agreement.[135]

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126. *See infra* notes 127–49.
127. SIGA Techs., Inc. v. Pharmathene, Inc., 132 A.3d 1108, 1137 (Del. 2015).
128. 273 A.3d 752 (Del. 2022).
129. *Id.* at 756.
130. *Id.*
131. *Id.*
132. *Id.* (emphasis added).
133. *See id.*
134. *See Cox Commc'ns, Inc.*, 273 A.3d at 757.
135. *Id.*

The appellate court provided the following delineation of the possible meanings of an agreement to negotiate:

> Under the traditional rule, the absence or indefiniteness of material terms generally rendered an agreement unenforceable. In [an earlier decision], however, we recognized that parties could enter into two types of enforceable preliminary agreements. Type I agreements reflect a consensus "on all the points that require negotiation" but indicate the mutual desire to memorialize the pact in a more formal document. In Type II agreements, the parties "'agree on certain major terms, but leave other terms open for future negotiation.'" Type I agreements are fully binding; Type II agreements "do[] not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith[.]"[136]

Cox argued that the first sentence of section 9(e) was a Type II agreement, and the trial court had not made a finding about good faith.[137] In fact, the trial court had held that section 9(e) was a binding agreement of Type I and had enjoined Cox from violating it.[138]

T-Mobile argued to affirm the trial court's order on the ground that, if not for binding effect in section 9(e), the section would be without consideration because its promise would be "worthless."[139] As an initial matter, the appellate court observed that agreements "to negotiate in good faith are not worthless."[140] It also said that courts should not look for consideration in single sections of a contract, but should evaluate "the contract's total consideration," and neither party had argued that the settlement agreement as a whole lacked consideration.[141]

Then, the appellate court held that the trial court had strayed from the plain meaning of section 9(e).[142] That section did not promise a final agreement (it was not what the court styled Type I), but it required good faith in negotiations (meaning that it was Type II).[143] The court observed that "it is possible—as conceivably happened here—that the good-faith efforts of both parties will nevertheless fail to produce an agreement."[144] But the other possibility was that a final agreement might result from good faith negotiations. Therefore, the appellate court ordered the trial court to decide whether Cox had acted in good faith.[145]

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136. *Id.* at 761 (footnotes omitted).
137. *Id.* at 761–62.
138. *See id.* at 755–56.
139. *Id.* at 759.
140. *Cox Commc'ns, Inc.*, 273 A.3d at 764.
141. *Id.*
142. *Id.* at 765.
143. *Id.*
144. *Id.* (footnotes omitted).
145. *Id.* at 768.

Unfortunately, the court never explained its conclusion that section 9(e) required good faith in the first place. Instead, it simply asserted its conclusion: "Section 9(e) required Cox and T-Mobile to negotiate open terms in good faith."[146] But what was it about the language that created this duty? The court's non-explanation is curious in light of the partial dissent of Justice Valihura, who argued that "the better course here would have been to reverse the trial court's conclusion that Section 9(e) was clear and unambiguous [in requiring good faith], and instead, hold that Section 9(e) is ambiguous."[147] The appellate court then could have remanded for the trial court to make a finding based upon "the parties' intentions" about this issue.[148]

1. Implications for Attorneys Dealing with Partial Agreements

A lawyer who wants his client to have rights under a duty to negotiate would do well to have the parties' agreement contain express language to that effect. A possible provision might say something as simple as, "The parties agree to negotiate exclusively with each other." And the exclusivity should have a deadline, a date when the duty to negotiate will end, so that a fruitless negotiation can be followed by a search for another partner. Thus, the provision should add, "The period of exclusive negotiation ends on [date]."

The duty of good faith and fair dealing is probably implied because it is implied in all contracts, but the agreement would be better if it added, "The parties agree to negotiate in good faith." Otherwise, a party that has discovered a better deal could go through the motions of negotiating without intending to reach an agreement. A lack of good faith may be hard to prove in such circumstances, but its expression may caution some parties about bad conduct and encourage honest parties to bargain fruitfully.

The agreement to negotiate should also include that its breach can cause significant damages[149] and that both parties acknowledge this. If the nature of these damages is well known to the parties, the agreement might describe them, but with caution, lest an unexpected kind of damage occurs for which coverage turns out to be unclear. Finally, the parties might do well to consider a provision for either liquidated damages or actual damages at a non-breaching party's election. Liquidated damages are particularly useful in cases in which actual damages are difficult to measure or to prove.[150]

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146. *Cox Commc'ns, Inc.*, 273 A.3d at 765.

147. *Id.* at 776 (Valihura, J., dissenting).

148. *Id.* at 773.

149. *Cf.* SIGA Techs, Inc. v. Pharmathene, Inc., 132 A.3d 1108, 1137–39 (Del. 2015) (upholding $113 million in damages).

150. *See* CRUMP ET AL., PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES, *supra* note 106, at 376.

It may be, however, that a lawyer does not want this kind of agreement, but rather wants to keep his client from having any duties yet, even though the parties have reached partial agreement on some terms. More than likely, the client probably does not wish for even these "agreed-upon" terms to be finally adopted, because they may change in light of trading on later, not-yet-reached provisions. In this case, the lawyer might do well to follow the advice found later in this Article.[151]

E. Questionable Negotiations That Support Claims of Final Contracts

There are many cases that consider whether negotiations have, or have not, resulted in contracts. And many of the opinions that result are short and summary.[152] But along the way, a researcher may find surprises: cases that touch the wavering line between incomplete negotiations and contract. *Hairston v. Hill*[153] is a venerable, if ancient, decision about this gossamer line of separation.

The parties in *Hairston* agreed to a schedule of deliveries of iron ore from a certain leased parcel of land.[154] Alternatively, their signed document provided:

> [T]he said parties of the first part agree and bind themselves that they will sell the property herein leased and convey the same with general warranty of title free from all incumbrances unto the party of the second part . . . on or before the 1st day of September, 1905, at the price of two hundred and fifty thousand dollars ($250,000.00), . . . on the following terms, to wit: [followed by financing details].[155]

The Hairston parties refused to sell and denied that any contract had arisen.[156] The trial court agreed: the document "was an incomplete contract, or, in common parlance, . . . an 'option,'" and it therefore dismissed the plaintiff's claim for specific performance.[157]

The court of appeals, however, had a more expansive concept of contract formation.[158] It concluded that "the paper in no sense is an option, nor is it a mere memorandum of incomplete negotiations, in which the minds of the parties never met, and from which either party could recede at will."[159] The court

151. *See* discussion *infra* Section III.A (suggesting a form of document for this result).

152. *See, e.g.*, Ramos v. White, 506 P.3d 319 (Nev. 2022) (unpublished table decision) (holding that negotiations were "preliminary" and affirming dismissal of contract claim).

153. 87 S.E. 573 (Va. 1916).

154. *Id.* at 574.

155. *Id.*

156. *Id.* at 575.

157. *Id.*

158. *See id.*

159. *Hairston*, 87 S.E. at 575.

reasoned that the document contained all essential elements: "that is to say, competent parties, a legal subject-matter, a valuable consideration, and mutual assent."[160] If the document were considered less clear, said the court, the parties' implicit intent still made it sufficient because:

> [I]t would not only be unreasonable, but opposed to common experience, to believe that, if Hill and his associates had placed upon this contract the construction it received in the lower court, and which is insisted on here, that they would have expended their time, labor, and means upon any such venture.[161]

And, as the court explained, "[i]f the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed."[162]

Hairston v. Hill has been repeatedly cited for these points. For example, in *Reddy v. Adler*,[163] the court cited *Hairston* for the proposition that an "unreasonable" reading of a document should be avoided in a contract case.[164] But then the *Reddy* court proceeded to provide a complex reading of a property division agreement in a marriage dissolution case and to pronounce this reading "unreasonable."[165] It thus appears that the much older case is enabling courts to decide, apparently factually, that not just an item, but an entire string of items, can be rejected as "unreasonable," and that the contemplation of a definitive agreement need not be respected.[166] Along the way, the appellate court in *Reddy* became the surrogate for a jury, deciding points that really were ambiguous but had not been decided in the trial court.

1. Implications for Courts and Counsel

Courts deciding whether a contract exists should, as the cases hold, reject readings that are unreasonable.[167] But they should not take whole serial passages in a party's reasoning as "unreasonable."[168] This sort of holding is a fact finding, and it may well be an issue in which the court lacks expertise. Objective matters such as trade usages, contemporaneous statements, and course of dealing are more reliable factors. For counsel wanting to avoid finality in a halfway document, the only preventives are to insist upon language requiring

160. *Id.*
161. *Id.*
162. *Id.* (quoting Boisseau v. Fuller, 30 S.E. 457, 457 (Va. 1898)).
163. No. 1965-18-4, 2020 WL 1428181 (Va. Ct. App. Mar. 24, 2020).
164. *Id.* at *3.
165. *Id.* at *4.
166. *See id.*
167. *See, e.g.*, *Hairston*, 87 S.E. 573.
168. *E.g.*, *Reddy*, 2020 WL 1428181, at *3–4.

a definitive written agreement and denying that the document is a contract, and to avoid expressions by which the language they use can be taken as binding.

III. How Can Lawyers Best Deal with These Issues?

One of the best ways to avoid disputes about the existence or meaning of an agreement is to avoid potential partners who have sued other businesses over asserted contractual language. Security from litigation does not reside solely in stricter or tighter contracts. One might consider the advice from an industry source that one can infer came from the school of hard knocks:

> The goal should be an agreement both parties can live with, to facilitate smooth project fulfillment. Most client representatives approach contract negotiations just that way. Unfortunately, some rely on extremely tough negotiators who seem to believe that the best service comes from the "tightest" or most onerous contracts. They fail to recognize that some terms and conditions can be so constricting they cause even minor problems to swell into major disputes. Highly restrictive contracts benefit no one.[169]

But the same industry source shows how important contract language is, with the bulk of its reference guide consisting of samples of contract clauses and analysis of those provisions.[170] For example, it invites consideration of a lengthy provision about after-contract oral acceptances that provides, in part, "CLIENT specifically agrees that, as a condition precedent to CONSULTANT initiating service for the project involved, both parties shall consider CLIENT's oral acceptance or oral authorization to initiate services as formal acceptance of all terms and conditions of this AGREEMENT."[171]

A. Considerations for Parties Who Do Not Wish for Agreements to Be Binding

When negotiations stretch over many weeks or months, the parties need to memorialize the positions that they have tentatively agreed upon. They may not want to start over on language they have found satisfactory.[172] But at the same time, they may recognize the tentativeness of these positions. Terms

169. John Philip Bachner, Terra Contract Reference Guide 10 (4th ed. 2020) (written also by the Geophysical Business Association for its consulting professionals and by Terra Insurance Company).

170. *Id.* at 25–225.

171. *Id.* at 26.

172. *See generally* Crump et al., Property: Cases, Documents, and Lawyering Strategies, *supra* note 106, at 157.

may require modification or deletion in light of later-considered provisions, or a party may decide that the developing agreement is disadvantageous and want to abandon the process. In situations requiring extended negotiations, either or both parties may not want their memoranda of partial agreement to be binding at all, not even as an agreement to negotiate further.[173]

In this situation, the party not wanting binding effect should avoid having the memorandum of tentative agreement titled as an "Agreement," or "Letter of Understanding," or even "Memorandum." A more neutral term should be considered, such as "Status Letter," so captioned because it expresses "the status of our incomplete negotiations."[174] For greater force in denying agreement, it can contain an agreement not to claim the document as contract and provide for damages upon breach of this agreement. The following form of document is not foolproof—one might still face unwanted claims of final agreement—but it should minimize this possibility.

"Status Letter"

> This document, of which Part A is not a contract or an agreement to negotiate, but Part B is a contract, sets forth the status of our negotiations for the purchase and sale of Blackacre.
>
> A. Status of Our Noncontractual Negotiations. The status of our ongoing negotiations is as follows: (1) Price, $1,275,000; (2) title may have no encumbrances or restrictions other than utility easements; (3) [etc.] We have not yet reached agreement on other essential terms.
>
> B. Part A Is Not a Contract, but Part B Is. The parties agree that they have not reached a contract for the purchase and sale of Blackacre and have also not created an agreement to negotiate. We also agree not to claim that Part A above or any negotiations constitute a contract or an agreement to negotiate, until we execute a definitive written agreement. Breach of this contract not to claim a contract or an agreement to negotiate shall entitle the prevailing party to all relief authorized by law, including damages, and specifically including attorney's fees and all other expenses caused by the breach.
>
> [Signatures and dates.][175]

In the give-and-take of a friendly negotiation, however, with both parties sincerely hoping for a final contract, it may not be advisable to use a suspicious-sounding approach to memorializing terms like this one. In such a situation, it may make sense only to title the document as a Status Letter and use

173. *Id.*
174. *Id.* at 157–58.
175. *Id.*

an adapted form of Part A above. But in a world where strangers deal with strangers and all seek their own advantage, it may still be wise to take whatever other features of this document fitting the occasion.

B. But What if You Do Want a Final Agreement to Arise from On-the-Spot Circumstances?

At the end of a mediation, which perhaps has ended with agreement at two o'clock in the morning with everyone exhausted, you still have to paper up this agreement. And you want to paper it now, while everyone is congratulating each other, rather than wait until tomorrow, when the sunrise might bring dissent from another party. Your hand is shaky as you put a pen to a legal pad. Usually, you would follow your old professor's advice and start every document by finding and following a form from a sound source, but now you cannot do that; you are relegated to handwriting. You want a contract now, and you want it to be a final, binding one, not a document that another party can meaningfully challenge in court.

In other words, your objective is the opposite of the one expressed in the Status Letter above. You want to execute a binding contract, not deny it. In that event, as with the Status Letter, no solution is incapable of producing nasty litigation. But some of the following suggestions may help.

First, title your document as a "Contract," or better yet, as a "Final Contract." Put some "Whereases" in, such as, "Whereas, the parties want to buy peace by this contract, and to do so finally." These kinds of expressions may seem superficial, but in actuality, they convey the mutual assent of the parties to the provisions expressed. State specifically that "the parties agree that this document expresses their final contract."[176] Add language to the effect that "the terms set forth here are agreed to be all essential terms of their final contract."[177] And provide that, "in the unlikely event a court should find, contrary to our agreement, that a term is omitted, we agree that the court itself shall supply the term, using a standard of reasonableness."[178]

IV. CONCLUSION

Halfway contracts are everywhere. They are useful as way stations to final agreement. They also are dangerous, because they are the foundations of expensive and loss-prone litigation.[179] Lawyers cannot eradicate this risk

176. *See id.* at 158 (suggesting similar phrases).
177. *See id.* (same).
178. CRUMP ET AL., PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES, *supra* note 106, at 158 (same).
179. *See supra* Section II (providing this suggestion).

completely, but with some kinds of advice to clients, tempered by recognition of the need not to be deal-killers, they can minimize it.[180]

In particular, lawyers advising clients who create memorials of incomplete points of agreement, or term sheets, should get them to include forceful language excluding the possibility of a contract, an agreement to negotiate, or any contract founded on the term sheets combined with any other conduct or expression.[181] Clients should specifically avoid titling any of their memoranda as "Letters of Understanding" and should not include any similar language in the content of their documents.[182]

Lawyers should advise caution in the aftermaths of tentative agreements, such as excessive celebration, expressions of agreement, or even statements like, "We have a deal."[183] Clients should avoid auctions in which the rules are too one-sided.[184] On the other hand, if final contracting will be far distant and will embroil the client in great expense to investigate it or fulfill conditions precedent, the lawyer might well prepare a written agreement providing for the parties to negotiate exclusively with good faith for a set period of time.[185]

Courts face difficult and time-consuming tasks in litigation about halfway deals. The most important thing courts should do is adopt a rule or presumption against the use of documents that expressly state that they are not contracts to form contracts, even when combined with later informal indications of actual "deals."[186] The jurisdictions that have created the biggest risks of this outcome have tended to avoid it lately.[187] As for LOUs, the courts will have no choice but to wade through them to determine, on a case-by-case basis, whether their terms express agreement. Courts and lawyers should also caution contracting parties not to use LOUs.[188]

Auctions create special problems because there is a time, either in months, weeks, or instants, when the potential contract is in limbo. This situation arises naturally in an auction because it combines a contract document, multiple bidders that are temporarily bound to the document, a potential contracting party that wants an eventual sale but wants to avoid being bound for a period of time, and an auctioneer who owes duties to that party.[189] If the auction document clearly negates contract formation, a court should avoid using it to make one.[190] But a tricky problem arises in the event that a bid is

180. *See supra* Section III.A (providing this suggestion).
181. *See supra* Section III.A (same).
182. *See supra* Section II.B (dealing with this issue).
183. *See supra* Section II.A.1 (covering the *Texaco* case).
184. *See supra* Section II.C.
185. *See supra* Section II.D (providing this suggestion).
186. *See supra* Section II.B.3 (providing this advice).
187. *See supra* Section II.A.2 and note 53 (discussing the *Chalker* case).
188. *See supra* Section II.B (making this suggestion).
189. *See supra* Section II.C.1.
190. *See supra* Section II.C.2 (giving this advice).

selected by the auctioneer or its client in an informal manner and the selection is positively communicated to the bidder. The courts should look to the particular facts to determine whether there is an acceptance of the bidder's offer.[191]

Courts should recognize that, in the event a claim of contract fails, an agreement to negotiate may exist. The easiest case for this conclusion is one in which the parties have formally agreed to negotiate exclusively with each other in good faith.[192] A more complex situation is presented if the document upon which a contract claim is founded does not contain, or even suggest, these terms. In such a case, the court should look to the parties' intentions, which may be shown by such indicia as one party's having conducted onerous and expensive efforts to comply with conditions precedent or having verified another party's intended performance.[193] If the document expressly provides that it is not a contract, an agreement to negotiate may still exist (unless that possibility, too, is expressly denied), but the disclaimer of contract is circumstantial evidence against it.[194]

Halfway deals appear frequently, and they can produce troublesome disputes where situations make incomplete documents advantageous. These halfway documents create big burdens on courts. To the extent possible, these disputes should be dealt with on matter of law grounds: by rules or presumptions such as those suggested here. But in many cases, the disputes may depend upon fact finding by a court or jury, resulting in costly resolutions and disproportionate consumption of judicial resources.

191. *See supra* Section II.C (dealing with auctions).
192. *See supra* Section II.D.1 (making this point).
193. *See supra* Section II.D (making this suggestion).
194. *See supra* Section III.A (dealing with this issue).