

CLIENT ALERT

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Stating That A Binding Agreement Is “Subject To” Execution Of A Final, Written Contract Does Not Necessarily Preclude A Judicial Finding That, Despite The Absence Of Such A Contract, A Binding Agreement Exists

To Our Clients and Friends:

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It is not unusual for parties negotiating a transaction to state that a binding agreement is “subject to” the execution of a final, written contract. The recent New York Court of Appeals’ decision in *Stonehill Capital Management v. Bank of the West* carries a message of caution for negotiating parties who rely on such language to defer any binding obligations until the parties have signed a final, written agreement. Where the totality of the circumstances demonstrates the parties’ intent to be bound, simply stating that an agreement is “subject to” the execution of a written contract may not prevent a finding that the parties have entered into a binding agreement, even if no such final, signed contract exists. If the parties do not want to be bound until

an agreement is reduced to writing and signed, they should communicate that affirmatively, by using language stating that there is no agreement unless and until a written contract is signed.

The *Stonehill* Decision

The *Stonehill* case involved a dispute as to whether plaintiff, Stonehill Capital Management (“Stonehill”), could enforce its purchase of a syndicated loan (referred to as the “Goett Loan”) held by defendant, Bank of the West, and auctioned in an online auction by Bank of West’s agent (together, “BOTW”). The parties were in agreement on the material terms of the sale: the amount of Stonehill’s accepted bid and the steps for closing the transfer of the loan. Those steps, as set out in

Stonehill's memorandum distributed as part of the auction process, required immediate execution of a pre-negotiated asset sale agreement. But on the same day Stonehill submitted the bid, it informed BOTW that the proposed asset sale agreement was not the proper document to effectuate this loan transfer. While the parties communicated about the form of the asset sale agreement, BOTW orally informed Stonehill that it had submitted the winning bid. BOTW then sent an email confirming that it had agreed to Stonehill's bid, stating: "Subject to mutual execution of an acceptable [asset sale agreement, BOTW] has agreed to the Stonehill bid" Over the next two weeks, the parties continued to communicate about, and exchange drafts of, the form of the asset sale agreement. Before the form of agreement was finalized, however, BOTW informed Stonehill that it would not proceed with the trade. Stonehill filed suit to enforce the sale.

BOTW argued, among other things, that its email made an executed agreement a precondition to a binding contract, and because no agreement was finalized and executed, BOTW was not bound to sell the Goett Loan to Stonehill.

The Court of Appeals disagreed. After analyzing the various exchanges between the parties, the Court found that the totality of the parties' actions and communications demonstrated agreement on the material terms of the loan sale – the terms of the purchase and the date and instructions for the closing – and held that the parties, therefore, were bound by an enforceable agreement.

The Court rejected BOTW's argument that BOTW's "subject to" language made the execution of a written asset sale agreement a precondition to the existence of a binding contract to sell the Goett Loan to Stonehill.

Acknowledging that "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent," the Court found that the "subject to" language did not meet that standard: "Such a forthright, reasonable signal is not obvious from the mere inclusion . . . of such formulaic language that the parties are 'subject to' some future act or event. Less ambiguous and more certain language is necessary to remove any doubt of the parties' intent not to be bound absent a writing."

Rather than interpreting the "subject to" language as imposing a precondition to the existence of an

agreement, the Court interpreted the language as creating a post-agreement requirement necessary for the consummation of the transfer. The Court concluded that the parties entered into a binding agreement to complete the sale; that BOTW breached that agreement; and that Stonehill was entitled to damages from BOTW for failure to transfer the Goett Loan.

Guidance After *Stonehill*

The *Stonehill* decision is recent and it remains to be seen how broadly or narrowly it will be interpreted by the lower courts. The lesson at this point, however, is clear: Including a statement that a transaction is “subject to” the execution of a final agreement, without more, does not necessarily protect a party from being bound to an agreement, even if the parties fail to execute a written contract. Parties wishing to ensure that there is no binding contract in the absence of a final, executed agreement should affirmatively so state, in unambiguous language. One formulation, taken from the Court’s discussion in *Stonehill*, is a statement that there is no agreement or transaction “unless and until a written contract . . . is signed and delivered.”

Every transaction is different, and the specific advice of counsel may be needed to determine and properly safeguard against the risk of being unintentionally bound to an agreement in any given situation.

The full text of the Stonehill opinion is available here:

<http://law.justia.com/cases/new-york/court-of-appeals/2016/191.html>

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