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## Breach of agreement to negotiate: Vestar Dev. v General Dynamics, 2001

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**Breach of agreement to negotiate:  
*Vestar Dev. v General Dynamics, 2001*  
Roger Bernhardt**

**In suit for breach of agreement to negotiate sale of real property, prospective buyer cannot seek lost profits because they are too speculative.**

*Vestar Dev. II, LLC v General Dynamics Corp.* (9th Cir 2001) 249 F3d 958

In 1994, Vestar Development (Vestar) began negotiating to purchase a portion of a large tract of land owned by General Dynamics (seller). In July 1997, the parties signed a letter of understanding (LOU) outlining the proposed business terms that “will provide the basis for completing a formal Purchase and Sale Agreement.” Under the LOU, the seller agreed to negotiate exclusively with Vestar for 90 days. The parties later extended the negotiating period by another 60 days. Later, the seller advised Vestar that it had decided to sell the entire tract to a third party.

Vestar sued the seller to enforce the agreement to negotiate. Vestar sought damages of \$48 million in lost profits it expected to make on the shopping center that it had planned to build on the parcel, but expressly did not seek any reliance damages. The district court dismissed the suit because Vestar could not prove the lost profits with reasonable certainty as required by CC §3301. The court noted that damages for breach of an agreement to negotiate are usually limited to reliance damages because there is no way of knowing what the terms of the ultimate agreement would have been.

The Ninth Circuit affirmed, holding that Vestar’s lost profits were too speculative to satisfy CC §3301. The LOU did not establish the terms of the sale, but merely a starting point from which negotiations would continue. There was no way to know what the terms of the eventual sale would have been, or even if the sale would have occurred at all. “[A]ssessing lost profits by the hypothetical terms of a never-formed deal would require impermissible speculation.” 249 F3d at 962. The only damages that Vestar could have proven with the requisite certainty are “reliance damages: time spent, expenses incurred, opportunities foregone, or perhaps harm to its reputation.” 249 F3d at 962. Because Vestar sought only lost profits and no reliance damages, its complaint was properly dismissed. The court further noted that no California case has affirmatively held that agreements to negotiate are enforceable, even for reliance damages.

►**THE EDITOR’S TAKE:** One of the notions people find terribly hard to accept is that you either have a contract or you don’t, and there really is no middle ground. The failure to reach a final agreement frequently leaves one of the parties aggrieved, but frustration rarely equals a cause of action for breach of contract. In this case, the parties had probably generated hundreds if not thousands of pages of paperwork between them, but none of those documents contained a sentence saying “We agree. . . .”

Brokers, at least in California, often seem to appreciate this more than lawyers do. Brokers use deposit receipts that always contain language of offer and acceptance (although I think it is so well hidden that buyers frequently don’t appreciate that they are making legally enforceable offers when they sign those documents). With these forms, brokers know that all they have to do

is get both parties' signatures on the same document and they have a deal. (Back East, where filling in the blanks is often treated as the practice of law, the brokers have to get the parties to attorneys to *make* an enforceable agreement *after* they have already obtained an agreement in fact. This makes it quite possible for either party to “gazump” or “gazunder” the other by withdrawing in the middle.)

Unlike brokers—who want to get the deal closed as quickly as possible to get their commissions and preempt deal-breaking developments—lawyers seem to enjoy lengthy negotiations. But that is a dangerous luxury if the negotiation stage allows either party to just change his or her mind and walk away from the deal. Law students are so taken with the case method we use for teaching that they always want to assume that a judge will write the contract for the parties if they can't do it themselves; and too many lawyers seem never to abandon that article of faith.

There are bad ways and good ways to come close to getting half of a contract. The bad way involves writing what looks like an enforceable agreement but which contains so many escape hatches (“subject to the satisfaction of my spouse”) as to not really bind your client. The trouble is that an illusory contract will be unenforceable against either side, enabling the other party to walk away as easily as your client (indeed, more so, if it's your language). The good way is to acknowledge that you want to lock in the other side while at the same time not committing your client to the deal. That is not hard to do, but you have to pay for it. It's called buying an option.

—*Roger Bernhardt*