

Race Politics, O’Hare Airport Expansion, and Promissory Estoppel: The More Things Change, the More They Stay the Same

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Quake Construction v. American Airlines, Inc. is featured in some prominent American casebooks on contract formation or precontractual liability, where scholars and authorities debate when liability should properly attach. The case is widely cited by courts and secondary authorities, both on precontractual liability based on a letter of intent and the more unwieldy doctrine of promissory estoppel.

Quake is a 1990 Illinois Supreme Court decision which, on its face, appears to present the garden variety contracts issue of what to do when parties have reached a written preliminary agreement anticipating a formal writing that never occurs. Besides the fascinating doctrinal issues presented, the backstory reveals sensitive racial issues in Chicago’s political context at the time.

The dispute arose shortly after Mayor Washington was elected the City’s first black mayor and he sought to open up public projects to minority groups that had been previously excluded from the public trough. Much pressure was exerted upon American Airlines and Jones Brothers, its construction management company, which awarded the small, \$1 million project to Quake as part of the larger O’Hare Airport expansion. This Minority Business Set Aside (“MBE”) award was done without the due diligence prudent for major jobs. Eight days later, when Quake’s president appeared at a preconstruction meeting as the only person of color, without any of the named MBE’s listed on its bid, American’s representatives summarily terminated the relationship.

Nearly nine years of litigation focused only on whether the trial court correctly granted defense motions to dismiss. The Illinois Supreme Court reversed and remanded, finding the letter sufficiently ambiguous that plaintiff should have an opportunity to present parol

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evidence on the parties' intent on the contract claim. In four short paragraphs the majority opinion recognized the possibility of plaintiff recovering under a standalone claim for promissory estoppel, based on claimed reliance occurring during the short time between the notice of award and termination for this small construction contract.

The lack of clarity in drafting and implementation of the letter of intent should give pause to commercial actors about the risks of sloppiness in the bargaining process, especially when dealing with parties who may be perceived as somewhat unsophisticated. This Article's doctrinal treatment and backstory are a cautionary tale to lawyers embarking on commercial relations using letters of intent.

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INTRODUCTION

The State of Illinois and city of Chicago have well-earned reputations for sleazy politics, especially common in many public construction projects.¹ The political backstory to the 1990 Illinois Supreme Court decision, *Quake Construction, Inc. v. American Airlines, Inc.*, makes sense of what appears to be an unusual case of precontractual liability.²

American Airlines (“American”), acting through its general contractor, designated a small component of its work for the O’Hare Airport Expansion to be performed on a fast track basis to a qualified minority or women-owned business. The mid-March 1985 Invitation for Bids for the work set a deadline of early April with work to begin by April 15 and to be completed by mid-August. Oral notice was given to Lawrence Quamina, President of Quake Construction (“Quake”), followed by a letter of intent dated April 18, 1985, stating “[w]e have elected to award the contract for the subject project to your firm”; providing that a detailed agreement was “being prepared”; including a brief description of the scope of work for a stated price; and concluding that Jones “reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement.”³ The preconstruction meeting was held on April 25, but ended abruptly with Jones terminating the relationship, which was confirmed by letter later that day without explanation as to the reason for such action. Quake responded, by filing suit in state court, seeking damages for breach of contract and for costs incurred in preparing to perform. The trial court dismissed the case on the pleadings three times, with dismissal of the third amended complaint making the matter ripe for appeal.

This Article details what happened over nearly nine years of subsequent litigation challenging the sufficiency of the Quake complaint, with no discovery during the case-in-chief. In 1990 the Illinois Supreme Court held that American’s letter of intent was ambiguous, and acknowledged the possibility of recovery under promissory estoppel,

1. See, e.g., Karen Ann Cullotta, *In Illinois, A New Push to Combat Corruption*, N.Y. TIMES, Apr. 1, 2009, at A20 (discussing reform proposals); Monica Davey & Emma Graves Fitzsimmons, *Illinois Unconvinced Corruption Culture Will Fade*, N.Y. TIMES, Aug. 18, 2010, at A18; see also Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341, 1464–68, 1482 (1995) (discussing Oklahoma Supreme Court; Appendix D summarizes research identifying suspect cases in which convicted Justice Welch participated, three of which involved public construction projects).

2. *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E.2d 990 (Ill. 1990) (affirming the decision of the intermediate appellate court that the plaintiff stated a claim for relief, under breach of contract and promissory estoppel, based on defendant’s letter of intent awarding Quake a \$1 million construction contract for the minority set aside project at O’Hare Airport).

3. *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E.2d 990, 992–93 (Ill. 1990); see also Letter from Charles J. Dierker, Project Eng’r., Jones Bros. Constr. Corp., to Lawrence Quamina, President, Quake Constr., Inc. (Apr. 18, 1985), *infra* Appendix A (on file with Author).

therefore remanding the case back to the trial court to receive parol evidence regarding the parties' intent.⁴ On remand, American answered with an Affirmative Defense raising the race-related issues of non-compliance with the MBE condition, and then with counterclaims in 1994 seeking recovery for additional expenses in obtaining a bona fide minority contractor to perform the work. Ironically, American now sought recovery under promissory estoppel.

Under standard contract doctrine, when some additional writing was contemplated but never executed, courts had to determine whether the preliminary document alone sufficed to create binding obligations or whether none existed unless further negotiations culminated in a formal writing.⁵ The common law treated this situation as an all or nothing proposition, with the binary choice of contract or no contract.⁶ Courts considered a laundry list of factors relating to parties' intent, including whether this was the type of agreement usually put into writing, the extent of details and amount of money involved, and whether the negotiations indicated the need for a formal written document.⁷

Traditional contract doctrine treats any precontractual bargaining costs as sunk costs incurred—the basic investment that negotiating parties make to improve the likelihood of reaching final agreement and considered a customary cost of doing business—to improve the likelihood of reaching final agreement and a customary cost of doing business. Promissory estoppel had been used in very limited ways since the nineteenth century,⁸ but rarely allowed relief for precontractual liability.⁹

A leading contracts textbook includes *Quake* in a section entitled “Postponed Bargaining: The Agreement to Agree,” discussing the controversial topic of precontractual liability.¹⁰ Another text includes a

4. *Quake Constr. Inc.*, 565 N.E.2d at 1005.

5. Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 674–75 (1963).

6. *Id.* at 675.

7. *Quake Constr. Inc.*, 565 N.E.2d at 994 (citing *Ceres Ill., Inc. v. Ill. Scrap Processing, Inc.*, 500 N.E.2d. 1 (Ill. 1986)).

8. Compare *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898) (discussing probate matter; grandfather wrote promissory note for \$2,000 so that granddaughter did not need to work; court enforced on estoppel grounds), with *Kirksey v. Kirksey*, 8 Ala. 131 (1845) (denying recovery on estoppel grounds finding lack of consideration). See generally Carol Weisbrod, *An Uncertain Trumpet: A Gloss on Kirksey v. Kirksey*, 32 CONN. L. REV. 1699 (2000) (discussing the “rebellious leadership” of John J. Ormond, who wrote the majority opinion for *Kirksey v. Kirksey* holding that Sister Antillico's reliance did not count, yet simultaneously believed that Sister Antillico's reliance did actually create a contract); William R. Casto & Val D. Ricks, “Dear Sister Antillico . . .”: *The Story of Kirksey v. Kirksey*, 94 GEO. L.J. 321 (2006) (discussing factual background and why plaintiff lost before Supreme Court).

9. See E. ALLAN FARNSWORTH, *CONTRACTS* 195 (4th ed. 2004); *Markov v. ABC Transfer & Storage Co.*, 457 P.2d 535 (Wash. 1969) (explaining that liability is based on lessor's fraudulent negotiation behavior).

10. CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW CASES AND MATERIALS* 82 (7th ed. 2012).

similar excerpt in the chapter on mutual assent under the topic of incomplete agreements.¹¹ Ironically, neither textbook makes reference to four paragraphs of the majority opinion from *Quake* that allowed the possibility of recovery based on promissory estoppel alone,¹² which generated major expansion of the doctrine. The case is often cited by state, federal, and international tribunals.

Two twentieth century cases in the United States expanded the possibility of relief on this basis. In 1967, the Wisconsin Supreme Court decided the path-breaking case, *Hoffman v. Red Owl Stores, Inc.*¹³ Hoffman, an unsophisticated baker allergic to flour, wanted to obtain a franchise for a Red Owl supermarket.¹⁴ Over a two-year period he took expensive steps in reliance on repeated assurances he received from a Red Owl representative, ensuring him that he would get the franchise only if he would complete the next step he was asked to undertake, with each step becoming progressively more expensive.¹⁵ Red Owl never made an offer creating a power of acceptance in Hoffman. The court nevertheless entered judgment on a jury verdict for reliance damages based on section 90 of the Restatement of Contracts, which provides for the ability of a court to enter judgment as needed to avoid injustice.¹⁶ Red Owl allowed a standalone, independent cause of action for precontractual liability based only on promissory estoppel.

Contracts Professor Charles Knapp's classic 1969 work, *Enforcing the Contract to Bargain*, subsequently used *Hoffman* as support for judicial recognition that at some point in the negotiation process, where parties had reached preliminary agreement, the law should impose a mutual duty to bargain in good faith; after that, liability should attach where one withdraws for an unjustified reason not contemplated by the parties.¹⁷ The other leading case, *Texaco, Inc. v. Pennzoil Co.* arose when Getty Oil reneged on an announced merger intent with Pennzoil, instead selling its shares to Texaco for a higher price.¹⁸ Pennzoil sued in the State of Texas, then a pro-plaintiff legal environment especially favorable to Pennzoil because of the fact that Texaco had previously moved the company's home office from Houston to New York. Silver-tongued

11. CHRISTINA L. KUNZ & CAROL L. CHOMSKY, *CONTRACTS: A CONTEMPORARY APPROACH* 249–58 (2d ed. 2013).

12. *Quake Constr., Inc.*, 565 N.E.2d at 1004–05.

13. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965).

14. See generally William Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010) (describing how reimbursing precontractual reliance in this circumstance can be done without creating a rule requiring the same in all circumstances).

15. *Id.* at 809–28.

16. *Hoffman*, 133 N.W.2d at 274.

17. Knapp, *Enforcing the Contract to Bargain*, *supra* note 5, at 686–90; see also KNAPP ET AL., *supra* note 10, at 188 (citing RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (AM. LAW INST. 1981)).

18. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987).

plaintiffs' attorney Joe Jamail persuaded the jury to punish Texaco for this, as it awarded a record-breaking verdict of \$10.53 billion in actual and punitive damages to Pennzoil. The Texas Court of Civil Appeals affirmed. Texaco, however, persuaded a judge sitting in the Southern District of New York to grant a preliminary injunction against enforcement or to obtain a lien, because Texaco claimed that the cost of obtaining an appeal bond for the judgment would force it into bankruptcy due to the massive amount of punitive damages awarded.¹⁹ The United States Supreme Court then reviewed and unanimously ruled to dismiss the federal suit.²⁰

Hoffman and *Pennzoil* roiled the commercial world accustomed to treating those precontractual investments as sunk (and non-recoverable) costs incurred to improve the likelihood of completing the deal. E. Allan Farnsworth's famous piece, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, appeared in 1987, further cementing the theoretical foundation laid by Knapp.²¹ Liability in *Quake* casts doubt on that usual supposition by substantially extending risk of promissory estoppel liability in the bargaining context.

Quake allows the possibility of standalone recovery for precontractual reliance costs under promissory estoppel doctrine, even absent an offer creating a power of acceptance in the party seeking relief. *Quake* is cited extensively, both regarding letters of intent and for the use of promissory estoppel as an affirmative basis of recovery.²² While many of those citations appear in opinions by state and federal courts sitting in Illinois, *Quake*'s notoriety is more widespread than that. cursory review of the promissory estoppel cases citing *Quake* raises genuine policy concerns that the case has opened the litigation floodgates. Many federal district court opinions have refused to enter final judgment on

19. *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250 (S.D.N.Y. 1986). See generally THOMAS PETZINGER, JR., *OIL & HONOR: THE TEXACO-PENNZOIL WARS* (1987) (narrating the high-risk \$11 billion battle over oil); Stuart Taylor Jr., *Texaco Set Back by Supreme Court in Pennzoil Case*, N.Y. TIMES (Apr. 7, 1987), <http://www.nytimes.com/1987/04/07/business/texaco-set-back-by-supreme-court-in-pennzoil-case.html?pagewanted=all>.

20. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (precluding federal court review of constitutional claims not raised in underlying state court action under the *Younger* abstention doctrine); Taylor Jr., *supra* note 19.

21. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987). Farnsworth's concept of precontractual liability was based on more traditional contract law, finding potential liability under "agreements to negotiate" and "agreements with open terms," as opposed to Knapp's separate contract to bargain, imposed at law to sanction improper bargaining contract. *Id.*

22. Westlaw search produced 376 case citations and 153 secondary sources (last updated June 11, 2017). Westlaw search produced 172 cases citing *Quake* and promissory estoppel (last updated Nov. 21, 2017).

promissory estoppel based only on the pleadings.²³ It is clear that the mere assertion of a promissory estoppel claim does not insure recovery in Illinois or other courts, although the cases are fact-specific and may not be rationalized coherently with cases upholding possible recovery.²⁴ Numerous practitioner publications in a range of practice areas issue strong precautions about avoiding unintended risks in using letters of intent.²⁵

Contracts scholars take differing views on *Quake's* doctrinal significance.²⁶ This Article finds that the court's main holding, allowing precontractual liability based on the ambiguous letter of intent, is fully supported by law and policy. By contrast, however, *Quake's* apparent recognition of a standalone claim based on promissory estoppel is troubling. Regardless of one's views about *Hoffman*, readers of this

23. See, e.g., *Dugas-Filippi v. JP Morgan Chase, N.A.*, 66 F. Supp. 3d 1079 (N.D. Ill. 2014) (precluding summary judgment on a promissory estoppel claim based on fact issues); *Kirgan v. FCA, LLC*, 838 F. Supp. 2d 793 (C.D. Ill. 2012) (denying dismissal where statements sufficiently unambiguous to state promissory estoppel claim); *Jaskowski v. Rodman & Renshaw, Inc.*, 842 F. Supp. 1094 (N.D. Ill. 1994) (precluding summary judgment on a promissory estoppel claim based on fact issues); *Decker v. Andersen Consulting*, 860 F. Supp. 1300 (N.D. Ill. 1994) (precluding summary judgment on a promissory estoppel claim based on fact issues); *Lamaster v. Chi. & Ne. Ill. Dist. Council of Carpenters Apprentice & Trainee Program*, 766 F. Supp. 1497 (N.D. Ill. 1991) (denying motion to dismiss; alleged promise sufficiently unambiguous). But see *Brooks v. Aon Corp.*, 404 F. Supp. 2d 567 (S.D.N.Y. 2005) (granting motion to dismiss; prospective employee did not sufficiently allege promissory estoppel elements under Illinois or Connecticut law).

24. See, e.g., *Prentice v. UDC Advisory Servs., Inc.*, 648 N.E.2d 146 (Ill. App. Ct. 1995) (noting absence of promissory estoppel claim by limited partners in real estate investment partnership against general contractor; claims for breach of contract and promissory estoppel were mutually exclusive); *Wagner Excello Foods, Inc. v. Fearn Int'l, Inc.*, 601 N.E.2d 956 (Ill. App. Ct. 1992) (holding that where seller established binding requirements contract under UCC, no promissory estoppel claim was stated; claims mutually exclusive). Cf. *Owasso Dev. Co. v. Associated Wholesale Grocers, Inc.*, 873 P.2d 212 (Kan. Ct. App. 1994) (affirming dismissal on summary judgment; promissory estoppel not available to bar a Statute of Frauds defense to the alleged oral lease agreement); *Camosy, Inc. v. River Steel, Inc.*, 624 N.E.2d 894 (Ill. App. Ct. 1993) (ambiguity in general contractor's bid proposal barred promissory estoppel recovery against subcontractor).

25. E.g., ANDREW ULMER ET AL., 2 MEDIA, ADVERTISING, & ENTERTAINMENT LAW THROUGHOUT THE WORLD § 38:40 (2011); VED P. NANDA ET AL., 1 TRANSNATIONAL BUSINESS TRANSACTIONS §§ 4:10, 4:25-4:31, 4:44, 5:21 (2016) (indicating special risks because doctrinal variations among nations); Thomas C. Homburger & James R. Schueller, *Letters of Intent—A Trap for the Unwary*, 37 REAL PROP., PROB. & TR. J. 509 (2002); 1 WILLISTON ON CONTRACTS §§ 4:2, 4:10, 4:13, 4:25, 8:4-8:8, 64:2 (4th ed. 2016); Kathryn Cochrane Murphy, *Commercial Real Estate Leases: Selected Issues in Drafting and Negotiating in Current Markets*, on Letters of Intent, SLO17 ALI-ABA 225 (2006); Steven G.M. Stein & Joel J. Rhiner, *Enforcing Letters of Intent and Handshake Agreements*, 20 APR CONSTR. L. 37 (2000).

26. Compare Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 740-44 (2001) (characterizing opinion as "funny combination of rather formalistic rules applied pragmatically and flexibly. . . [that] reached the right result"), with Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 483-84 n.183, 496 n.209 (1999) (discussing economic incentives for precontractual "cheap talk" and trend in which "disappointed potential traders" can recover under "nonpromissory, performance-based liability theory" for "failed negotiations (talk with no trade)").

Article may agree that *Quake* takes potential liability for thin reliance to unprecedented heights. Of great importance is the fact that, because of American's primary litigation strategy, *Quake's* claimed reliance was never subjected to adversarial scrutiny during the litigation. That strategy will be further detailed in a later Part of this Article.

Years ago, a junior contracts colleague prompted me to explore why the Illinois court expanded precontractual liability on the scant factual record in *Quake*. Legal narrative, which investigate detailed background of a litigated case—also referred to as storytelling or “legal archaeology”—is an accepted form of legal scholarship. Such narratives provide practical lessons about the legal system and enable reflection on the wisdom of a court's ruling.²⁷ Court records raise but do not answer delicate issues about corruption in public works, minority set aside projects, and the murkiness of precontractual liability. All of the judges involved in *Quake* were above reproach.²⁸ The legal, political,²⁹ and doctrinal³⁰ issues remain timely.³¹ Construction at O'Hare Airport

27. Whitford & Macaulay, *supra* note 14, at 805 n.13 (citing DOUGLAS BAIRD, *CONTRACTS STORIES* (2007)); Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161, 1175–77 (2006); Judith L. Maute, *Response: The Values of Legal Archaeology*, 2000 UTAH L. REV. 223, 224–31 (2000).

28. See Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENV. U. L. REV. 1231 (1997) (includes discussion of “Operation Greylord” in which numerous Cook County judges and lawyers were convicted for bribery and corruption). For other internal references to public corruption, see *supra* note 1; *infra* notes 28–29, 54; notes 196, 198, 275 and accompanying text; *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) (determining a one year suspension for failing to report another lawyer's defalcation of money owed to client).

29. See *Ricci v. DeStefano*, 557 U.S. 557 (2009); Mario Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); Workshop, Ass'n of Am. Law Schs., “Post Racial” Civil Rights Law, Politics and Legal Education: New and Old Color Lines in the Age of Obama (June 8–12, 2010).

30. See *Newton Tractor Sales, Inc. v. Kubota Tractor Corp. et al.*, 906 N.E.2d 520 (Ill. 2009) (reaffirming *Quake* and citing *Hoffman v. Red Owl Stores*; explaining that promissory estoppel is recognized as an affirmative theory of recovery). For scholarly debates on precontractual liability based on promissory estoppel, see Whitford & Macaulay, *supra* note 14; Robert E. Scott, *Hoffman v. Red Owl Stores and the Limits of the Legal Method*, 61 HASTINGS L.J. 859 (2010) [hereinafter Scott, *Hoffman v. Red Owl Stores and the Limits of the Legal Method*]; Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71 (2007) [hereinafter Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*].

31. Cf. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (upholding challenge to university's race-conscious university admission policy supported by compelling interest in achieving critical mass, as opposed to racial balancing for its own sake), *cert. granted*, 135 S. Ct. 2888 (2015), *aff'ing*, 136 S. Ct. 2198 (2016). Minority set-aside contracts, especially in airport contracting may be conducive to alleged improprieties. See Peter Applebome, *Atlanta Watches Nervously as Corruption Trial Begins*, N.Y. TIMES (Jan. 5, 1994), <http://www.nytimes.com/1994/01/05/us/atlanta-watches-nervously-as-corruption-trial-begins.html>; see also Laurie Cohen and Dan Mihalopoulos, *Firm Retained Minority Status Despite Warnings*, CHI. TRIB. (Apr. 10, 2005), http://articles.chicagotribune.com/2005-04-10/news/0504100177_1_minority-owned-city-business-status (reporting that politically connected Hispanic businessman retained MBE status long after official statement he would be barred from further city business); Press Release, The Fed. Bureau of Investigation: Chi. Division, *Azteca Supply, Its Owner, and Owner's Husband Indicted for Alleged Minority Contract Fraud, Including Two O'Hare Projects* (Feb. 4, 2010), <https://archives.fbi.gov/>

continues.³² Uncovered facts put *Quake* in political and historical context, explaining the short duration of the contractual relationship between Quake and American as well as the possible reasons for Quake's termination which were not revealed until much later, after the 1990 Supreme Court opinion. Specifically, in 1992 American answered Quake's complaint and asserted the affirmative defense that Quake had not satisfied the MBE participation requirements set forth in the letter of intent and bid requirements.³³

In understanding the facts that eventually came to light, it is important to note that they played out during the short-lived administration of Mayor Harold Washington, Chicago's first African-American mayor. Washington was committed to sharing the wealth gained from public projects with groups previously excluded by the dominant Chicago Democratic machine. Notably, the contract facts in *Quake* also occurred at the same time that Richmond, Virginia had its first black mayor, which eventually gave rise to the 1989 Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, invalidating the city's minority business set-aside program.³⁴

Part I of this Article focuses on Chicago, Illinois, where both the state and city of Chicago have established reputations for political corruption in which patronage rewards supporters of the party then in power. Upon election as the city's first black mayor, Harold Washington committed to opening the public trough to black, minority, and women-owned businesses and professionals. It is essential to understand the volatile and racialized political context at the relevant time both in Chicago and nationwide. Part II details what happened in *Quake*, starting with the initial transaction between Quake and American and its quick disintegration following American's abrupt termination of the deal. Subparts II.B through II.D summarize the litigation through the trial and appeal courts until the case reached the Illinois Supreme Court.

Part III then evaluates the Illinois Supreme Court's decision in *Quake*, starting with the loosely written majority opinion by Justice Calvo (or his clerks) and the superb concurring opinion by Justice

archives/chicago/press-releases/2010/cg020410.htm.

32. Current construction is identified as "modernization." See CHI. DEPT OF AVIATION: O'HARE MODERNIZATION PROGRAM, <https://www.cityofchicago.org/dam/city/depts/doa/general/pdf/OMPSummer2010Update.pdf> (last visited Nov. 21, 2017); see also Jay Koziarz, *Planned O'Hare Terminal Revamp Would Decrease Delays, Meet Surging Demand*, CURBED CHI. (July 18, 2016, 12:53 PM), <https://chicago.curbed.com/2016/7/18/12213272/chicago-transportation-expanded-terminal-ohare-airport>.

33. Answer and Affirmative Defenses to Third Amended Complaint, American Airlines, Quake Constr., Inc. v. American Airlines, Inc., 565 N.E.2d 990 (Ill. 1990) (on file with Author).

34. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding based on Equal Protection Clause, where city did not demonstrate compelling state interest and plan not narrowly tailored to remedy effects of prior discrimination).

Stamos. Part III.C Epilogue explores unusual events that occurred after the Supreme Court's 1990 decision, when American finally answered the complaint on the merits and then filed a counterclaim seeking discovery, which led to the trial court dismissing the case when Quake did not file timely responses. Quake's appellate counsel obtained reversal for lack of notice. It was only at this time that express issues of race appeared on the record, with a junior Katten Muchen lawyer raising as an affirmative defense and counterclaims for what it cost American to obtain a minority contractor to do the work. This Article concludes with an important message to corporate and litigation counsel regarding the dangers of precontractual liability for cheap talk on unproven reliance, as well as about their practical and ethical responsibilities to train and advise their clients about bargaining risks and their need to consult before taking action that may present unwanted juridical risks.

I. CHICAGO: "THE CITY THAT WORKS" IN THE ERA OF "BEIRUT BY THE LAKE"

Hog Butcher for the World,
Tool Maker, Stacker of Wheat,
Player with Railroads and the Nation's Freight Handler;
Stormy, husky, brawling,
City of the Big Shoulders³⁵

To understand the *Quake* decision in its political and doctrinal context, one must appreciate the historical setting in which the case arose. Politics determined what got done in the public arena regardless of which party controlled. Chicago has a long, storied racial history closely tied to the rise (and demise) of Reverend Jesse Jackson and his Operation PUSH.³⁶ The back story of *Quake* arose during the height of Reverend Jackson's local prominence.³⁷

Chicago is a grand, robust, ethnically diverse city with beautiful architecture, outstanding performing arts, museums and restaurants, professional sports, great people, and colorful politicians. It also has a long history of racial stress, with super segregated housing patterns isolating blacks and ethnic minorities in poor, underserved sections of the city that generally excluded minorities from the patronage spoils, especially during the first term governed by former Mayor Richard J.

35. CARL SANDBURG, *Chicago*, in CHICAGO POEMS (1916).

36. See *Organization and Mission*, RAINBOW PUSH COALITION, <https://rainbowpush.org/organization-and-mission> (last visited Nov. 21, 2017).

37. See *supra* note 1; *infra* notes 40–57 and accompanying text.

Daley and his administration.³⁸ Daley called Chicago “The City that Works.”³⁹ Despite the seamy underside of its patronage system, government services like garbage and snow removal tended to operate on time. *Quake*, like other Illinois cases, bristles from the interplay of

Following the long reign of Mayor Richard J. Daley (1955–1976), control of the Democratic Party machine was up in the air. Mayor Michael Bilandic, who assumed office following Daley’s death, was defeated in the mayoral primary, which some commentators attribute to the city’s “inability to properly plow city streets” during a major blizzard.⁴³ Jane Byrne was elected the city’s first female mayor in 1979.⁴⁴ In 1983, Harold Washington defeated her and four others (including

38. See *Elrod v. Burns*, 427 U.S. 347 (1976) (invalidating patronage based dismissals when non-civil service employees hired by Republican sheriff were replaced by a Democrat); see also Lois Wille, *Scandals Have Slid off Daley (Until Now)*, CHI. TRIB. (Aug. 20, 2006), http://articles.chicagotribune.com/2006-08-20/news/0608200020_1_scandals-silly-aides (discussing new pride in Chicago burnished by then Mayor Richard M. Daley, after “25 years of pummeling and ridicule”; though troubles simmered for years before they “burst to the surface in the mid-1960s with bloody upheavals in the misery-soaked black ghettos, the ghettos that Daley’s father, Mayor Richard J. Daley, said didn’t exist.”).

39. David E. Rosenbaum, *Daley Remembered as Last of the Big-City Bosses*, N.Y. TIMES (Apr. 21, 2005), http://www.nytimes.com/2005/04/21/us/daley-remembered-as-last-of-the-bigcity-bosses.html?_r=0.

40. See, e.g., *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1186 (7th Cir. 1989) (noting a leading insider preference bankruptcy case commonly known as “Deprizio,” in which Judge Easterbrook described public contractor corruption at O’Hare as “suspicions of affiliation with organized crime . . .”); see also Joel Kaplan & James Strong, *Medley’s Conviction Casts Cloud over O’Hare Pact*, CHI. TRIB. (Aug. 31, 1989), http://articles.chicagotribune.com/1989-08-31/news/8901090157_1_taxiway-removal-contract-minority (reporting the federal bribery conviction of Chicago Transit Authority board member; Medley was also an MBE doing business on an O’Hare project awarded during the Washington administration).

41. Charles N. Wheeler III, *Gov. James R. Thompson, 1977–1991: The Complete Campaigner, the Pragmatic Centrist*, ILL. ISSUES (Dec. 1990), <http://www.lib.niu.edu/1990/ii901212.html> (explaining long-term, otherwise unblemished reign of Republican Governor’s use of patronage to reward loyal blue collar workers of his party); Editorial, *Riding to the Suburbs’ Rescue*, CHI. TRIB., Apr. 18, 1986, § 1, at 18 (discussing Thompson’s courting of Republican suburbanites with focus on O’Hare noise complaints). A divided Supreme Court later invalidated Thompson’s use of patronage. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79 (1990) (extending earlier patronage cases applied to various other personnel decisions).

42. See Wille, *supra* note 38 (referring to 1984 *Wall Street Journal* reference to Chicago as “Beirut on the Lake,” as Chicago’s “richly deserved . . . sobriquet” in which a “bloc of white aldermen staged a race-based war against Harold Washington . . . and city government ground to a halt for three years.”).

43. See Whet Moser, *Snowpocalypse Then: How the Blizzard of 1979 Cost the Election for Michael Bilandic*, CHI. MAG. (Feb. 2, 2011), <http://www.chicagomag.com/Chicago-Magazine/The-312/February-2011/Snowpocalypse-Then-How-the-Blizzard-of-1979-Cost-the-Election-for-Michael-Bilandic>.

44. See R. Bruce Dold, *When Jane Byrne Was Elected Mayor*, CHI. TRIB. (Nov. 14, 2014), <http://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-byrne-story-story.html>.

Daley's son and later mayor, Richard M. Daley) in the Democratic primary, tantamount to election.⁴⁵ A city with a large black population, Washington became Chicago's first black mayor.⁴⁶ Washington, a graduate of Northwestern University School of Law, served in the Illinois legislature and United States Congress before his election as Mayor.⁴⁷ He, like other newly elected black mayors of big cities, "wasted little time in making clear that the old rules of city contracting were going to change the relationship between voting power and contracting power . . ." ⁴⁸

Washington served from November 1983 until his sudden death on November 25, 1987.⁴⁹ Chicago politics were especially tumultuous then, earning the label "Beirut by the Lake," which referred to racially polarized political conflict between the City Council and the Washington administration.⁵⁰ Within hours of Washington's inauguration, what have come to commonly be known as "Council Wars" began, pitting an all-white bloc of city aldermen led by Ed Vrdolyak and Ed Burke (commonly known as "the Vrdolyak 29" or "The Eddys") against the new black mayor, who was supported by 21 council members, including all of the black and a few of the white liberal members.⁵¹ Chicago's governmental structure provided for a weak mayor and a strong council. Knowledgeable observers believed that racism was behind the Council Wars but that ideology played an equal role, with Washington embracing a redistributionist agenda as contrasted with the more conservative

45. See Robert Davice, *The Election of Harold Washington the First Black Mayor of Chicago*, CHI. TRIB. (Apr. 12, 1983), <http://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-haroldwashington-story-story.html>.

46. *Harold Washington (1922–1987)*, NW. U. ARCHIVES, <http://exhibits.library.northwestern.edu/archives/exhibits/alumni/washington.html> (last visited Oct. 5, 2017); David B. Wilkins, "If You Can't Join 'Em, Beat 'Em!" *The Rise and Fall of the Black Corporate Law Firm*, 60 STAN. L. REV. 1733, 1750–51 (2008) (reporting an incident "[p]roving that Chicago politics was even dirtier than its colorful reputation" after Washington won the primary, some Democratic politicians circulated a false police report intimating he had been arrested for child molestation).

47. NW. U. ARCHIVES, *supra* note 46.

48. Wilkins, *supra* note 46, at 1748.

49. *Id.* at 1751.

50. John Helyar & Robert Johnson, *Brawling City: Chicago Political Rift Deepens, Worsening City's Many Problems—Black Mayor's Election Fails to Lesson the Tensions; Is it Beirut on the Lake?—How Rouse Co. Project Died*, WALL ST. J., Aug. 6, 1984, at 1 (airport expansion temporarily shelved during rift between Mayor Washington and city council); see also Vernon Jarrett, *Council Wars*, ENCYCLOPEDIA OF CHI. (2005), <http://www.encyclopedia.chicagohistory.org/pages/342.html>.

51. See Jarrett, *supra* note 50; see also Dan Mihalopoulos et al., *Feds Catch Up with 'Fast Eddie' Vrdolyak*, CHI. TRIB., May 11, 2007, at 1, http://articles.chicagotribune.com/2007-05-11/news/0705111414_1_edward-r-vrdolyak-harold-washington-mayor-richard-j-daley (reporting federal indictment of Vrdolyak for alleged kickback. The former seminarian and University of Chicago Law graduate is described as a "consummate Chicago politician" who had often been investigated, but never before charged with misconduct from his political dealings.).

ideology of the Vrdolyak 29.⁵² Washington's "comparatively genteel" background had not prepared him for "urban political streetfighting."⁵³

Mayor Washington took bold moves to open the spoils of government contracts to the African-American and other minority communities, which had long been excluded.⁵⁴ This generated controversy, particularly when it appeared that some contracts were given to cronies lacking relevant expertise,⁵⁵ or to sham minority companies using token black participants as fronts for white-owned businesses.⁵⁶ On April 3, 1985, Mayor Washington issued an executive

52. Michael Fumento, *Hot Air in the Windy City*, POLY REV. (1986), <http://fumento.com/government/chicago.html>; Jeff Lyon, *Council Wars: The Battle for City Hall, Key Players Reassess the Wrangling and Maneuvering that Divided the City 10 Years Ago*, CHI. TRIB. (Oct. 31, 1993), http://articles.chicagotribune.com/1993-10-31/features/9311010001_1_clifford-kelley-harold-washington-mayor.

53. Fumento, *supra* note 52.

54. See, e.g., Editorial, *New Patronage Shows Itself*, CHI. TRIB. (Feb. 12, 1985), http://articles.chicagotribune.com/1985-02-12/news/8501090101_1_bond-work-mayor-washington-million-industrial-revenue-bond (contrasting "old patronage" banned by courts, enabling elected officials to build armies of political workers with city jobs, with "new patronage" enabling elected officials to give lucrative work to a few friends, specifically four black lawyers given city bond work despite their lack of experience in the field); Dean Baquet, *Mayor Orders Minority Contracts 30 Percent of City's Business to Be Reserved*, CHI. TRIB. (Apr. 4, 1985), http://articles.chicagotribune.com/1985-04-04/news/8501190288_1_city-contracts-minorities-mayor-jane-byrne (discussing Mayor Washington's executive order setting a thirty percent goal for city contracts to be awarded to companies that are at least fifty-one percent owned by women, blacks, Hispanics, Asian-Americans and Alaskan natives, and under the daily operational control of qualified minorities). Dean Baquet received a Pulitzer Prize in 1988 for leading a three-person team that exposed corruption in the Chicago City Council on public construction works; since May 2014 he has served as Executive Editor of the *New York Times*, as the highest ranking African American in the newsroom. See Dean Baquet, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/b/dean_baquet/index.html (last visited Nov. 21, 2017). He prefers the term "Creole." Born to a prominent Creole family, his father was a New Orleans restaurateur. See *New Orleansian Named Editor of N.Y. Times*, THE ADVOCATE (May 17, 2014, 5:50 PM), http://www.theadvocate.com/new_orleans/news/article_91bb58f9-7625-5c03-980f-85a32361bce6.html.

55. See, e.g., Steve Neal & James Strong, *Bond Fees Go to Mayor's Allies, Blacks Overdue in Getting Legal Work, He Says*, CHI. TRIB. (Feb. 5, 1985), http://articles.chicagotribune.com/1985-02-05/news/8501070706_1_bond-issues-municipal-bonds-bond-field (identifying, among others, Albert Terrell, who previously shared office space with Chicago Corporation Counsel James Montgomery); Steve Neal & James Strong, *Burke Sets New Rules for Bonds*, CHI. TRIB., Feb. 6, 1985, http://articles.chicagotribune.com/1985-02-06/news/8501070835_1_minority-firms-bond-issues-bond-work (reporting criticism of Ald. Edward Burke, that the city steered tax bond work to four minority lawyers who were the Mayor's four political allies, despite limited relevant experience in the field); Editorial, *New Patronage Shows Itself*, *supra* note 54; Mark Eissman, *Bond Firms Hit Costs of Minorities*, CHI. TRIB., Feb. 19, 1984, at C14 (reporting that Montgomery directed the city's usual bond law firms to affiliate as co-counsel with four minority lawyers as part of the mayor's affirmative action program; Montgomery defended the decision because of segregation in the Illinois legal community and who they serve).

56. See, e.g., Dean Baquet, *Mayor Scores Coup on Contract Issue*, CHI. TRIB., Nov. 24, 1985, at 1 (discussing history, with both problems and successes); John McCarron, *Contractor Building Something Bigger*, CHI. TRIB. (Oct. 24, 1993), http://articles.chicagotribune.com/1993-10-24/business/9310240167_1_minority-contractors-minority-owned-black-enterprise (honoring the recognition of Paul King and UBM Inc. as Chicago's top minority-owned construction

order directing that thirty percent of the city's contracts should be awarded to minority-owned and women-owned businesses.⁵⁷ The Council Wars produced political deadlock from 1983 until May 1986, when court-ordered special elections of seven redistricted wards were held, resulting in an increase in the number of ethnic minority representatives who supported Mayor Washington.⁵⁸

B. O'HARE AIRPORT EXPANSION (1980s AND BEYOND)

Expansion of the Chicago O'Hare International Airport ("O'Hare") has been a volatile political issue for decades. Although it is technically located outside city limits, Chicago owns the property, finances work through bonds, and exercises substantial regulatory authority over it.⁵⁹ Corruption scandals have occurred over alleged political favoritism, bribes, and the use of sham minority enterprises as fronts for non-minority contractors.⁶⁰ *Quake* arose out of the controversial

firm by Enterprise Magazine, and contrasting them with "several of the so-called MBEs (minority business enterprises) [which] consisted of little more than a letterhead and a listing in the phone book. A white-owned firm would do the work and pay the MBE owner a fee for lending his or her name to the enterprise. Among the most blatant was an outfit called Precision Contractors, Inc., controlled by Noah Robinson, half-brother to Rev. Jesse Jackson." Precision was awarded numerous public contracts, but reports indicated its representatives seldom appeared at work sites. Following convictions for fraud and racketeering, he served time in federal prison).

57. Mayor Harold Washington, Exec. Order 85-2, *Award of City Contracts to Minority Businesses* (on file with Author); Baquet, *supra* note 54; see also Dean Baquet, *Lowry A Model for Minority Contract Plan*, CHI. TRIB. (Mar. 27, 1985), http://articles.chicagotribune.com/1985-03-27/news/8501170382_1_million-in-city-contracts-minority-owned-companies-government-contracts (discussing the report of consultant Jim Lowry, a nationally prominent spokesman for government set-aside programs as essential economic development tools. Lowry, who had consulted with four Chicago mayors, was an influential confidant of Mayor Washington).

58. Jarrett, *supra* note 50; Smith v. Bd. of Election Comm'rs for the City of Chi., 587 F. Supp. 1134 (N.D. Ill. 1984) (ordering special election), *rev'd sub nom.* Gjersten v. Bd. of Election Comm'rs for the City of Chi., 791 F.2d 472 (7th Cir. 1986) (holding that the district court failed to engage in proper analysis before ordering the special election).

59. Telephone Interview with Sheldon J. Lustig, former Jones Project Director for AA terminal expansion, transcript at 13 (Aug. 25, 2007) (on file with Author) (stating terminal expansion financed through city revenue bonds and must meet city requirements on use of minority contractors). For general history of O'Hare's perpetual expansion as city-owned property, see *O'Hare History*, CHI. DEPT. OF AVIATION, <http://www.flychicago.com/OHare/EN/AboutUs/History.aspx> (last visited Nov. 21, 2017).

60. *E.g.*, *Baja Contractors, Inc. v. City of Chi.*, 830 F.2d 667 (7th Cir. 1987) (upholding the city's decertification of a sham MBE contractor on the O'Hare project); Robert Enstad, *12 Road Paving Firms Indicted in Bid-Fixing*, CHI. TRIB., Mar. 1, 1977, at 1 (discussing the 1974 runway construction and politically connected contractors); Hank Klibanoff, *Chicago's Political Feud to Take an Economic Toll*, PHILA. INQ., Sept. 30, 1984, at A2; Debbe Nelson & Chuck Neubauer, *Indictments Expected in O'Hare Project Probe*, CHI. SUN TIMES, Jan. 12, 1986, at 3 (bribes, false billings, "possible irregularities in the choice of minority contractors"); Joseph Ryan, *Delays, Doubts and Debt Project Gets Going, but Challenges and Uncertainty Rise Behind Money Problems*, DAILY HERALD, July 8, 2007, at 1 (stating that major O'Hare expansion has been considered since at least the 1980s, with years of political fights and extensive litigation); O'HARE MODERNIZATION PROGRAM, *supra* note 32.

expansion project that O'Hare announced in 1983, which proposed a \$1 billion modernization program to "bring aging and congested terminal and roadway facilities into balance with underutilized side capacity."⁶¹ Surrounding suburbs sued to challenge the planned expansion, raising concerns about noise and air pollution.⁶² Other opponents sued to block funding and prevent land grabs.⁶³ Cost overruns and continuing skirmishes caused the price tag on the project to increase from \$1 billion to \$1.4 billion when the Council Wars threatened to shut down construction in the fall of 1984, throwing a thousand construction workers off the job.⁶⁴ The 1981–1982 recession affected the construction industry and strong inflationary pressures increased commercial lending rates. High interest rates encouraged fast-tracked construction projects predictably causing the need to rework changes.⁶⁵

Key to the vituperative dispute at this time was the question of whether the council's Finance Committee would maintain its authority to review and approve all city contracts over \$50,000.⁶⁶ In June 1984, Mayor Washington, who campaigned "to break the Democratic Party's lock on patronage," answered that question in the negative, discontinuing that "time-honored, but not legally required policy."⁶⁷ Council promptly attached an amendment to Mayor Washington's bill requiring such approval to three pending public works bills, including that for O'Hare's expansion.⁶⁸ Washington's veto, sustained by his 21-member minority bloc, threatened significant economic loss.⁶⁹

Delays, litigation, and cost overruns plagued the airport expansion, including the \$1.5 billion project that took place between 1983 and 1992 that gave rise to the *Quake* dispute.⁷⁰ Upon completing one phase of construction another immediately began, and sometimes another phase began before the previous one even ended.⁷¹ "Battle after battle and the

61. OFF. OF TECH. ASSESSMENT, AIR SYSTEM DEVELOPMENT 94 (1984) (citing J. Ott, *\$1 Billion Upgrade Planned at O'Hare*, AVIATION WK. & SPACE TECH 35–36 (1983)).

62. See *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186 (7th Cir. 1986).

63. Ryan, *supra* note 60.

64. Klibanoff, *supra* note 60.

65. Frank P. Davidson & Jean-Claude Huot, *Large-Scale Projects: Management Trends for Major Projects*, 4 PROJECT APPRAISAL 133, 135 (1989); See Tim Sablik, *Recession of 1981–82: July 1981–November 1982*, FED. RES. HIST. (Nov. 22, 2013), <http://www.federalreservehistory.org/Events/DetailView/44>; see also E-mail from Douglas Baird, Professor of Law, Univ. of Chi. Law Sch., to Judith Maute, Author of this Article (June 29, 2016, 10:51 CDT) (on file with Author) [hereinafter Baird E-mail June 29, 2016] (referencing high interest rates as strong incentive to fast track, especially because of political pressure on American to hire MBEs).

66. Klibanoff, *supra* note 60.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Airport Expansion Delay Claimed*, ENG'G NEWS-REC., Mar. 28, 1985, at 14, 1985 (discussing delays in \$1.5 billion expansion program, expecting completion in 1992).

71. O'HARE MODERNIZATION PROGRAM, *supra* note 32; Press Release, Office of the Mayor, City of

war seemed endless, but finally the years-long political fight over whether to expand . . . was over.”⁷² If the politicians’ promises were fulfilled, the expansion would reduce delays, improve the nation’s air traffic flow, and ensure regional economic vitality.⁷³

Before turning to *Quake*, it must be stated that political battles and possible corruption in public construction projects are not unique to Chicago:⁷⁴ “Chicago is a test-tube case, a microcosm of the whole country.”⁷⁵ Rather, they reflect similar conflicts and alleged scandals erupting elsewhere, with the issue of minority set-asides further complicating matters.⁷⁶ Since 1967, analogous conflicts arose following elections of the first black mayor in other big cities, including Atlanta—Maynard Jackson, elected in 1974—and Richmond, Virginia—Henry L. Marsh III, elected in 1977.⁷⁷ Thoughtful observers suggest that periodic rounds of ethical fervor may have unduly targeted black officials, professionals, and business enterprises.⁷⁸

For example, *City of Richmond v. J.A. Croson Co.*, a case decided by the Supreme Court, arose in Virginia after Mayor Marsh III spearheaded the 1983 enactment of an MBE ordinance.⁷⁹ That, and other pending disputes, provided a compelling backdrop for all individuals concerned about public works projects, regardless of one’s position on issues of diversity. The Supreme Court struck down the MBE ordinance at issue in

Chicago, Mayor Emanuel and Aviation Officials Break Ground on Major Cargo Project at O’Hare International Airport (Oct. 30, 2013), http://www.cityofchicago.org/city/en/depts/doa/provdrs/omp/news/2013/nov/mayor_emanuel_andaviationofficialsbreakgroundonmajorcargoproject.html.

72. Ryan, *supra* note 60.

73. *Id.*

74. See, e.g., Thomas D. Thacher II, *Combating Corruption in the Construction Industry: Combating Corruption and Racketeering: A New Strategy for Reforming Public Contracting in New York City’s Construction Industry*, 40 N.Y.L. SCH. L. REV. 113, 113 (1995); *In re Earle Asphalt Co.*, 950 A.2d 918 (N.J. Super. Ct. App. Div. 2008) (upholding constitutionality of state statute prohibiting award of public contracts over specified amount to businesses making recent campaign contributions).

75. Helyar & Johnson, *supra* note 50 (quoting Thomas Roeser, President of City Club of Chicago).

76. Dean Baquet & Douglas Frantz, *Minority Contracts Backfire*, CHI. TRIB. (Mar. 25, 1985), http://articles.chicagotribune.com/1985-03-25/news/8501160794_1_white-couple-minority-woman-owned (discussing “widespread evidence that blacks and women were used to set up front companies for white businesses” in various U.S. cities).

77. Wilkins, *supra* note 46, at 1771 (observing that black mayors, lawyers, bankers and other businesses targeted for prosecution); Applebome, *supra* note 31 (federal corruption trial alleging that MBE program “became a swamp of corruption that largely benefited white businessmen, politically connected blacks and black public officials”). Henry Marsh, Richmond’s first black mayor seems to have survived unscathed. See *Henry Marsh, III*, 2010 AFRICAN AM. TRAILBLAZERS IN VIRGINIA HISTORY, <http://www.lva.virginia.gov/public/trailblazers/2010/honoree.asp?bio=7> (last visited Nov. 21, 2017).

78. Applebome, *supra* note 31. For more recent investigation of black officials, see David M. Herszenhorn & Carl Hulse, *In Personal Ethics Battles, a Partywide Threat*, N.Y. TIMES, Aug. 2, 2010, at A1. For further information on the ties between Thacker Construction, the Georgia-based firm American eventually hired to assign MBEs, and Maynard Jackson, see Dean Baquet, *Minorities Seeking More O’Hare Work*, CHI. TRIB., Mar. 1, 1985, at A3.

79. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); Wilkins, *supra* note 46, at 1772–73.

Croson in 1989, finding that Richmond had not sufficiently demonstrated intentional past discrimination as the justification for the ordinance.⁸⁰

A key finding I have made from this research and a principal thesis is that since the 2009 Supreme Court decision in *Ricci v. DeStefano*⁸¹ public actors must affirmatively justify voluntary use of racial preferences, which may further silence frank disclosure in litigation, heightening risk of precontractual liability for alleged reliance. *Ricci* referenced risk of Title VII liability as a possible justification, making private actors reluctant to acknowledge diversity-based motivations for business decisions without conceding potential Title VII violations and discrimination lawsuits.⁸² These constitutional and statutory rulings put commercial actors like American Airlines in a catch-22. If they are transparent about their objectives to encourage diversity in public contracts, they incur the risk of certain lawsuits by disappointed nonminority bidders. If they do not engage in diversity-related outreach, however, and do not provide any favored treatment to qualified MBE bidders, they then risk criticism from communities that are home to significant populations of color who are excluded from public work projects.

When placed in this broader context, the colorblind *Quake* litigation, in which American refrained from raising any racial issues for most of the litigation, makes sense. If the Supreme Court continues in the direction of *Ricci*, requiring public actors to substantiate the need for using racial preferences, those actors may have to be deliberately opaque in litigating disputes where racial preferences have in fact affected their decisions. Putting aside the external litigation costs, as a policy matter for contract law in the realm of public works, should those issues be silenced and excluded from public debate? Only time will tell.

II. *QUAKE CONSTRUCTION v. AMERICAN AIRLINES*

At first I was troubled that defense counsel avoided raising the affirmative defense that *Quake* was acting as a front and did not qualify for a MBE set-aside contract during the litigation. Over time and in light of continuing controversies on race-conscious criteria before the United States Supreme Court,⁸³ I now understand that had American promptly stated its reasons for termination it would have further inflamed the

80. *Croson*, 488 U.S. at 498–505 (despite evidence to the contrary submitted to City Council in support of the ordinance); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that strict scrutiny applies to all racial classifications imposed by any federal or state actor).

81. *Ricci v. DeStefano*, 557 U.S. 557 (2009) (involving the permissibility of public actors considering race in making official decisions).

82. *Id.*

83. See, e.g., *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

volatile situation then unfolding in Chicago. By waiting several years until the political frictions had subsided, American could only then raise the affirmative defense and counterclaims.⁸⁴

A. AMERICAN AIRLINES EMPLOYEE FACILITIES AND AUTO SHOP EXPANSION: THE BID, THE LETTER OF INTENT, AND TERMINATION

During the O'Hare expansion project, American Airlines sought to expand its Chicago presence by undertaking \$200 million worth of projects in connection with O'Hare's \$1 billion modernization project. American hired the California-based Jones Brothers Construction Company ("Jones") as the general contractor for the complex set of projects.⁸⁵ A coalition of black organizations led by Reverend Jesse Jackson's Operation PUSH pressured American to award thirty-five percent of that work to minority business enterprises.⁸⁶ Reverend Jackson's political career soared to national heights around this time, including a strong showing in the 1984 Democratic presidential primaries.⁸⁷ He and other critics questioned American on its decision to hire the Atlanta-based Thacker Corporation as its \$2.5 million MBE consultant instead of an established Chicago firm.⁸⁸ Supporters of Thacker maintained that the decision reflected a need for a fresh, outsider perspective distanced from Chicago politics to help select and train minority businesses new to contracting.⁸⁹

84. Clarence Page, *Jesse Jackson Treads Carefully Toward 1992*, CHI. TRIB. (Apr. 3, 1991), http://articles.chicagotribune.com/1991-04-03/news/9101300579_1_jesse-jackson-presidential-race-black-candidate (discussing Jackson's "tardy and tepid" endorsement of black mayoral candidate, as Author first heard him complain of low energy, Chicago's divided black community, and national preference for a moderate black presidential candidate).

85. Quake Constr., Inc. v. Am. Airlines, Inc., 565 N.E.2d 990, 992 (Ill. 1990).

86. Baquet, *supra* note 78 (quoting Reverend Willie Barrow). The coalition similarly lobbied United Airlines to improve its contracting practices. Dean Baquet & Douglas Frantz, *Airline Resists Black Coalition's Contract Pressure*, CHI. TRIB., Apr. 22, 1985, at 1 (discussing United's \$400 million expansion project).

87. See *Jesse Jackson*, HISTORY.COM (2009), <http://www.history.com/topics/black-history/jesse-jackson> (noting his 1984 presidential campaign won five primaries and caucuses and garnered over eighteen percent of votes; in his 1988 campaign he won the nomination in eleven primaries and caucuses).

88. See *generally* Baquet, *supra* note 78 (describing tension around the hiring of an Atlanta-based Thacker Corporation). McCarron, *supra* note 56 (reporting that Paul King honored by Black Enterprise magazine as top minority-owned construction firm, 1975 founder of UBM Inc.).

89. Douglas Frantz & Dean Baquet, *Mayor Defends 'Outsider' Black Firms: Too Few Contractors in Chicago, He Says*, CHI. TRIB. (Mar. 15, 1985), http://articles.chicagotribune.com/1985-03-15/news/8501140901_1_firms-contracts-mayor-harold-washington; see also Dean Baquet & Douglas Frantz, *Politically Linked Georgia Firm Key to O'Hare Contracts*, CHI. TRIB. (Feb. 24, 1985), http://articles.chicagotribune.com/1985-02-24/news/8501110101_1_minority-owned-firms-minority-companies-thacker [hereinafter Baquet & Frantz, *Politically Linked*] (black aldermen who recommended based on company's size and experience). Sheldon J. Lustig recalls a private conversation with an audience member after he spoke about American's affirmative action strategy at Rev. Jesse Jackson's southside church. A man asked "who recommended Thacker to you?" When

Late in February 1985, in response to American's selection of Thacker, a group of black leaders met with American representatives for three "sometimes tense" hours to complain about their selection of Thacker as MBE consultant.⁹⁰ At a press conference that followed, Reverend Willie Barrow, national director of PUSH, announced: "If you fall short of the grace of God, you have to repent . . . [a]nd American will have to repent[.]"⁹¹ Paul King, a black Chicago construction executive whose company, Powers & Sons, was considered but not selected for that important role, stated: "I don't know why we need a Georgia influence here . . . Thacker doesn't know anything about Chicago."⁹² Former Atlanta mayor Maynard Jackson was now practicing law with an established Chicago firm that did extensive bond work, including financing for American's O'Hare expansion.⁹³ Jones maintained, however, that it "felt no political pressure" to choose Thacker's firm as its MBE administrator.⁹⁴

American and Jones set aside the Employee Facility and Auto Shop Expansion on the lower level of Concourse K, a small component of its \$200 million O'Hare facilities project, for only MBEs to bid on. On March 19, 1985, Jones published the "invitation to bid" with an April 9 deadline, just six days after Mayor Washington issued his executive order directing that a certain percentage of contracts be awarded to minority-owned businesses.⁹⁵ Quake submitted a bid that Jones date stamped April 13, which designated Lawrence Quamina as the company's President.⁹⁶ Quake's base bid of \$1,060,568 listed four⁹⁷ MBE subcontractors to be paid \$32,124 for air conditioning, electrical, and plumbing work.⁹⁸ Charles Dierker, Jones Project Engineer for the O'Hare

Lustig identified someone in Mayor Washington's Public Works Department, the man appeared visibly pleased. Lustig was favorably impressed in his dealings with the Thacker organization. Lustig Interview, *supra* note 59, at 14.

90. Baquet, *supra* note 78; see also Baquet & Frantz, *Politically Linked*, *supra* note 89.

91. Baquet, *supra* note 78; see also Baquet & Frantz, *Politically Linked*, *supra* note 89.

92. Baquet & Frantz, *Politically Linked*, *supra* note 89.

93. Ronald Smothers, *Maynard Jackson Wins in Atlanta*, N.Y. TIMES, Oct. 5, 1989, at A23 (discussing his reelection to third term). During a hiatus from office, between 1982-89, he affiliated with Chicago-based firm of Chapman & Cutler; see also *Maynard Jackson Jr.: Obituary*, LEGACY.COM, <http://www.legacy.com/obituaries/atlanta/obituary.aspx?n=maynard-jackson&pid=1113182> (last visited Nov. 21, 2017).

94. See Smothers, *supra* note 93. Jones Project Manager Sheldon Lustig said he first heard of Thacker in fall of 1984 "when [an unnamed] high-ranking city official telephoned." *Id.*

95. Third Amended Complaint at Exhibit 5, *Quake Constr., Inc. v. Am. Airlines, Inc.*, No. 86-Lo1502 (Ill. Cir. Ct. July 16, 1987) (on file with Author).

96. *Id.* The fact that Quake's late bid was accepted is evidence that Jones and American did not strictly comply with their own stated rules.

97. Answer and Affirmative Defenses to Third Amended Complaint, *supra* note 33.

98. Bid and Evaluation of Bids for MBE and WBE Participation, both required forms prepared by American and Jones. Third Amended Complaint, *supra* note 95.

project, confirmed an oral notice of award to Quake by letter on April 18, 1985. That "letter of intent" was later the basis of the subsequent lawsuit.⁹⁹

Quake Construction Inc.
Attention: Mr. Lawrence Quamina

We have elected to award the contract for the subject project to your firm as we discussed on April 15, 1985. A contract agreement outlining the detailed terms and conditions is being prepared and will be available for your signature shortly.

Your scope of work as the general contractor includes the complete installation of expanded lunchroom, restroom and locker facilities for American Airlines employees as well as an expansion of American Airlines existing Automotive Maintenance Shop. The project is located on the lower level of "K" Concourse. A sixty (60) calendar day period shall be allowed for the construction of the locker room, lunchroom and restroom area beginning the week of April 22, 1985. The entire project shall be complete by August 15, 1985.

Subject to negotiated modifications for exterior hollow metal doors and interior ceramic floor tile material as discussed, this notice of award authorizes the work set forth in the following documents at a lump sum price of \$1,060,568.00.

- a) Jones Brothers Invitation to Bid dated March 19, 1985.
- b) Specifications as listed in the Invitation to Bid.
- c) Drawings as listed in the Invitation to Bid.
- d) Bid Addendum #1 dated March 29, 1985.

Quake Construction Inc. shall provide evidence of liability insurance in the amount of \$5,000,000 umbrella coverage and 100% performance and payment bond to Jones Brothers Construction Corporation before commencement of the work. The contract shall include MBE, WBE and EEO goals as established by your bid proposal. Accomplishments of the City of Chicago's residency goals as cited in the Invitation to Bid is also required. As agreed, certificates of commitment from those MBE firms designated on your proposal modification submitted April 13, 1985, shall be provided to Jones Brothers Construction Corporation.

Jones Brothers Construction Corporation reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement.

We look forward to working with you on this project.

Cordially,
JONES BROTHERS CONSTRUCTION CORPORATION

99. Third Amended Complaint, *supra* note 95.

Likely no coincidence, that same day American signed an agreement with the PUSH-led coalition to award about \$50 million of contracts to MBE contractors, “grant[ing] the private coalition a role in identifying legitimate minority firms.”¹⁰⁰ The work was to begin four days later, on April 22. The fast-track project was to start before all planning details were final, with completion set for August 15.¹⁰¹ Such projects carry inherent risks of mistakes or mishaps.¹⁰² It remains a mystery *how* exactly Quake was selected among the bids submitted, as no representative from American or Jones accepted ownership of the selection decision. That is not surprising; the ensuing litigation gave reason for finger-pointing among the responsible actors.

The preconstruction meeting was rescheduled from its original date to April 25 because of airport planning issues on heating and air conditioning (“HVAC”).¹⁰³ The routine meeting introduced those present, outlined standard procedures, and announced the rescheduled April 29 start date.¹⁰⁴ The meeting roster identifies those present on behalf of Quake as Lawrence Quamina and [first name illegible] Driscoll.¹⁰⁵ None of the three subcontractors listed on the Quake bid attended. And, instead of McGrew, Boykin & Associates, the company listed on Quake’s bid for electrical work, someone from the non-MBE Paulmarc Electric Company signed the attendance roster.¹⁰⁶ Subcontractor Pyramid Plumbing, a notorious front, was also listed on the bid but no plumbing subcontractor signed the roster.¹⁰⁷ Another subcontractor listed on Quake’s bid, Energy Enterprises, Inc., also was not in attendance at this meeting nor was any other HVAC subcontractor.¹⁰⁸ However, that is understandable given the unexpected HVAC planning difficulties that arose.

100. Douglas Frantz, *Airline Promises Work to Minorities*, CHI. TRIB. (Apr. 19, 1985), http://articles.chicagotribune.com/1985-04-19/news/8501230169_1_airline-s-contract-american-airlines-legitimate-minority-firms (describing unusual agreement reached after two months of negotiations between American, PUSH, Chicago Urban League, Midwest Community Council, and Chicago Economic Development Corp.).

101. Third Amended Complaint, *supra* note 93 at C189.

102. Lustig Interview, *supra* note 59, at 31–33. Lustig, who had thirty years of civil engineering experience with the United States Air Force, had no prior experience with Chicago politics and limited background implementing affirmative action programs. He had been with the O’Hare expansion for about a year at the time in question; he left several months later. *Id.* at 1–2; *see also* Telephone Interview with Dr. Victoria D. Coleman (Aug. 3, 2007), transcript at 10 (describing they were behind on the project; mistakes common when project rushed to catch-up); Davidson & Huot, *supra* note 65.

103. Third Amended Complaint, *supra* note 93 at C196.

104. Brief for Plaintiff-Appellant at 6, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 537 N.E. 2d 863 (Ill. App. Ct. 1989) (No. 88-0043) (copy on file with Author).

105. *See* Department of Aviation Construction Section—O’Hare Airport Meeting Roster (on file with Author); *see also* Third Amended Complaint, *supra* note 95, at C279.

106. *Id.*

107. *Id.*

108. Lustig Interview, *supra* note 59,

Who was—and was not—present at the meeting determined what happened next. It appeared that Lawrence Quamina was the only person of color at the meeting. Charles Dierker, the Jones Project Engineer, was struck by the absence of any minority subcontractors at the meeting, and by the fact that the subcontractors who were in attendance differed from those listed on the bid.¹⁰⁹ Dierker conferred with his supervisor, Sheldon Lustig, who confirmed Dierker's concerns that the subcontractor involvement was largely nonminority. They believed—but did not say—that Quake was acting as “a front” for a nonminority contractor,¹¹⁰ leading the meeting to end abruptly.¹¹¹ Afterward, Dierker and Lustig informed Quamina of their decision to terminate Quake's involvement with the project, and confirmed it in writing the same day.¹¹² Promised follow-up correspondence never materialized, leading the week old business relationship to spawn nearly nine years of litigation that followed.

Dr. Victoria Coleman, an African-American Administrator of Jones' Affirmative Action Program for the project, agreed with Dierker and Lustig's perception of Quake. Coleman recalled no direct involvement with Quake. Instead she worked with the Thacker organization to develop minority owned business for American's projects.¹¹³ All businesses claiming to be MBEs were technically supposed to prequalify as such through Coleman's office and to obtain city and federal certification before submitting bids. Nevertheless, it was common for businesses to circumvent that process, often with assistance from local political actors.¹¹⁴

109. Telephone Interview with Charles J. Dierker, Interview with Richard Heytow, (Dec. 15, 2006), transcript at 3–4, 8–9. Richard Heytow, who represented Quake before the Supreme Court and through settlement said it was not uncommon that the actual subcontractors used were different from those listed on the construction permit application; there was a high degree of informality in the process.

110. Jones Project Eng'r (July 25, 2007), transcript at 5–8, 10–11; Lustig Interview, *supra* note 59, at 19, 22, 23.

111. Dierker Interview, *supra* note 109, at 8, 11; Lustig Interview, *supra* note 59, at 32. Dierker and Lustig state they discussed the situation and decided to terminate Quake after the meeting ended.

112. Letter from Charles J. Dierker to Mr. Larry Quamina, Quake Constr. Inc., (Apr. 25, 1985) (“As discussed with you in our offices, we have elected to terminate your involvement with the . . . project as of this date . . . This letter is provided in response to your immediate request. Correspondence in greater detail will follow.”) (on file with Author). Dierker and Lustig state they discussed the situation and decided to terminate Quake after the meeting ended. Dierker Interview, *supra* note 110, at 8, 11; Lustig Interview, *supra* note 59, at 32.

113. Coleman Interview, *supra* note 102, at 9.

114. *Id.* at 6–9. She recalls the crazy political scene in spring of 1985, with many different forces pressuring (or trying to “shakedown”) Coleman, Lustig, and others acting on behalf of American. It was then common for nonminority contractors to form joint ventures with minorities or women, falsely obtain MBE-designated work using the minority business as a front for work actually done by nonminority contractors. *Id.* at 9–10. Coleman, formerly a tenured psychology professor at Purdue University, started working part-time for American in the fall of 1984. Lustig started full time in

If, as it now appears, Quake did not incorporate until June 1985, Coleman stated:

[Quake] would not [have] . . . qualified to be considered. They would not have been pre-qualified according to [her] standards . . . [that required information that the bidder] have been established, legally . . . current and previous projects that the business has worked on . . . people were immediately forming corporations when they had not previously worked together and had no history. That's what I didn't like.¹¹⁵

An early interview with Quamina conflicts with Coleman's unfavorable characterization of him. He had worked on business matters for a few years before teaming up with Bill Kent, an experienced concrete contractor who had a successful track record with the city of Chicago.¹¹⁶ Richard Heytow, who represented Quake before the Supreme Court, describes Quamina as a dapper, affable businessman.¹¹⁷ The preconstruction meeting afforded only limited time to interact, and Heytow thought it pretextual that Jones asserted reasons for terminating Quake.¹¹⁸ If Jones really had a preferred contractor, they could have selected that contractor initially and "avoided all this brouhaha."¹¹⁹

Quamina later declined any further cooperation with this research project because it brought back many painful and unpleasant memories. In his words, "It was the opportunity of our lives and [the] road to success [was] snatched from my hands in broad daylight in front of people."¹²⁰

January 1985 and left in the spring of 1986. *Id.* at 1–4; *About Dr. Victoria Dorée Coleman*, THE COLEMAN GROUP, <http://www.mediate.com/thecolemangroup/pg1.cfm>.

115. Coleman Interview, *supra* note 102, at 4–5. Quake Construction Inc. incorporated with the Illinois Secretary of State June 26, 1985, listing Lawrence Quamina as President; "involuntary dissolution" dated Nov. 1, 1994. As a practical matter, such partnerships could be bona fide, with the majority contractor training the MBE contractor on how to get the job done well. OFF. OF THE ILL. SEC. OF STATE, <http://www.ilsos.gov/corporatelle/CorporateLlcController> (last visited Nov. 21, 2017).

116. Heytow Interview, *supra* note 109, at 7. Heytow represented Quake on appeal to the Illinois Supreme Court. The Author recalls taking handwritten notes when Heytow phoned Quamina to formalize consent to discuss the case. Interview notes indicate that Kent (now deceased) had a city "favored" construction company and that perhaps meetings took place without involving Quamina. Heytow also mentioned "words/hints about kickbacks" and maybe money "greasing palms." Quamina owned sixty percent of Quake shares and seventy-five percent of subcontractors were minorities. When Author resumed work on this project during the summer of 2007, Mr. Quamina asked her to prepare written questions. Thereinafter, he declined further communications about the case, which brought back much pain, anger and difficulties.

117. *Id.*

118. *Id.*

119. *Id.* at 6.

120. "It troubles me deeply, to sit and think about the event . . . The event took me to financial bottom [and] almost led me to ruin . . . We were robbed!! The most embarrassing event I had ever experience . . . A lot I don't remember all of that information was written down and in the attorney's hands long ago. I will ponder this . . . I either have to dig up the past and recall what I can, or bury it, forget it . . . and move on." E-mail from Lawrence Quamina to Author of this Article (July 24, 2007, 22:46 EST) (on file with Author).

Until December 3, 1990—the day the *Quake* opinion was issued by the Illinois Supreme Court—no African American had ever served on that court. That same day, African American Justice Charles Freeman—who swore Mayor Washington into office and who served on the intermediate court panel on *Quake*—was sworn into office.¹²¹ Freeman replaced Justice John Stamos, author of the special concurrence in the Illinois Supreme Court's *Quake* opinion, who resigned in order to create the vacancy for an interim appointment.¹²² The events of December 3, with Stamos resigning and Freeman taking his place, corroborate my instinct that racial concerns underlie the conduct of the squeaky clean Illinois Supreme Court so that no one could cast aspersions on the legitimacy of the *Quake* decision.

B. THE LITIGATION

1. Initial Complaint

Quake filed suit in January 1986, nine months after the termination. Chicago lawyer Bruce Plattenberger signed the original two-count complaint against American Airlines and Jones.¹²³ Plattenberger, a white graduate of Chicago's Loyola University School of Law, was a sole practitioner who specialized in plaintiffs' personal injury trial practice.¹²⁴ Plattenberger was renowned for "[h]is ability to win over juries in apparently hopeless cases"¹²⁵ Quamina recalls that the "cocky wonderful" attorney undertook the representation on a contingent fee basis.¹²⁶

Count I of the complaint alleged that American hired Jones as its agent and, through that agent, terminated the Quake contract without "cause and justification."¹²⁷ As a result, Quake allegedly lost expected profits and had spent substantial sums of money preparing to perform before receiving notice of termination. Count II alleged a nearly identical

121. Telephone Interview with John Stamos, Former Illinois Supreme Court Justice (June 30, 2012) (on file with Author).

122. As is common throughout the states, a judicial vacancy is created by resignation, which is then filled by appointment. In Illinois, the remaining members of the Supreme Court make the interim appointment. The appointee then runs for a full ten-year term in the relevant district through a partisan election and are retained for additional ten year terms through nonpartisan retention elections. *Judicial Selection in the States: Illinois*, NAT'L CTR. FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/index.cfm?state=IL (last visited Nov. 21, 2017).

123. Complaint at 1, No. 86Lo1502 (Ill. Cir. Ct. Jan. 22, 1986), refiled on appeal, No. 91L19409 (Ill. Cir. Ct. Dec. 4, 1991). The initial complaint requested a jury trial (on file with Author).

124. Henry Wood, *Lawyer, 35, Slain on Cta Train*, CHI. TRIB., Sept. 13, 1988, http://articles.chicagotribune.com/1988-09-13/news/8801290898_1_westbound-train-gunman-passengers.

125. Jorge Casuso, *L' Victim Had Trust in People*, CHI. TRIB. (Sept. 14, 1988), http://articles.chicagotribune.com/1988-09-14/news/8801300246_1_train-gun-friends.

126. E-mail from Lawrence Quamina, *supra* note 120.

127. Complaint, *supra* note 123, at 2.

claim against Jones.¹²⁸ Each count prayed for relief “in an amount as justified by the evidence and for breach of contract, plus interest, costs and attorneys’ fees presumed to be in excess of \$15,000[,]”¹²⁹ which probably was the jurisdictional minimum to invoke district court jurisdiction, rather than ending up in small claims court. The three-page complaint attached the bid, the letter of intent, and the letter of termination.

Chicago firm Katten, Muchin, and Zavis appeared on behalf of Defendants American and Jones.¹³⁰ Partner Peter Petrakis¹³¹ and associate Barbara Stuetzer¹³² (both white) moved to dismiss the case for failure to state a claim, contending the letter of intent did not constitute a contract and hence no actionable breach of contract existed.¹³³ Alternatively, they argued that the letter’s cancellation clause authorized termination.¹³⁴ The circuit court judge granted the motion with leave to amend, finding that the complaint was legally insufficient because “the parties did not intend to be bound until the execution of a formal subcontract agreement.”¹³⁵

2. *Second Amended Complaint*

Quake promptly amended its complaint, alleging the letter of intent was to provide assurance to subcontractors that they would be used on the job and that Quake would enter into contracts with them. American and Jones again sought dismissal.¹³⁶ The presiding judge dismissed the

128. *Id.* at 3.

129. *Id.*

130. Twenty-four attorneys established Katten, Muchin & Zavis in Chicago in 1974. Now named Katten, Muchin & Rosenman LLP, the firm has over 600 lawyers in the United States and London. *Firm History*, KATTEN, MUCHIN & ROSENMAN LLP, <https://www.kattenlaw.com/firm-history> (last visited Nov. 21, 2017).

131. Petrakis graduated from the Loyola University of Chicago School of Law in 1976, one year ahead of Plattenberger. *See Attorney Profile: Peter Petrakis*, MARTINDALE, <https://www.martindale.com/park-ridge/illinois/peter-thomas-petrakis-915419-a/> (last visited Nov. 21, 2017). No evidence suggests the two became acquainted while in school.

132. Loyola University of Chicago School of Law (J.D. 1981). Barbara Stuetzer surmised that the firm was hired because she represented someone connected to the O’Hare project. Interview with Barbara J. Stuetzer, Former Associate, Katten, Muchin, & Zavis (June 4, 2007), transcript at 1–3. *See, e.g., Jones v. Jones Bros. Constr. Corp.*, 888 F.2d 1215 (7th Cir. 1989), *reh’g en banc denied* (1990) (affirming after remand trial court’s fact-finding in Title VII action upholding recovery by female plaintiff terminated from her job as O’Hare construction escort). The relevant underlying dates are after the firm’s April 1, 2006, certificate of appearance. Nevertheless, the facts suggest ongoing need for legal advice on American’s O’Hare project.

133. Brief for Defendant-Appellee at 5, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 537 N.E. 2d 863 (Ill. App. Ct. 1989) (No. 88-0043).

134. *Id.* at 13.

135. Circuit Court Judge Rakowski dismissed the first complaint. *Id.* at 2.

136. Interview with Richard Heytow, *supra* note 109.

second amended complaint as well and denied Quake's motion to reconsider.

3. *The Third (and Final) Amended Complaint*

At this point the circuit court had ruled three times that Quake had not stated an actionable claim.¹³⁷ Quake persevered. Nearly six months after filing the initial complaint, Plattenberger filed the third and final amended complaint with exhibits, a total of 103 pages.¹³⁸ For the first time, the complaint sought recovery for detrimental reliance and claimed that Jones waived the requirement of a writing.¹³⁹ Quake attached all relevant written communications between the parties, including the invitation to bid; the bid itself; the letter of intent; a lengthy standard form subcontractor supplementary agreement; a memo of delay on the proposed start date showing the contract awarded to Quake; the preconstruction meeting roster of attendance; and the letter of termination.¹⁴⁰

Once again, Defendants sought dismissal. At the hearing on the motion, Stuetzer argued: "There is no unequivocal promise here. There is no reliance that is either reasonable or justifiable in the face of this clear statement that there would be no agreement until a signed subcontract was presented. Now that is not before this Court. It never has been."¹⁴¹

Plattenberger replied that, in construing contract language, courts can "look at the conduct of the parties. And it's our opinion . . . that the parties conducted themselves as if there was a deal."¹⁴² The amended complaint contained new factual allegations, including that:

Quake was specifically informed by the defendant that a written contract was not necessary for them to start the job; that they had to start the job before the written contract could be given to them; that the contract was being typed by the defendant's office in California; that the contract after it was typed would be sent to Chicago for signature, but that Quake had to start a meeting, that Quake had to get all of its subcontractors . . .¹⁴³

137. The three different occasions referenced are the Initial Complaint, Second Amended Complaint and the Motion to Reconsider.

138. Third Amended Complaint, *supra* note 95.

139. Quake asserted a fourth claim for impossibility of contract; because it was not raised on appeal, it became irrelevant.

140. Third Amended Complaint, *supra* note 95, at 196–281.

141. Report of Proceedings on Motion to Dismiss Third Amended Complaint at 3, Quake Constr., Inc. v. Am. Airlines, Inc., No. 86-Lo1502 (Ill. Cir. Ct. Dec. 1, 1987) (on file with Author) [hereinafter Circuit Court, Hearing and Order on Third Amended Complaint]. Stuetzer said a responsive brief received the day before "cites some new authority and finally clarifies one of the theories to . . . sustain this pleading." *Id.*

142. *Id.* at 5.

143. *Id.* at 6–7.

The day before the motion hearing, Plattenberger filed a legal memo citing authority for a standalone promissory estoppel claim.¹⁴⁴ He argued:

[I]n Illinois the theory of promissory estoppel is a theory which operates without a contract. That's what the theory was designed for, if this Court determines that there is no contract, and I think the Court has determined there is no contract, the theory of detrimental reliance or promissory estoppel is a theory which operates in that void. It's a theory which presumes that there is no contract.¹⁴⁵

American made an unambiguous promise that no written agreement was necessary to begin work, and insisted that Quake begin work immediately.¹⁴⁶ In reliance on this, Quake placed a project manager on its payroll.¹⁴⁷

[I]f we ever do get to the proof stage, even though a week seems like a short period of time in this courtroom, these people were out there at this project at 5:00 o'clock every morning and were having meetings all day. I say this only because I understand the judge may be skeptical that these things could happen in a week. But I do believe they are well-pled facts, and I do believe they must be taken as true.¹⁴⁸

Quake did everything necessary to begin the project, with its reliance expected and foreseeable.¹⁴⁹ Stuetzer countered: While there was "no doubt" that the alleged acts of reliance occurring in the one-week time span "may have occurred[,] it was "ludicrous" to consider the promises "unequivocal and definite" to an extent sufficient to support a recoverable claim for the jurisdictional minimum amount.¹⁵⁰

Quake's complaint was again dismissed with prejudice, making the case ripe for appeal.¹⁵¹ The judge's patience tested, he summarily ruled on Counts I (breach of contract) and III (breach of contract and waiver of condition precedent), stating "I ruled on it once, and I reaffirmed it. I'm not even going to hear argument on it for a third time . . . now do you have any other counts?"¹⁵² He also dismissed the promissory estoppel claim, explaining:

144. *Id.* at 9–10.

145. *Id.* at 15.

146. *Id.*

147. *Id.* at 16.

148. *Id.* at 15–16.

149. *Id.* ("Quake had to begin work on the project immediately . . .").

150. *Id.* at 17–18.

151. Order, *Quake Constr., Inc. v. Am. Airlines, Inc.*, No. 86-Lo1502 (Ill. Cir. Ct. Dec. 2, 1987) (on file with Author). Quake's Third Amended Complaint included a fourth claim for impossibility of contract; because plaintiff did not appeal its dismissal of this claim it was no longer at issue.

152. Circuit Court, Hearing and Order on Third Amended Complaint, *supra* note 141, at 8 (referring to a prior extensive hearing on defendants' motion to dismiss second amended complaint at which Mr. Quamina was present). *Id.* at 18.

I think the key element . . . in the doctrine of promissory estoppel . . . has to be reliance. And in this case, there could be no reliance in the face of unambiguous language of . . . the letter of intent . . . reserving . . . their right to refuse to go ahead with the deal until it committed itself in writing. And in the face of that, there simply could be no justifiable reliance.¹⁵³

The judge made it clear that he interpreted the letter of intent as giving American complete discretion as to whether to use Quake “up to the moment that [it] formally committed itself.”¹⁵⁴ Until then, there could be no justifiable reliance. He posed two hypotheticals: First, where the general contractor solicits a subcontractor’s bid, using that bid to win the prime contract where the general contractor induced the subcontractor’s reliance, the general contractor is liable under promissory estoppel. In the second hypothetical, the subcontractor submitted the bid on the express condition the bid was not binding until the subcontractor signed a written contract to do the work. In that situation there could be no justified reliance because the offer was expressly made conditional upon acceptance.¹⁵⁵

Judge Lassers¹⁵⁶ did not cite the famous contract cases on which his hypotheticals were based, but it appears his reasoning was based on two leading contract cases. The first hypothetical parallels *Drennan v. Star Paving Co.*, an opinion by Justice Traynor of the California Supreme Court, using pre-acceptance reliance as a substitute for consideration sufficient to create a binding option contract and holding irrevocable the subcontractor’s bid as necessary to avoid injustice.¹⁵⁷ *Drennan* is the prime authority on which section 87(2) of the Restatement of Contracts (Second) is based.

The second hypothetical tracks Second Circuit Judge Learned Hand’s opinion in *James Baird Co. v. Gimbel Bros., Inc.*, where the subcontractor supplier presented a bid expressly qualified upon being accepted after the prime bid was awarded the contract.¹⁵⁸ And thus, within the general common law that offers are revocable until acceptance, any reliance by the offeree could not be justified—nor needed, because acceptance would create a binding bilateral contract.¹⁵⁹

153. *Id.* at 20.

154. *Id.*

155. *Id.* at 21–22.

156. Cook County Circuit Court Judge Willard J. Lassers made all subsequent rulings on the sufficiency of the amended complaints. Brief for Plaintiff-Appellant, *supra* note 104, at 2–3. He received his law degree from the University of Chicago in 1942 and was admitted to practice in 1953 after military service. Between 1978–1994, Judge Lassers served in various appointive and elective lower court judicial roles. *Judicial Profile for Willard J. Lassers*, in ILL. JUDICIAL PROFILES 387, 387–88 (1994).

157. *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958).

158. *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d. Cir. 1933).

159. *Id.* (explaining that pre-acceptance reliance is “sunk cost” to improve likelihood of reaching a

Judge Lassers found applicable the second hypothetical, and dismissed Count III on promissory estoppel.

Quake appealed to the Appellate Court of Illinois—First Judicial District.¹⁶⁰ The appellate arguments took the lawyers' professional sparring to new heights.

C. THE APPEAL

1. Appellate Court of Illinois—First Judicial District

a. Brief of Plaintiff-Appellant Quake Construction

Plattenberger's succinct, well-written brief cited Illinois cases to support the contract and promissory estoppel claims, arguing that the trial court erred in the dismissal.¹⁶¹ As to Counts I (breach of contract) and III (waiver of writing as condition precedent to existence of binding contract), the brief maintained that Quake's bid constituted an offer which Jones accepted by (1) oral notice of award; (2) written notice contained in the letter of intent; and (3) conduct signifying assent.¹⁶² Quake submitted the bid in response to Jones' invitation for bids that included specifications and drawings. Knowing that Quake would not commence work without a written manifestation of acceptance, Jones sent the April 18 letter to induce plaintiff to move forward, providing Jones with two subcontractors' license numbers and otherwise preparing to start construction immediately.¹⁶³

bargain).

160. Notice of Appeal, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 537 N.E.2d 863 (Ill. App. Ct. 1989) (No. 85Lo273) (filed Dec. 23, 1987) (on file with Author).

161. Brief for Plaintiff-Appellant, *supra* note 104. Count IV, alleging impossibility, was not pursued on appeal. *See Quake Constr., Inc. v. Am. Airlines, Inc.*, 537 N.E.2d 863, 865 (Ill. App. Ct. 1989). It appears that Counts II (detrimental reliance) and III (waiver of condition precedent) first appeared in the Third Amended Complaint. *See* Brief for Defendant-Appellee, *supra* note 133, at 2–3.

162. Brief for Plaintiff-Appellant, *supra* note 104, at 7–8 (citing *Premier Elec. Constr. Co. v. Miller-Daris Co.*, 422 F.2d 1132 (7th Cir. 1970) and *Jones v. Eagle*, 424 N.E.2d 1253 (Ill. App. Ct. 1981) for the proposition that Illinois law “unequivocally recognizes a bid for a contract as an offer” if it is definite and contains all essential terms). *See generally* CONTRACTS, *supra* note 9, at §§ 3.10–3.13 (2d ed. 1990) (summarizing fact-specific determination on what constitutes offer creating binding power of acceptance).

163. Brief for Plaintiff-Appellant, *supra* note 104, at 9–10. This argument suggests, but does not raise, the evolving view that sometimes treats as an irrevocable offer the bid of a subcontractor to a general contractor. *See generally* CONTRACTS, *supra* note 9, at §§ 3.23–3.26; Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952) (describing general contractors' use of bid-shopping and bid-chopping does not warrant making subcontractor bids irrevocable); Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463 (1998) (explaining the role of relational values in deciding construction disputes); RESTATEMENT (SECOND) OF CONTRACTS § 97(2) cmt. e, illus. 6 (AM. LAW INST. 1981) (The use of subcontractor's bid in submitting prime bid acts as reliance serving as consideration substitute to create binding option contract that is irrevocable for a

Additional conduct by Jones further manifested an intent to contract: “[I]f defendant did not believe that it had awarded the contract to plaintiff, all this activity and interchange . . . was purposeless, and merely exercises in futility.”¹⁶⁴ The letter is a clear, unequivocal acceptance sufficient to form a binding contract.¹⁶⁵ When read together, the three documents contained all essential elements of a contract, including price, scope of work, and start of performance to begin four days later.¹⁶⁶ Although the letter contemplated later execution of a written contract, that was a mere formality “to memorialize that which had been agreed upon” and not a condition that was required to be met before binding obligations arose.¹⁶⁷ Assuming, *arguendo*, that the contemplated writing was a condition precedent to contractual liability, Defendant waived or was estopped from asserting its nonoccurrence.¹⁶⁸ The cancellation clause operated only if the parties could not, acting in good faith, agree on a fully executed contract. Because Jones summarily terminated Quake without any good faith effort to obtain an executed agreement, it “cannot use its own failure to shield itself from liability.”¹⁶⁹

Count II sought recovery for detrimental reliance *without regard to existence of a binding contract*.¹⁷⁰ Illinois precedent recognized the availability of such recovery in commercial transactions and construction projects.¹⁷¹ Quake alleged sufficient facts to make a *prima facie* showing of each required element: (1) an unambiguous promise, followed by (2) reasonable reliance, (3) foreseeable by the promisor, and (4) to the detriment of the promisee. American, through Jones, “unambiguously promised plaintiff that it had been awarded the contract and that the letter of intent was their contract and as such

reasonable time. As found by Judge Lassers, that line of authority has no application here, in which Quake, the putative offeror, seeks to bind the general contractor as offeree.); *see also* KNAPP, ET AL., *supra* note 10, at 256.

164. Brief for Plaintiff-Appellant, *supra* note 104, at 17. Jones’ letter allegedly induced Quake to get authorization providing Jones with license numbers of plumbing and masonry contractors. Brief did not identify those subcontractors by name. Jones delayed the start date because of design problems unrelated to Quake. The Memorandum of Delay distributed to various agencies and individuals stated: “A contract award has been made for approximately \$1 million dollars to a Chicago Minority Contractor (Quake Construction).” Memorandum of Delay (Apr. 19, 1985) (on file with Author); *see also* Brief for Plaintiff-Appellant, *supra* note 104, at 10.

165. Brief for Plaintiff-Appellant, *supra* note 104, at 11.

166. *Id.* at 13.

167. *Id.* at 11–13, 16–17 (citing *Inland Real Estate v. Christoph*, 437 N.E.2d 658 (Ill. App. Ct. 1981) (granting specific performance for sale of real estate based on letter of intent with cancellation clause).

168. Brief for Plaintiff-Appellant, *supra* note 104, at 27.

169. *Id.* at 28.

170. *Id.* at 20 (citing *inter alia*, *S.M. Wilson & Co. v. Prepakt Concrete Co.*, 318 N.E.2d 722 (Ill. App. Ct. 1974)); *Jenkins & Boller Co., Inc. v. Schmidt Iron Works, Inc.*, 344 N.E.2d 275 (Ill. App. Ct. 1976); *S.N. Nielsen Co. v. Nat’l Heat & Power Co., Inc.*, 337 N.E.2d 387 (Ill. App. Ct. 1975); *Ill. Valley Asphalt, Inc. v. J.F. Edwards Constr. Co.*, 413 N.E.2d 209 (Ill. App. Ct. 1980)).

171. Brief for Plaintiff-Appellant, *supra* note 104, at 22.

binding . . . bolstered . . . with numerous oral” and written assurances.¹⁷² Quake reasonably relied to its detriment by performing four tasks in preparation for the project, including: (1) expanding its physical office space at costs exceeding \$10,000; (2) placing on its payroll a project manager at a weekly salary exceeding \$500; (3) securing all necessary subcontractors and providing Defendants with license numbers of the plumber and masonry subcontractors; and (4) preparing to perform fully the contract, which required substantial time and labor.¹⁷³ This reliance was “expected and foreseeable” as well as “undisputable . . . especially where Jones kept scheduling start dates that were within a matter of days of the contract award.”¹⁷⁴

b. Brief for Defendant-Appellee

Stuetzer wrote the brief for Appellee, with editorial input from Petrakis.¹⁷⁵ The statement of facts shows that it forgot Quake dropped Jones as a named defendant after the initial complaint, thereafter pursuing only American Airlines.¹⁷⁶ The argument began as follows: “This litigation is about the effect of one sentence” as a matter of law, the reservation of rights/cancellation clause precluded both the existence of a contract and the possibility of reasonable reliance on any promise made.¹⁷⁷

At times the language almost drips with sarcasm: “Where the parties intend that an agreement be reduced to writing and formally executed as a condition precedent to its completion, no contract exists till then even if the actual terms have been agreed upon.”¹⁷⁸ Quake’s allegations of oral statements, conduct, and the introductory language in the letter are stated:

*[I]n isolation from the crucial reservation of rights sentence. This tactic reaches its nadir . . . [in a later argument suggesting] that the opening sentence . . . unequivocally shows the formation of a contract. Incredibly, Quake has structured its brief so that it might show the court this introductory sentence, and make unwarranted characterizations about [its effect, thus telling the court] only part of the picture . . . [which cannot adequately be considered] without having what Paul Harvey might call “the rest of the story.”*¹⁷⁹

172. *Id.* at 22.

173. *Id.* at 23.

174. *Id.* at 24.

175. Stuetzer, *supra* note 132, at 7.

176. Brief for Defendant-Appellee, *supra* note 133, at 1 (Defendant-Appellee seemed to forget this, mentioning Jones as a defendant in later briefs).

177. *Id.* at 5–7, 14–16.

178. *Id.* at 6; *see also* CONTRACTS, *supra* note 9 (explaining “law of conditions,” and judicial process of interpreting unambiguous language as a matter of law. RESTATEMENT (SECOND) OF CONTRACTS § 224h (AM. LAW INST. 1981)).

179. Brief for Defendant-Appellee, *supra* note 133, at 6–7. Paul Harvey was the host of a popular

Count III, alleging waiver of writing as a condition precedent to contract, was “a last minute desperate attempt to salvage a pleading which had already been dismissed twice.”¹⁸⁰ It gave no basis for relief, because “before the issue of a waiver can be addressed there must be an existing contract with conditions which are waived . . . In this case, the very condition . . . which Quake said was waived goes to the formation of the contract.”¹⁸¹

Defendant-Appellee contended that the elements of promissory estoppel “are woefully lacking”:

it requires reservoirs of self-delusion for Quake to read the letter. . . from beginning to end and . . . conclude [there was] . . . an unambiguous promise . . . Ironically, while Quake had an acute sense of hearing with respect to certain alleged statements, at the same time it was apparently sightless to the actual words on the page of the letter of intent.¹⁸²

There were no specific allegations of reliance and any claimed under the circumstances would be “absurd.”¹⁸³ A footnote dismissed Quake’s contention that “the existence of promissory estoppel factors is a question of fact . . . [S]uggest[ing] that the doctrine . . . is some mystical incantation which automatically and always opens the door to the jury room.”¹⁸⁴

c. Plaintiff-Appellant’s Reply Brief

Plattenberger’s reply brief argued that the various documents together comprised a written contract.¹⁸⁵ Intent to enter a binding agreement must be determined in context, looking at the entire April 18 letter, the parties’ conduct, and the surrounding circumstances both before and after that document was prepared.¹⁸⁶ Defendant argued “solely by reference to the last paragraph of the two-page document, ignoring the balance of the document” and the parties’ conduct.¹⁸⁷ Correctly interpreted, the “reservation of rights” language became operative only “if the parties [*could not*] agree on a fully executed

Chicagoland radio program called “The Rest of the Story,” wherein he would develop lesser known facts that were key elements of a news story. The show might be considered the radio version of “legal archeology” or “law stories,” including the instant work. *The Rest of the Story*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Rest_of_the_Story (last visited Nov. 21, 2017).

180. Brief for Defendant-Appellee, *supra* note 133, at 20.

181. *Id.* at 22.

182. *Id.* at 16–18.

183. *Id.* at 15.

184. *Id.* at 18.

185. Reply Brief of Plaintiff-Appellant at 2, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 537 N.E.2d 863 (Ill. App. Ct. 1989) (No. 88-0043).

186. *Id.*

187. *Id.*

subcontract agreement.”¹⁸⁸ They did so agree, as the letter reflected, with the defendant assuming the ministerial task of typing the final agreement.¹⁸⁹ That interpretation differed greatly from Defendant’s contention that deferred binding duties and maintained American’s unfettered right to cancel unless and *until* the parties agreed to the terms of a fully executed contract.¹⁹⁰

If formal contract execution were a condition precedent, its “completion was entirely” within defendant’s control, with defendant agreeing to finalize the document reflecting the terms which had already been agreed upon.¹⁹¹ Such one-sidedness made the condition illusory, buttressing the promissory estoppel claim. On that count, plaintiff reasonably relied on “defendant’s *explicitly stated* intentions and demands.”¹⁹² Defendant’s “consternation” about waiver was unwarranted.¹⁹³ Had it answered the complaint and pled nonoccurrence of the MBE condition as an affirmative defense, plaintiff could have countered with waiver.

In the procedural context, a separate waiver count is proper.¹⁹⁴ The deliberate defense litigation strategy deprived plaintiff from defending on the merits when proof of compliance might have been available and caused the litigation to drag on. Indeed, Plaintiff’s Reply Brief unwittingly forecast Defendant’s future defense after the Illinois Supreme Court decision.

2. *Unique Proceedings Before the Illinois Appellate Court (First District, Third Division)*

At this point, readers may begin to see the subtle interplay between race and contract doctrine, although it takes careful reading between the lines, and does not yet expressly appear of record. At the request of both parties, the case was set for oral argument before the Appellate Court of Illinois, First District, Third Division, sitting in Chicago.¹⁹⁵ Plattenberger was killed on September 12 in a botched train robbery after briefing, but before argument.¹⁹⁶ Official court records state the argument was

188. *Id.* at 3.

189. *Id.*

190. *Id.* at 6.

191. *Id.* at 3–4.

192. *Id.* at 5–6.

193. *Id.* at 7.

194. *Id.* at 7–8.

195. Both parties’ briefs requested oral argument. Brief for Defendant-Appellee, *supra* note 133, at 1; Reply Brief of Appellant, *supra* note 186, at 1.

196. Casuso, *supra* note 125. The evening of September 12, 1988, Plattenberger resisted a robbery on a Chicago Transit Authority train, saying “That’s not a real gun. I think it’s a cap pistol.” *Id.* He was shot and died instantly. *Id.* Friends described him as “cocky . . . [A]lways coming up with a wise comment . . . [He] had a way of mesmerizing people.” At 36 years old, he was a “top-flight

scheduled for January 11, 1989, and that “argument [was] waived.”¹⁹⁷ Defense counsel Peter Petrakis stated that he appeared at court ready for oral argument. He recalls that two of the three assigned judges were African American and that Quake had a new lawyer on appeal.¹⁹⁸ Mr. Quamina mentioned that this new lawyer was Albert Terrell, a then prominent and politically connected African-American Chicago lawyer who appeared at the appointed time for oral argument.¹⁹⁹ Nothing evidenced who appeared for Plaintiff.

After brief consultation, the presiding three-judge panel—including Justices White, Freeman, and McNamara—announced the case would be decided on the briefs alone, without argument.²⁰⁰ It appears that one or more justices, perhaps Freeman or White, were acquainted with Terrell and sought to avoid an appearance of impropriety by interacting with

attorney . . . on his way to becoming a mover and a shaker.” *Id.*

197. Defendant-Petitioners’ Petition for Leave to Appeal at 5, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 537 N.E.2d 863 (Ill. App. Ct. 1989) (No. 88-0043).

198. Annual Bluebook of Justices confirms; Justices William Sylvester White and Charles E. Freeman were African American and Justice Daniel McNamara was Caucasian, of Irish descent. Telephone Interview with Peter Petrakis, Law Offices of Peter Petrakis (Oct. 17, 2006).

199. Terrell’s name appears nowhere in the record. Mr. Quamina mentioned that Albert Terrell represented Quake after Plattenberger’s death at the intermediate court. See Memorandum to Lawrence Quamina (July 17, 2007) (on file with Author); see also Douglas Frantz, *Restaurant Dispute Gets Feverish in Medical Area*, CHI. TRIB., May 13, 1985; Douglas Frantz, *Judge Criticizes City Law Office*, CHI. TRIB., June 26, 1985 (noting that it appeared that Terrell, a former law partner of Chicago corporation and counsel James Montgomery under the Washington administration, helped arrange some meetings, and the City of Chicago dropped objections after he was retained by the owners of Popeye’s restaurant).

Albert George Terrell was born in 1954, graduated from the University of Illinois College of Law and admitted to practice in May 1982. Telephone Interview with Jim Grogan, Deputy Administrator and Chief Counsel, ARDC (July 27, 2007). In September 1991, the Illinois Supreme Court approved and confirmed the report and recommendation of the IARDC Hearing Board to suspend him for 18 months and “until further order of Court is allowed.” M.R. 7739 *In re: Albert George Terrell* (Sept. 26, 1991) (on file with Author). Jim Grogan, now Deputy Administrator and Chief Counsel of the Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois (“ARDC”) provided the files and gave his take on what happened. Telephone Interview with Jim Grogan (July 27, 2007) (on file with Author). Terrell appeared at the disciplinary hearing pro se (*always* a bad idea in disciplinary proceedings); the three lawyers on the panel were people who were sympathetic and inclined to give Terrell a break. *Id.* at 3. The transcript indicates in Terrell’s Closing that he had the kind of personal meltdown common in discipline cases: divorce, financial problems and mental pressure. Hearing Transcript at 47, *In re: Albert George Terrell*, No. 90 CH 414 (1991). He failed to pay his 1989 registration fee but continued to appear in court on occasion, mostly in pro bono work for family members. *Id.* at 28–35. He begged for, but did not receive the panel’s mercy. *Id.* at 45–48. And he asked the panel to show “compassion and understanding.” *Id.* at 48. Grogan described this as a “heavy hit” and difficult to get readmitted to practice after this type of suspension and order. *Id.* I find this a tragic case, especially because of continuing frustration over efforts to diversify the legal profession. It reinforces my empathy for Mr. Quamina’s decision to not further participate with this research project, at times too painful to revisit. Terrell is now a nonlawyer tax advisor in Chicago, apparently doing well.

200. Interview with Peter Petrakis, *supra* note 198; see also Petition for Leave to Appeal, *supra* note 197.

him in their judicial capacity.²⁰¹ Heytow concurs with this speculation; ordinarily the appellate court would announce in advance its plan to decide a case without oral argument, notifying the parties by postcard.²⁰²

In historical context, this interpretation of the unusual decision to dispense with oral argument makes sense. The infamous Operation Greylord Scandal, in which numerous Cook County judges and lawyers were prosecuted for bribery and perjury, “rocked the community and exposed a judicial system rife with corruption, incompetence, intrigue, and influence peddling.”²⁰³ Each judge on the *Quake* appeals panel had an unblemished record and was highly respected in the legal community.²⁰⁴ The year before, in 1988, the Illinois Supreme Court decided *In re Himmel*, suspending a lawyer for failing to report another lawyer’s known embezzlement of client funds.²⁰⁵ Because of the lingering bruises from Operation Greylord, the courts had a heightened sensitivity to ethics propriety, with judges careful to avoid any conduct that might

201. The postcard system may also reflect a judicial tendency to reduce the number of oral arguments in Illinois Appellate Courts. See Gino L. DiVito, *Surviving the Death of Oral Argument*, 99 ILL. B.J. 188 (2011).

202. Interview with Richard Heytow, *supra* note 109, at 12.

203. Richard Lindberg, *No More Greylords?*, IPSN.ORG (1994), <http://www.ipsn.org/greylord.html>. The investigation and prosecutions spanned thirteen years, indicting ninety-two judges, lawyers, detectives, police officers, and court officials. *Id.* The last conviction was obtained in 1993. *Id.*

204. Justice William Sylvester White, author of the majority opinion, was born in 1917, received his A.B. and J.D. degrees from the University of Chicago; he then had a distinguished career in the U.S. Navy. Before his 1980 election to the First District Appellate Court in 1980, he served Cook County circuit judge (1964–1980), as an Assistant U.S. Attorney for the Northern District of Illinois and Assistant Cook County State’s Attorney, as Deputy Commissioner of the Chicago Department of Investigation and in other prominent positions. *Jim Edgar, Secretary of State*, ILL. BLUE BOOK 1989–90 (on file with Author) [hereinafter 1987–89 ILL. BLUE BOOK]. *William Sylvester White, Ex-Illinois and Appellate and Juvenile Court Judge, Dies*, JET, Mar. 8, 2004, at 15. Charles E. Freeman, concurring with Justice White, was born in 1933; received his undergraduate degree from Virginia Union University, served in the Army (1956–58) and received his law degree from John Marshall Law School (1962). Voters elected him to the Cook County Circuit Court (1976–82) and the First District Appellate Court (1982–90) and the Supreme Court in 1990. *Id.* Notably, he swore Mayor Washington into office. *Judicial Profile for Charles E. Freeman*, in ILL. JUDICIAL PROFILES, 239 (1994).

Justice Daniel J. McNamara, who dissented, was born in Chicago in 1921, received his undergraduate degree from Notre Dame (1942), served in the Navy during World War II and then received his law degree from DePaul (a Jesuit school) and admitted to practice in 1948. *George H. Ryan, Secretary of State*, ILL. BLUE BOOK 1997–98 (on file with Author) [hereinafter 1997–98 ILL. BLUE BOOK]; *Judicial Profile for Daniel J. McNamara*, in ILL. JUDICIAL PROFILES, 474 (1994).

205. *In re Himmel*, 533 N.E.2d 790, 795 (Ill. 1988); Telephone Interview with James J. Grogan, Deputy Administrator and Chief Counsel, Illinois Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois (June 26, 2012) [hereinafter Grogan June 26, 2012, Interview]. Justice Stamos, author of the special concurring opinion in the Supreme Court *Quake* decision also authored *Himmel*, which some legal ethics experts consider the most important ethics decision of the twentieth century. Arthur F. Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003). It certainly woke up Illinois lawyers—Illinois has the highest frequency of reporting, including self-reporting, in the United States. *Id.* at 273.

be perceived as unseemly.²⁰⁶ Justice Freeman served on the appellate bench beginning in 1976 until December 3, 1990, when he was sworn in as the state's first African-American member of the Illinois Supreme Court—the same day that court decided *Quake*. At his swearing-in Justice Freeman stated: “The public perception of the judicial branch of government is at an all-time low. We must address that perception.”²⁰⁷

On March 29, 1989, after nearly four years of litigation, the Illinois Appellate Court, First District, reversed and remanded in a split decision, with Justice McNamara dissenting.²⁰⁸ As is common, the majority and dissent reflect opposite facts and law.

Justice William S. White, educated at the University of Chicago, authored the lucid majority opinion reflecting modern legal realism.²⁰⁹ Because the trial court dismissed the complaint with prejudice, the appellate court was required to take as true all well-pled facts in the complaint and all reasonable inferences that could be drawn therefrom, and to interpret them in the light most favorable to the plaintiff. Dismissal was improper unless “no set of facts could be proved that would entitle the plaintiff to relief.”²¹⁰ After summarizing the factual allegations for dismissal of each count raised on appeal, the court reversed and remanded, finding sufficient the contract and promissory estoppel claims. The determinative finding was that the letter of intent was ambiguous, requiring the factfinder below to receive parol evidence and to decide upon the parties' intent, taking into account all the relevant facts and circumstances. Even absent a finding of a binding contract created by the documents, the complaint stated sufficient allegations for independent recovery under promissory estoppel.

With respect to the contract formation issue, where a writing was contemplated but not executed, the court quoted the familiar standard on the importance of intent:

If the parties to the writing intended that it be contractually binding, that intention would not be defeated by the mere recitation in the writing that a more formal agreement was yet to be drawn . . . [If] the language is ambiguous, the construction of the writing is a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended.²¹¹

206. Telephone Interview with Mike Trucco, Litigation Partner at Stamos & Trucco, LLP (June 25, 2012).

207. William Grady, *Illinois Supreme Court Swears in 3 Members*, CHI. TRIB. (Dec. 4, 1990), http://articles.chicagotribune.com/1990-12-04/news/9004110293_1_illinois-supreme-court-appellate-judge-appellate-courts.

208. *Quake Constr., Inc. v. Am. Airlines, Inc.*, 537 N.E.2d 863 (Ill. App. 1989).

209. Email from Judith Maute, Author, to Douglas Baird (June 27, 2012, 1:27 PM CST) (on file with Author) (concerning overlap in time and whether Justice White studied with Karl Llewellyn).

210. *Quake Constr., Inc.*, 537 N.E.2d at 865.

211. *Id.* at 866 (internal citations omitted throughout).

Parsing the letter of intent within the context of the alleged surrounding circumstances, the majority found that it supported a reasonable inference that the parties intended that work begin prior to execution of the formal contract, which would then be governed by the letter's terms.²¹²

[L]anguage referring to [Jones'] reservation of right to cancel the letter if the parties could "not agree on a fully executed subcontract agreement." . . . is itself ambiguous and supports both constructions . . . [I]t may be construed [that the executed writing] is a condition precedent [to formation of the contract] . . . [but] there would be little need to provide for [its] cancellation . . . if the parties did not intend to be bound by it . . . [T]he statement [also] implic[es] that the parties could be bound by the" letter absent the fully executed contract.²¹³

Because the trial court erred in finding the letter unambiguous, the appellate court found that the matter had to be reversed and remanded so the factfinder could consider parol evidence in making its determination of the parties' intent as to contract formation and waiver of a formal writing. Even if no contract was formed, further findings needed to be made on whether the alleged reliance was reasonable.²¹⁴

Justice McNamara's dissent suggests a traditional Willistonian perspective, stating strong policy concerns focused on the need for predictability and the long-established Illinois precedent "that parties may expressly provide that negotiations are not binding until a formal agreement is reduced to writing and executed."²¹⁵ The dissent also suggests acute awareness that the burgeoning city of Chicago provide a welcome legal environment for the business community.

Justice McNamara found the key language of the letter of intent in its second and last sentences:

A contract agreement outlining the detailed terms and conditions is being prepared and will be available for your signature shortly . . . [Defendant] reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement.²¹⁶

Justice McNamara stated that this language "is incapable of being understood in more senses than one. We have repeatedly held such language to be unambiguous" so the court could discern parties' intent as a matter of law and without the need to delve into parol evidence. He referenced a case not cited by either party, stating "[t]he parties are entitled to shape a letter of intent as they wish."²¹⁷ To find this language

212. *Id.* at 867.

213. *Id.*

214. *Id.* at 867-68.

215. *Id.* at 869.

216. *Id.*

217. *Id.* (citing *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1214, 1221 (7th Cir. 1988) (citing *Schek*

ambiguous “would ignore these cases and would deprive negotiating parties of all precedence and guidance in how best to draft a letter of intent so as to avoid a contractually binding effect.”²¹⁸ Justice McNamara would have enforced the requirement of executing a formal contract as a condition precedent to formation and would have upheld the trial court’s dismissal, finding that the letter of intent was unambiguous.²¹⁹

D. APPEAL TO ILLINOIS SUPREME COURT

1. *American Airlines’ Petition for Leave to Appeal*

American sought leave to appeal and asked the Illinois Supreme Court to “reverse the 2 to 1 decision of the Appellate Court and affirm the trial court’s dismissal of the plaintiff’s third amended complaint.” The brief Procedural History and Prayer for Leave to Appeal emphasized the repeated dismissal of each of Quake’s Complaints by two different trial judges who each held that “no enforceable contract came into existence between the parties.” It stressed Justice McNamara’s dissent in which he agreed that the letter of intent did not show an intent to enter into a binding contract.²²⁰

The Statement of Facts was apparently written in haste, misstating the date of the letter of intent and other facts²²¹ and asserting that the reservation of rights clause and language referring to the execution of a written subcontract agreement created conditions to the formation of a contract.²²² It referred to Petitioners’ American Airlines and Jones collectively as “Jones” and dismissed the two parties’ relationship in two sentences before reciting from each of the three Complaints.²²³ The brief echoed the colorful adjectives from its brief to the court below. For example, it characterized as speculative Quake’s insistence that the letter

v. Chicago Transit Auth., 247 N.E.2d 886 (Ill. 1969))).

218. *Quake Constr., Inc.*, 537 N.E.2d at 869. The letter evidenced a lesser undertaking by the parties, a precursor to a valid and enforceable agreement. *Id.* at 869. Further, the words “awards” and “cancels” did not alter the established interpretation of the unambiguous second and last sentences. *Id.* It omitted many essential terms of the contract. *Id.* at 870.

219. *Id.* at 869.

220. Defendant-Petitioner’s Petition for Leave to Appeal, *supra* note 197, at 24. The thirty-seven page Petition contained a four-part brief and short Appendix. The brief contained a Procedural History and Prayer for Leave to Appeal, a Statement of Facts, and a four-part Argument. Four exhibits comprised the appendix: (1) Exhibit A, the Appellate Court Opinion; (2) Exhibit B, Jones’ Affidavit of Intent to File Petition for Leave to Appeal, with a Notice of Filing to the Appellate Court and Proof of Service; (3) Exhibit C, the April 18, 1985 Letter of Intent from Jones to Mr. Quamina; and (4) Exhibit D, the Table of Contents of Record on Appeal to the Appellate Court.

221. *Id.* at 3 (stating the date of the letter of intent as April 25, 1988—three years after the correct date the 1985 letter was written and date filed suite (correctly Jan. 22, 1986), both typographical errors missed in proofreading).

222. *Id.*

223. *Id.* at 3.

of intent sought to induce reliance, deplored Quake's reference to extrinsic documents as an attempt "to piece together" an enforceable contract, and alleged that the lack of a formally executed contract was an "insurmountable" barrier to relief.²²⁴

The Argument restated its main argument from below: "This litigation is about the effect of one sentence[;]"²²⁵ as a matter of law, the reservation of rights/cancellation clause both precluded the existence of a contract and absence of reasonable reliance on a promise. It stressed Justice McNamara's dissent, which discussed the resulting public policy implications if letters of intent became binding;²²⁶ classifying the reservation of rights clause as ambiguous would create uncertainty for other businesses wishing to use letters of intent without risk of contractual liability.²²⁷ Because of the growing use of such letters in business, Defendant-Petitioners "believe that Justice McNamara rightly saw the difficulty which negotiating parties will have in finding limiting words which the majority in this case would not consider ambiguous."²²⁸

Quake stated no breach of contract claim because execution of a formal written agreement was a condition precedent. "Where the parties intend that an agreement be reduced to writing and formally executed as a condition precedent to its completion, no contract exists till then *even if* the actual terms have been agreed upon."²²⁹ It distinguished Quake's cited cases, supplementing the argument with the interpretations of "two judges of the circuit court, and Justice McNamara" who:

[o]n five separate occasions . . . found that the reservation of rights language was a condition precedent . . . limit[ing] the effect of the letter of intent to a nonbinding, cancellable letter of intent which, in the words of Judge Lassers, 'means that Jones is not bound until they sign on the dotted line.'²³⁰

Nor did the complaint state a claim under promissory estoppel because there was no reasonable reliance.²³¹ Reliance is not reasonable

224. *Id.* at 4–5.

225. Brief and Argument for Defendant-Appellee, *supra* note 133, at 5, 14–16; Defendant-Petitioner's Petition for Leave to Appeal, *supra* note 197, at 7.

226. See 110A ILL. COMP. STAT. ¶ 315(a) (West 2017) (stating that appeals are a matter of sound judicial discretion and listing the general importance of the question presented as a factor to be considered by the Court in granting leave to appeal).

227. Defendant-Petitioner's Petition for Leave to Appeal, *supra* note 197, at 7–8 (citing *Quake Constr., Inc. v. Am. Airlines Co., Inc.*, 537 N.E.2d 863, 918 (Ill. App. Ct. 1989) (McNamara, J., dissenting)).

228. Defendant-Petitioner's Petition for Leave to Appeal, *supra* note 197, at 8.

229. *Id.* at 15 (quoting *In re Marriage of Chaltin*, 506 N.E.2d 338, 340 (Ill. App. Ct. 1987) (emphasis added)).

230. Defendant-Petitioner's Petition for Leave to Appeal, *supra* note 197, at 16 (quoting Transcript of Proceedings at 24, *Quake Constr., Inc. v. Am. Airlines, Inc.*, No. 86-L-01502 (Ill. Cir. Ct. June 18, 1987)).

231. Defendant-Petitioner's Petition for Leave to Appeal, *supra* note 197, at 21 (citing S.N. Nielson

“where a condition precedent to the formation of a contract was not fulfilled.”²³² Finally, the complaint stated no waiver claim: “[w]e are frankly at a loss to understand precisely what cause of action was intended to be alleged by Count III.”²³³ Whatever was intended, it should not be a separate count; any question of waiver belongs under a breach of contract claim, and any question of estoppel belongs with the promissory estoppel claim.²³⁴ “This fundamental inadequacy in the waiver/estoppel count can be expressed by recognizing that Quake has simply placed the cart before the horse. Before the issue of waiver can be addressed there must be an existing contract with conditions which are waived or subject to estoppel.”²³⁵

2. *Brief and Argument for Plaintiff-Appellee Quake Construction*

The Illinois Supreme Court granted Petitioners’ leave to appeal on October 5, 1989.²³⁶ Quake filed its Brief and Argument on January 16, 1990.²³⁷ Quake’s new counsel on appeal, Richard Heytow, a 1977 graduate of the Chicago-Kent College of Law, signed the sparse fourteen-page brief.²³⁸

The two paragraph Statement of Facts contested Appellant’s characterization of the letter of intent.²³⁹ Where Appellant’s Statement of Facts tied facts together into self-serving legal conclusions, Appellee recited language pointing to binding intent that Jones “elected to award

Co. v. Nat’l Heat & Power Co., 337 N.E.2d 387, 389 (Ill. App. Ct. 1975)).

232. Defendant-Petitioner’s Petition for Leave to Appeal, *supra* note 197, at 22. The Argument also quotes the trial court’s assertion that “there could be no reliance in the face of the unambiguous language . . . [which] reserved to American Airlines their right to refuse to go ahead with the deal unless and until it committed itself in writing.” *Id.* (citing Transcript of Proceedings at 20, Quake Constr., Inc. v. Am. Airlines, Inc., No. 86-L-01502 (Ill. Cir. Ct. Dec. 1, 1987)).

233. Defendant-Petitioner’s Petition for Leave to Appeal, *supra* note 197, at 22.

234. *Id.* at 22–23.

235. *Id.* at 23.

236. Quake Constr., Inc. v. Am. Airlines, Inc., 545 N.E.2d 130 (Ill. 1989).

237. Brief for Plaintiff-Appellee, Quake Constr., Inc. v. Am. Airlines, Inc., 565 N.E.2d 990 (Ill. 1990) (No. 68585). Jones and American did not need to file a brief; under 110A ILL. COMP. STAT. ¶ 315(h) (West 2017), “[i]f leave to appeal is allowed, the appellant may allow his or her petition for leave to appeal to stand as the brief of appellant” While court rules specify thirty-five days for Appellee to respond after Appellant’s brief is filed, it apparently allowed an extension of time due to Quake’s change of counsel. *Id.*

238. Brief for Plaintiff-Appellee, *supra* note 237, at 14; Richard D. Heytow, then Crystal & Heytow, P.C., was primarily an insurance defense lawyer with a significant appellate practice. It was pure happenstance that he came to represent Quake and Quamina; he does not recall the amount of fee finally paid but was certain it was on a contingent fee basis. He first became involved after the Supreme Court granted discretionary review and continued until the matter was settled. The court held oral arguments, but no suggestion was made that it was a novel case. Heytow Interview, *supra* note 109, at 1, 14.

239. Brief and Argument for Plaintiff-Appellee, *supra* note 237, at 14.

the contract for the subject project,” and the letter referred to “this notice of award.”²⁴⁰

Part I addressed Quake’s breach of contract claim. The letter of intent was not a condition precedent to the formation of a valid contract. Appellant’s focus on “the effect of one sentence”²⁴¹ ignored contrary language evident throughout the remainder of the document.²⁴² Following the majority opinion below, Heytow referenced the letter’s use of terms such as “award,” enumeration of the price and details of performance, and other facts, proving “[i]t is clearly more than a letter of intent . . . intended to inform the Plaintiff that the Defendant has ‘elected to award the contract’ to the Plaintiff.”²⁴³ Taking the document as a whole, the “one sentence” in contention presents not a condition precedent, but rather a statement whose meaning is “nebulous.”²⁴⁴ Even if a fully executed agreement was a condition precedent, that condition had been complied with; the Complaint alleged that “a written contract had . . . been agreed upon” and “all of the material elements had been agreed upon and . . . Plaintiff had done everything requested of it by the Defendant.”²⁴⁵ Heytow disagreed with Justice McNamara’s characterization of “‘requests for bids’ as ‘non-binding’ [*sic*] or preliminary’ [which] fails to understand that “all of the ‘preliminary’ or ‘non-binding’ [*sic*] documents had already been submitted, reviewed, accepted and adopted by reference in the letter.”²⁴⁶ The majority decision below correctly applied Illinois precedent that the language contained in the letter was ambiguous.²⁴⁷

Part II addressed the promissory estoppel claim, contending the underlying facts supported each required element: “[I]n reliance upon the words and deeds of the Defendant, the Plaintiff changed its position and incurred substantial expenses and expended substantial time in complying with Defendant’s demands.”²⁴⁸ Quake’s reliance was not “unreasonable as a matter of law;” legitimate questions of fact remain for the trial court, including “whether the parties intended to be bound by

240. Brief for Plaintiff-Appellee, *supra* note 237, at 2.

241. *Id.* at 3 (citing Petition for Leave to Appeal, *supra* note 197, at 7).

242. Brief for Plaintiff-Appellee, *supra* note 237, at 3.

243. *Id.* at 4; *see* Quake Constr., Inc. v. Am. Airlines, Inc., 537 N.E.2d 863, 866–67 (Ill. App. Ct. 1989).

244. Brief for Plaintiff-Appellee, *supra* note 237, at 3.

245. *Id.* at 6–7.

246. *Id.* at 7 (citing *Quake Constr., Inc.*, 537 N.E.2d at 869 (McNamara, J., dissenting) (stating that terms such as price “would typically be included in any initial request for bids.”)).

247. Brief for Plaintiff-Appellee, *supra* note 237, at 8–10 (reasserting the Appellate Court’s construction of Illinois case law regarding . . . letters of intent as ambiguous); *see* *Quake Constr., Inc.*, 537 N.E.2d at 866–67 (citing *Intini v. Marino*, 445 N.E.2d 460, 463 (Ill. App. Ct. 1983); *Inland Real Estate Corp. v. Christoph*, 437 N.E.2d 658, 660 (Ill. App. Ct. 1981); *Chi. Inv. Corp. v. Dolins*, 418 N.E.2d 59, 62 (Ill. App. Ct. 1981); *Interway, Inc., v. Alagna*, 407 N.E.2d 615, 618 (Ill. App. Ct. 1980)).

248. Brief for Plaintiff-Appellee, *supra* note 237, at 11.

the letter, whether a condition precedent existed, whether the condition was complied with and whether the condition was waived.”²⁴⁹ Whether there was reliance, as alleged, was a disputed question of fact not to be determined on the pleadings.²⁵⁰

3. Reply Brief and Argument of Defendant-Appellant *American Airlines*

Appellant’s eight-page Reply Brief conceded “to the shortness of human life[,]” addressing only a few issues brought up by Appellee’s brief, which was “essentially faithful to the majority opinion of Justices White and Freeman [in the lower appeals court], merely adorning their points” “in the slightly different raiment of adversary armor rather than judicial robes.”²⁵¹

First, Quake’s focus on a wider scope of the letter improperly implied that “a quantitative assessment of which party can make more allegations about words or deeds” settles the issue of intent.²⁵² Rather, the one-sentence condition precedent was established with little elucidation.²⁵³ Quake wrongly implies that “every allegation made in the complaint must somehow be treated as gospel.”²⁵⁴ Because the letter of intent is an exhibit, it controls when “the ‘facts’ alleged are contradicted and controlled by the operative language of the letter of intent which indicates just the opposite.”²⁵⁵ Even the appellate court majority “dealt with the language of the letter of intent and the question of whether it was ambiguous” because it implicitly acknowledged that “the exhibit controlled the allegations of the complaint rather than vice versa . . .”²⁵⁶ Quake’s “geographical argument . . . that the language on which Jones relies comes at the very end of the letter of intent” was unsupported by Illinois authority requiring that language of condition be placed at the beginning—or at any specific location—of a document.²⁵⁷ Quake’s claim

249. *Id.* at 12.

250. *Id.* at 13.

251. Reply Brief for Defendant-Appellant at 1, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E.2d 990 (1990) (No. 68585); see 110A ILL. COMP. STAT. ¶ 315(h) (West 2017) (permitting an appellant to “file a reply brief within 14 days of the due date of appellee’s brief . . . [i]f an appellee files a brief.”).

252. *Id.* at 1–2.

253. Brief for Defendant-Appellant at 1–2, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E.2d 990 (1990) (No. 68585).

254. *Id.* at 2.

255. *Id.* at 2–3 (citing *Peelas v. Caterpillar Tractor Co.*, 30 F. Supp. 173, 177 (S.D. Ill. 1939), *aff’d* 113 F.2d 629 (7th Cir. 1940); *Panorama of Homes, Inc. v. Catholic Foreign Mission Soc’y, Inc.*, 404 N.E.2d 1104, 1107 (Ill. App. Ct. 1980); *Wilbur Waggoner Equip. Rental & Excavating Co. v. Johnson*, 342 N.E.2d 266, 269 (Ill. App. Ct. 1975)).

256. Reply Brief and Argument of Defendant-Appellant, *supra* note 251, at 3.

257. *Id.* at 3. While Quake’s Brief did not base any of its arguments on the physical location of the disputed portion of the letter, it did state that the last substantive page of the letter, the only one considered by the Trial Court and the one focused upon by the Defendant to the exclusion of all others,

that finalities of the construction industry which bear on the interpretation of this letter of intent.”²⁵⁸ Because construction contracts such as this involve a high level of value and complexity, “it is naïve to suggest . . . that this letter of intent amounts to a binding contract and leaves ‘virtually nothing else of substance to be negotiated.’”²⁵⁹

Part II reiterated the inadequacy of Appellee’s promissory estoppel pleadings, which neither alleged reliance nor that any reliance would be reasonable.²⁶⁰ It is inconsistent to assert that Jones made an unambiguous promise while also asserting that the letter of intent was ambiguous.²⁶¹ Quake merely alleged conclusory facts and “gloss[ed] over its pleading defects by falling back on its earlier contention that ‘facts’ relevant to the missing elements ha[d] been admitted.”²⁶² Part III contended that Quake merged Counts II and III, but did not outline each cause of action “with even the most liberal pleading standard.”²⁶³ Quake’s limp attempt to “bootstrap Count II into Count III (or vice versa)” left contrary arguments “unchallenged.”²⁶⁴

III. DECISION OF THE ILLINOIS SUPREME COURT

The Illinois Supreme Court unanimously affirmed, agreeing with the court below that, because the letter of intent was ambiguous, dismissal was improper because intent had to be determined by the trier of fact.²⁶⁵ As noted in the Introduction of this Article, *Quake* is excerpted in two contracts textbooks in sections on contract formation and precontractual liability.²⁶⁶ Both omit the four most significant paragraphs of the court’s opinion finding that Count II on promissory estoppel also states an actionable claim.²⁶⁷ A third textbook cites *Quake* in a footnote in its section on precontractual reliance.²⁶⁸

is . . . ambiguous It is noteworthy that although the letter awards the contract to the Plaintiff, provides notice of the award and authorizes the work, the first and only time the Defendant refers to the letter as a letter of intent is at the end. Brief for Plaintiff-Appellee, *supra* note 237, at 5–6.

258. Reply Brief for Defendant-Appellant, *supra* note 251, at 3.

259. *Id.* at 4. This misquotes Quake’s Brief, which states that “virtually all of the material elements have been agreed upon and accepted in the letter.” Brief for Plaintiff-Appellee, *supra* note 237, at 6.

260. *Id.*

261. Reply Brief for Defendant-Appellant, *supra* note 251, at 5–6.

262. *Id.* at 5.

263. *Id.* at 7.

264. *Id.* (citing Brief for Defendant-Appellee, *supra* note 133, at 20–24; referring to Petition for Leave to Appeal, *supra* note 197, at 22–23).

265. *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E.2d 990, 1005 (Ill. 1990).

266. *See supra* notes 10, 11.

267. *Quake Constr., Inc.*, 565 N.E.2d at 1004–05.

268. MURRAY ON CONTRACTS, *supra* note 29, at 317 (note 564 cites *Rosnick v. Dinsmore*, 457 N.W.2d 793, 800 (Neb. 1990)); *Quake* for the proposition that “[s]everal courts hold that the promise necessary to activate promissory estoppel need not amount to an offer or otherwise include all of the elements of a contract[.]” *that is, Quake* as authority for estoppel as a standalone basis for

If *Quake's* precedential value were limited to that of contract formation and the need for parol evidence on what the parties intended the letter of intent to accomplish, this would be unremarkable *except* for the fact that doctrinal analysis ignored the sensitive racial backstory that appeared nowhere in the record until the very end. Of greater import, however, is that the court upheld the promissory estoppel complaint and remanded for further proceedings with scant allegations to support the required elements. As discussed earlier, this expanded use of promissory estoppel in a large variety of instances may incentivize foolish reliance and punish bargaining sloppiness.²⁶⁹

Illinois continues to elect all judges.²⁷⁰ The biographies of Justice Horace L. Calvo, whose name appears on the majority opinion, and Justice John J. Stamos, author of the special concurring opinion, are as sharp a contrast as the opinions themselves. In studying the opinions, I was struck by the vast difference in writing, legal analysis, and mastery over the delicate policy issues in the case. The sharp contrast warrants consideration of the significant differences in their educational, professional backgrounds and legal perspectives at the time the case was decided.

Justice Calvo was a Democrat from downstate Illinois, Fifth District, elected to a ten-year term in November 1988, and served from December 1988 until his death on June 3, 1991, after a long battle with cancer.²⁷¹ He was likely ill during the months preceding the issuance of the December 3, 1990, opinion. Born in Chicago in 1927, his parents soon moved downstate.²⁷² Calvo's weak educational background²⁷³ did not

recovery.

269. See *supra* notes 21–25 and accompanying text; see also *supra* note 26 (regarding “cheap talk”).

270. See Peter C. Alexander & George M. Vineyard, *A Proposal to Select Illinois Appellate and Supreme Court Justices*, 2017 U. ILL. L. REV. 22 (Oct. 13, 2017) (discussing intermittent proposals to abandon judicial election in favor of what is known as merit selection; such efforts are thwarted by suspicion that it would move discussion to political backrooms).

271. See Michael Gillis, *State High Court Justice Horace L. Calvo*, 64 CHI. SUN-TIMES, June 4, 1991, at 63; Beverley Scobell, *Electing Justices to Illinois Supreme Court*, ILL. PERIODICALS ONLINE (1992).

272. See Gillis, *supra* note 271 at 63.

273. He took two years of night courses at the now-defunct Lincoln College of Law in Springfield and transferred to St. Louis University where he was enrolled for two years, but did not graduate. He passed the bar on the third try and received an Illinois license in 1956. These facts became public during his campaign for the Supreme Court. After World War II, Illinois and other states offered returning veterans an expedited means of licensure. Grogan June 26, 2012 Interview, *supra* note 205. Calvo served in the Air Force from 1944–47. There is no clear record of his activities from 1947 until 1953. He attended St. Louis University School of Law (“SLU”) from 1953–54. E-mail from Elizabeth Stookey, Assistant Dir., Development and Alumni Relations at SLU (June 28, 2012, 13:54 CST) (on file with Author). Illinois did not require law degree for admission until 1967. The only eligibility requirement for judicial office is a law license. Joseph R. Tybor & Maurice Possley, *No Degree No Bar to Judgeship*, CHI. TRIB., Mar. 17, 1988. Between 1956 and 1975 he worked variously as a private practitioner, assistant Illinois attorney general and representative in the Illinois House of Legislature. He was then appointed to fulfill an unexpired term in the Circuit Court (trial level) where he served

impede his political success, having served in all three branches of government representing a judicial district known in legal circles for being pro-plaintiff. That should not surprise anyone familiar with Illinois political history, or with similar judicial districts around the country.

By contrast, Justice Stamos' special concurrence reflected deep mastery of contract doctrine, policy, scholarship, and interpretation of letters of intent as they might arise in different factual contexts. I liken it to the kind of nuanced, deep intellectual reasoning of University of Chicago Professor Douglas Baird or Karl Llewellyn.

On April 20, 1988, the Illinois Supreme Court appointed Justice John Stamos to finish the unexpired term of a justice who resigned.²⁷⁴ Of the twenty-five applicants, he was one of four rated the highest by three bar groups who evaluated the candidates.²⁷⁵ He "had close ties with the regular Democratic Party in the past but also . . . a reputation for independence."²⁷⁶ Born in 1924 and raised on the Southside of Chicago where the stench of steel mills permeated the air, Stamos studied pre-law at DePaul University until drafted to serve in World War II.²⁷⁷ Because an undergraduate degree was not then required for bar admission, Stamos returned to enter DePaul College of Law where he received the LL.B. and was admitted to practice in 1949.²⁷⁸

Despite his affiliation with the Cook County Democratic Party during the Daley administration, his long professional record remained unblemished.²⁷⁹ He served over twenty years on the Illinois Appellate

until 1987 when he was assigned to the Appellate Court (5th District). The next year he beat three candidates from his district for election to the Supreme Court. Gillis, *supra* note 271, at 63. Some, but not all this information is contained in his official Supreme Court biography. *Horace L. Calvo: Previous Illinois Supreme Court Justice*, ILL. COURTS, http://www.state.il.us/COURT/SupremeCourt/JusticeArchive/Bio_Calvo.asp (last visited Nov. 21, 2017).

274. Joseph R. Tybor, *State High Court Picks Stamos Appellate Judge to Take Simon's Spot*, CHI. TRIB., Apr. 21, 1988. Justice Seymour Simon stepped down for personal reasons unrelated to any cloud of suspicion. Grogan June 26, 2012 Interview, *supra* note 205.

275. Tybor, *supra* note 274. Illinois judges are still selected through partisan elections. This selection, on the heels of Operation Greylord, increased pressure for merit-based appointments. The Chicago Council of Lawyers said he had "an excellent reputation for integrity' whose opinions are 'well researched, clear and cogent.'" *Id.* The Illinois State Bar Association and Chicago Bar Association also gave strong endorsements, with the latter stating he was "a scholarly, thoughtful, hardworking justice [who] demands excellence from both himself and those who practice before him." *Id.*

276. *Id.*

277. Stamos Interview, *supra* note 121.

278. Stamos Interview, *supra* note 121.

279. Author's personal examination of Westlaw database in which he was listed as counsel for the Cook County State's Attorney (county-based criminal and civil division), including his time as chief of the criminal division (1961–65), when he was first deputy (1965) and then appointed the Cook County State's Attorney (1966–68). (June 30, 2012, Westlaw search). During his time as Cook County State's Attorney, Richard Speck murdered eight nursing students in a Chicago boarding house. Although his political career could have rocketed to the top by prosecuting that case, he gave it to one of his staff. See William J. Martin, *Attorney Recalls Speck Murders 45 Years Later*, CHI. DAILY L. BULLETIN, July 14, 2011. When Mayor Richard J. Daley picked someone else to slate for election to statewide

Court, First District, Third Division—the same appellate court that decided *Quake*. During that tenure, Stamos' name is referenced in over eight hundred opinions, and he delivered the court's opinion in over sixty cases.²⁸⁰ Justice Stamos served only nineteen months on the Illinois Supreme Court bench. Even in that short time, he left a lasting legacy, delivering the court's opinion in sixty-three cases, most of which remain good law.²⁸¹ Five opinions involved lawyer discipline and also reflect a crisp mastery of the law as well as a willingness to extend the law—most notable was the lawyer discipline case, *In Re Himmel*.²⁸²

September 20, 1989, Stamos announced he would not run for reelection and upon his December retirement would associate with his son's law firm.²⁸³ The announcement avoided a political dilemma for Democratic leaders who had pledged to slate a black candidate for that position.²⁸⁴ He retired December 3, 1990, and was replaced that day by Intermediate Appellate Court Justice Charles Freeman, who previously voted with Justice White to reverse the trial court's dismissal of *Quake*'s complaint.²⁸⁵ Justice Stamos' special concurrence in *Quake* was his last opinion, issued the same day.²⁸⁶

Separate consideration of Justice Calvo's majority opinion for the court and Justice Stamos' special concurrence is necessary to highlight the doctrinal impact of the case, both on letters of intent and promissory estoppel. The Calvo opinion leaves room for far-reaching interpretation, whereas Stamos' concurrence narrowly limits precontractual liability for promissory estoppel.

office of State's Attorney, Stamos then ran for and was elected in 1968 to the Illinois Appellate Court, First District based in Chicago. Tybor, *supra* note 274; *John J. Stamos: Previous Illinois Supreme Court Justice*, ILL. COURTS, http://www.state.il.us/court/SupremeCourt/JusticeArchive/Bio_Stamos.asp (last visited Nov. 21, 2017).

280. Author's Westlaw search dated June 30, 2012.

281. *Id.*

282. *In re Himmel*, 533 N.E.2d 790, 796 (Ill. 1988) (one year suspension); *In re Lunardi*, 537 N.E.2d 767, 775 (Ill. 1989) (eighteen month suspension for conviction of cocaine suspension and improper loans to judge; mitigating circumstances lessened discipline imposed); *In re Alexander*, 539 N.E.2d 1260, 1266–67 (Ill. 1989) (denying reinstatement for lawyer disbarred for bribing public officials and failing to make restitution; factually involve one of early Greylord defendants); *In re Imming*, 545 N.E.2d 715, 725 (Ill. 1989) (rejecting disbarment recommendation; two year suspension for client-lawyer conflict in business transaction and undue influence over client).

283. Charles N. Wheeler III, *Stamos Won't Seek New Term on High Court*, CHI. SUN-TIMES, Sept. 21, 1989, at 14.

284. *Id.*

285. Stamos Interview, *supra* note 121.

286. Stamos was formerly associated with his son's firm, Stamos & Trucco LLP. STAMOS & TRUCCO LLP, <http://www.stamostrucco.com/bio.php> (last visited Nov. 21, 2017). At times he was retained as a Special Consultant to the IARDC Administrator. E-mail from Jim Grogan, Deputy Administrator and Chief Counsel of the IARDC (July 19, 2012 12:41 CST) (on file with Author). He recently died at age 92. See Mark Mathewson, *Former Illinois Supreme Court Justice John Stamos Dies at 92*, ILL. STATE BAR ASS'N (Jan. 30, 2017).

A. MAJORITY OPINION UNDER THE NAME OF JUSTICE CALVO

Justice Calvo's opinion was painful to read. It was like that of a struggling first year or second year law student: badly overwritten, redundant, and sophomoric. It rehashes, *ad nauseum*, the arguments made by each side on appeal and repeatedly states its agreement with the decision below.

The textbook authors who edited this opinion must have strained to pick what selections to include. It is unfortunate, but understandable, that they could not instead excerpt Justice White's lower court opinion, the few of Calvo's paragraphs on promissory estoppel, and Justice Stamos' superb special concurrence. Those texts include extended passages that demonstrate ambiguity both from Plaintiff's and Defendant's perspectives. For example, the fact that "notice of award authorizes the work" and that work was to commence "4 to 11 days [later] . . . reveal[ed] the parties' [binding] intent . . . so the work could begin on schedule. . . . The cancellation clause also implied . . . [intent] . . . at least until they entered into the formal contract."²⁸⁷ Lengthy recital of Defendants' argument on incompleteness related to the kind of terms such as those pertaining to MBE and other open terms left to be negotiated.²⁸⁸

The defense arguments bear great force under traditional contract doctrine.²⁸⁹ Common law courts are hesitant to plug holes in agreements that parties carelessly left open, whether in an action for damages, as here, or for specific performance.²⁹⁰ Calvo's opinion ignored such policy concerns, stating "[t]he letter merely indicated that those goals would be reiterated in the contract. We acknowledge that the absence of certain terms . . . indicates the parties' [lack of] intent . . . [which] only confirms our holding that the letter is ambiguous" on the issue, dismissing the policy concerns.²⁹¹ "The particular facts in each case are significant. The only way to allay Defendants' fears is to change the law; we are unwilling

287. *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E.2d 990, 996–97 (Ill. 1990).

288. *Id.* at 997.

289. FARNSWORTH, *supra* note 9, at § 3.8 (future writing contemplated); *Id.* §§ 3.27–3.30 (definiteness requirement and mitigating doctrines); *Id.* § 12.7 (limitations on specific relief); *Id.* § 12.15 (uncertainty limitation). In first discussing the case with Peter Petrakis, lead defense counsel, he said the case turned traditional law on letters of intent "on their head." Petrakis Interview, *supra* note 198.

290. *See, e.g.*, *Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1965) (incomplete loan agreement fatally defective in damages action, but allowed defensive use of promissory estoppel for reliance damages; reversing dismissal on pleadings). If the case arose instead under Article 2 of the Uniform Commercial Code, the many "gap-fillers" authorize courts to fill in the blanks if there is sufficient evidence of binding intent (easily shown) and a basis for fashioning a remedy. *See generally* U.C.C. 2 §§ 2-204(3), 1-203–2-205, 2-301, 2-305–2-309, 2-313–2-316 (AM. LAW INST. & UNIF. LAW COMM'N 2014).

291. *Quake Constr., Inc.*, 565 N.E.2d at 997.

to do this.”²⁹² By contrast, the opinion below by Justice White and Justice Stamos’ special concurrence considered the need for closer examination of context.

The fact that prompt beginning was mutually understood further supported finding that the parties had moved beyond preliminary negotiations, muddling analysis of the customary factors courts weighed in deciding intent when a contemplated writing does not come into existence.²⁹³ The majority opinion conceded the plausibility of getting a contract finalized and signed quickly, finding that lent “credence to [the court’s] conclusion the letter is ambiguous concerning the parties’ intent [requiring] . . . the trier of fact [to] . . . decide which interpretation is valid.”²⁹⁴

While the cancellation clause could possibly be construed to make a formal, executed contract a true condition precedent to formation of a contract, the statement that Jones could “cancel” the letter created an internal ambiguity. If the letter of intent created no binding obligation, then there would be no need for the clause.²⁹⁵ This analysis paralleled Justice White’s opinion below. After more unnecessary verbiage, Justice Calvo’s majority opinion stated the holding on the main contract issue:

Thus, we hold that the letter of intent in the case at bar is ambiguous regarding the parties’ intent to be bound by it. Therefore, on remand, the circuit court should allow the parties to present parol evidence regarding their intent. The trier of fact must then determine, based on the parties’ intent, whether the letter of intent is a binding contract.²⁹⁶

Because the court below did not address the condition precedent issue, that too would be remanded to the circuit court.²⁹⁷ While the majority opinion purportedly limited its holding to the facts of the case, the extensive dicta could be viewed as a judicial treatise on the state of Illinois law on precontractual liability, albeit one that caused unnecessary confusion.²⁹⁸

Nineteen pages into the opinion appeared four paragraphs addressing promissory estoppel. With scant independent analysis, the court affirmed the lower court finding that “determination of the parties’

292. *Id.* at 998. Policy concern addressed again later. “Defendants [contend that affirmation would] . . . put[] the continued viability of letters of intent at risk [I]f we uphold . . . finding the cancellation clause ambiguous, negotiating parties will have difficulty finding limiting language which a court would unquestionably consider unambiguous. We disagree. Courts have found letters of intent unambiguous in several cases referred to in this opinion.” *Id.* at 1001.

293. *Id.* at 998.

294. *Id.*

295. *Id.* at 1000.

296. *Id.* at 1004.

297. *Id.*

298. See Mark K. Johnson, Note, *Enforceability of Precontractual Agreements in Illinois: The Need For a Middle Ground*, 68 CHI.-KENT L. REV. 939, 958–59 (1993).

intent will affect the question of whether plaintiff met the elements of promissory estoppel, namely, whether plaintiff could have reasonably relied on the promise and whether Defendants could have foreseen that plaintiff would so rely.”²⁹⁹ Plaintiff’s allegations “sufficiently alleged [a cause of action meeting] the elements of promissory estoppel.”³⁰⁰

B. SPECIAL CONCURRENCE BY JUSTICE STAMOS

Justice Stamos was a highly respected member of the court known for prior selfless acts.³⁰¹ His special concurrence agreed with the majority’s disposition but would limit recovery to the specific facts of the case. The letter was just ambiguous enough to withstand dismissal; the majority opinion would support dangerous expansion of recovery on letters of intent. “[T]he misuse of letters of intent by parties seemingly wishing to have their contractual cake and eat it too, or wishing merely to fudge the contract issue, ought to evoke judicial disapproval.”³⁰² The majority’s apparent view seems “to turn it on its head and to pervert any legitimate office of letters of intent.”³⁰³ Its effect thus “transmut[ed] this prospective bargain into current obligation, by confusing a hoped-for construction contract with a cancellable preliminary expression of intent.”³⁰⁴

The concurrence has a literary quality in its well-crafted legal analysis, quoting Shakespeare, Williston, Corbin, Knapp, and Farnsworth. It carefully parsed the letter’s words to conclude that Quake *might* have a right to recover. More important, Stamos admonished practicing lawyers to take greater care while drafting such letters.³⁰⁵

At issue was whether the letter’s term “elected” was ambiguous, leaving room for extrinsic evidence and presenting a fact question to be determined by the trier of fact. Here, “the written recital that Jones had ‘elected’ to award” the contract is so ambiguous that it only “hint[ed]” at whether or not the parties intended to be bound.³⁰⁶ Neither did the fact that the writing contemplated work to begin immediately support a finding of contract intent; a completed contract could be accomplished quickly.³⁰⁷ Stamos was especially troubled by the majority’s

299. *Quake Constr., Inc.*, 565 N.E.2d at 1005.

300. *Id.*

301. See Martin, *supra* note 279. One example was Stamos’ refusal to prosecute a high profile murder case against Richard Speck. *Id.*

302. *Quake Constr., Inc.*, 565 N.E.2d at 1006 (Stamos, J., concurring).

303. *Id.* at 1007.

304. *Id.* (“Much as word is a shadow of deed or which may be father to thought’ . . . a letter of intent may lead to a contract, but it is not necessarily the contract itself.” (quoting WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 5)).

305. *Quake Constr., Inc.*, 565 N.E.2d at 1010.

306. *Id.* at 1006.

307. *Id.*

interpretation of the cancellation clause, which referred to cancelling *the letter* and not the anticipated contract.³⁰⁸ Such language “powerfully militates” against finding a contract, which treats a future executed subcontract as a “future possibility rather than present reality.”³⁰⁹

Stamos considered a tenuous alternative theory that a contract existed based on Quake’s promise to perform in return for Jones’ conditional promise to pay if the parties reached agreement on a “fully executed” document and on other open terms.³¹⁰ The parties’ post-letter conduct would be relevant to whether they had reached a conditional construction contract, allowing Quake possible relief under either restitution or *quantum meruit*, but not expectation or reliance damages.³¹¹

Stamos preferred to treat the letter as an agreement to negotiate, with mutual consideration given to Quake by Jones’ implied promise of efforts to negotiate; by authorizing Quake to use the letter to obtain subcontractors’ license numbers; and Quake’s own promise to negotiate and promised efforts to contract with subcontractors.³¹² Stamos rejected a possible attack on lack of mutuality of obligation because only Jones had the right to cancel.³¹³ Citing comment e to section 26 of the Restatement (Second) of Contracts, the letter arguably gave Quake reason to know that Jones intended no contract until other terms were assented to.³¹⁴ Jones was merely American’s agent to review and award contracts, with Quake engaging in preparations to perform but never proceeding with actual work under the contemplated contract.³¹⁵

In customary business matters, “letters of intent are usually understood to be non-committal statements preliminary to a contract” warranting fact-intensive inquiries to find otherwise.³¹⁶ Because letters of intent present risks of unintended consequences they can be seen as “an invention of the devil.”³¹⁷ Stamos cautioned the need for drafters to avoid any ambiguity with respect to intent to be bound. Bargaining expediency may create ambiguities with short term benefits, but such

308. *Id.* at 1007.

309. *Id.*

310. *Id.* at 1008.

311. *Id.*

312. *Id.* at 1006–07 (citing FARNSWORTH, *supra* note 21, at 250–69 (addressing letters of intent as “agreements with open terms” and “agreements to negotiate”)); Knapp, *Enforcing the Contract to Bargain*, *supra* note 6, at 711 (regarding need to recognize “good-faith bargaining duty as intermediate stage between ultimate contract and none.”).

313. *Quake Constr., Inc.*, 565 N.E.2d at 1007 (Stamos, J., concurring).

314. *Id.* at 1009.

315. *Id.*

316. *Id.* (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2-6(c) (3d ed. 1987); FARNSWORTH, *supra* note 21).

317. *Quake Constr., Inc.*, 565 N.E.2d at 1009–10 (citing Andrew R. Klein, Comment, *Devil’s Advocate: Salvaging the Letter of Intent*, 37 EMORY L.J. 139, 139 n.1 (1988)).

“obscurantist language . . . can well lead eventually to litigation and undesired contractual obligations.”³¹⁸ Litigation risks exist despite the utmost care in drafting, yet greater clarity than that displayed here should reduce that risk.³¹⁹

C. EPILOGUE

After the court’s December 3, 1990, decision, the case limped along until the parties stipulated to dismissal on August 19, 1994. Heytow refiled the Third Amended Complaint a year after the decision. It appears Petrakis and Stuetzer grew weary or that American balked at the litigation costs because thereafter, all work was done by Cynthia Photos-Abbott, who was junior to them at the firm.³²⁰ Abbott demonstrated litigation smartness, with the best defense being a good offense. She tackled Quake head-on with a bare-boned answer filed in February 1992, admitting only that American made an oral award expressly conditioned on Quake obtaining MBE subcontractor participation consistent with specified goals, which it failed to do.³²¹

American still insisted there was no binding agreement absent a formalized writing and that the letter of intent was subject to cancellation if Quake did not meet the required MBE participation. Further, it maintained that Quake’s involvement in the project was properly terminated because of such failure.³²² American raised two affirmative defenses. First, American never intended the letter of intent to be a binding contract—having specifically reserved the right to cancel if the parties could not agree on a fully executed subcontract and other requirements, including MBE participation, were not met.³²³ Second, Quake’s involvement was properly terminated because it failed to obtain MBE participation consistent with the stated goals.³²⁴ This is the first time in seven years of litigation that Quake’s failure to meet the MBE goals was expressly made part of the litigation record.

On April 1, 1992, Heytow filed a general denial to the Affirmative Defenses. For the next year, the parties skirmished in discovery, with

318. *Quake Constr., Inc.*, 565 N.E.2d at 1010 (citing to *Pennzoil* liability as an extreme example of undesired contractual obligation).

319. *Id.*

320. Abbott received her J.D. from Northwestern in 1986 and worked at the Katten Muchin Rosenman firm after graduation until 1997, when she moved to Motorola, Inc. as Senior Litigation Counsel. *Cynthia (Cindy) Abbott*, LINKEDIN, <https://www.linkedin.com/in/cindyabbott> (last visited Nov. 21, 2017).

321. Answer and Affirmative Defenses to Third Amended Complaint, *supra* note 33, at Count 1, ¶¶ 6, 18, Count II, ¶¶ 10, 11.

322. *Id.* Count III, ¶ 12.

323. American Airlines, Inc.’s Answer and Affirmative Defenses to Third Amended Complaint, *Quak Constr., Inc. v. Am. Airlines, Inc.* 565 N.E. 2d 990 (Ill. 1990) (Feb. 19, 1992) (on file with Author).

324. *Id.* Affirmative Defenses.

limited information provided by either side. American identified Charles Dierker in Illinois and Ken Bower in Dallas-Fort Worth as having participated in the decisions both to award, and to terminate, Quake's involvement.³²⁵ Although individuals on both sides were served deposition notices, it appears none took place, as the lawyers pursued settlement discussions.³²⁶

The defense took a sharp offensive turn, with hand-delivered service of a Motion for Leave to File Counterclaim on April 12, 1994, and hearing scheduled at 11:15 that morning.³²⁷ Where American's Answer raised the affirmative defense that Quake was not a bona fide MBE, the Counterclaim added to the facts and suggest a nuanced rest of the story. The subcontractors who attended the preconstruction meeting "were completely different" from those Quake listed on its bid proposal and Quake failed to provide affirmative action certificates from the MBE firms it listed. After terminating Quake's involvement, American awarded the project to Powers & Sons—the next lowest responsive bidder—for \$90,000 more than Quake's price.³²⁸ My research indicated Powers & Sons had rich construction experience as an established minority-owned business and thus presented none of the risk of an entity like Quake—a new entrant with no established track record. Given American's original Answer—that it had no other bid documents—and that Powers & Sons had been considered for the \$2.5 million role of Minority Consultant, I speculate that the void left by Quake caused American to later recruit Powers' involvement in the smaller project.³²⁹

American's Counterclaim puts the case in an entirely new perspective. Assuming that American could have supported its Counterclaim with facts at trial, why did it wait so long to articulate its suspicions, until after losing before the Illinois Supreme Court? The

325. American Airlines, Inc.'s Response to Plaintiff's Interrogatories, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E. 2d 990 (Ill. 1990) (May 12, 1993). Neither Dierker nor Lustig were then employed by American. The Author made repeated efforts to interview Bowers, all to no avail. The case was transferred to a new judge who set it for a "progress call"; although the docket reflects notice was mailed, Heytow denies having received it; Judge Hogan dismissed the case June 5, 1992. He filed a Motion to Vacate and Affidavit claiming he first learned of the dismissal December 27, 1993, upon receipt of a letter refusing to produce Bowers, Dierker and Lustig. (Jan. 5, 1994), Plaintiff's Notice of Deposition (Dec. 14, 1993) (on file with Author). Judge Hogan granted plaintiff's motion to vacate (Feb. 7, 1994).

326. Heytow Interview, *supra* note 109, at 2.

327. Motion for Leave to File Counterclaim, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E. 2d 990 (Ill. 1990) (Apr. 12, 1994) (on file with Author).

328. Powers & Sons Construction Company website is a well-established MBE "committed to excellence since 1967." POWERS & SONS CONSTR. CO., <http://powersandsons.com/> (last visited Nov. 21, 2017) (listing its advantages of their "commitment to the MBE/WBE community" on homepage). Repeated efforts to communicate with responsible officials at Powers & Sons familiar with these matters were to no avail.

329. See Motion for Leave to File Counterclaim, *supra* note 327.

answer is probably a combination of politics, and when litigation arose, standard litigation defense strategy seeking dismissal to *avoid* the merits.³³⁰ Given the extreme pressure to hire more MBEs for the construction project, it would have looked foolish to award Quake the contract and then promptly discharge, stating its suspicion that Quake was a front. Indeed, proper focus would be on American's behavior *before* awarding the project to anyone. Had American followed its stated protocol, any bidder must first have incorporated and prequalified with the Small Business Administration. Had Powers & Sons actually submitted a bid for the project, they *should* have been given the job.³³¹ Had American done its homework and not rushed to award the contract and start the job it could have avoided this costly mess.

In support of the Illinois Supreme Court's decision remanding the case for fact finding on the parties' intent, *Quake* imposes potential liability on American for its sloppiness in the bargaining process and perhaps deliberate ambiguity in the letter of intent. Because the case settled, Quake was never put to the test to prove its legitimacy as an MBE. Multiple interviews indicate that the stated protocols were often circumvented, especially in public construction projects.³³² When Quamina appeared as the only person of color at the preconstruction meeting, why did American fail to first raise its suspicions and give Quake an opportunity to establish its bona fides? As a new entrant to the construction field, he may have embarked on the venture with the best intentions; if given an opportunity to explain or find other MBE subcontractors, he might have been able to make things right. Without imputing any bad faith to American's actors, they were sloppy and engaged in cheap talk.

The Illinois Supreme Court's decision is supportable by all scholars who subscribe to some type of limited role for precontractual liability. As

330. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (discussing restrictive procedural stop signs that are expensive, time consuming and prevent plaintiffs' claims from reaching trial); Baird E-mail June 29, 2016, *supra* note 65.

331. A curious possibility presents itself in American's Response to Plaintiff's Request to Produce, *Quake Constr., Inc. v. Am. Airlines, Inc.*, 565 N.E. 2d 990 (Ill. 1990) (June 21, 1993) (on file with Author). Request No. 1 seeks "All bids with all attached or supporting documents received by you concerning the project referred to in Plaintiff's Complaint." Response, following irrelevancy objection: "American states that it has no bids other than the bid attached as Exhibit 2 to plaintiff's complaint." *Id.* Could it be that Quake was the sole bidder on this project? But see *supra* notes 88-94 and accompanying text (discussing Powers' potential involvement as \$2.5 million MBE Consultant on the project). It is doubtful they would have also bid on the smaller project, but worth noting here; perhaps American had to bring in Powers when Quake proved unsuitable. If this imagined scenario were accurate, it would further prove the sloppiness caused by American rushing to quell the political pressures.

332. See Coleman Interview, *supra* note 102 (Jones waived its stated deadline by awarding project to Quake whose bid was date-stamped three days later.).

in *Hoffman*, when a planned deal goes south and the less sophisticated actor incurs costs in genuine reliance on what were thought to be unambiguous promises, liability properly attaches. Under Professor Knapp's "contract to bargain" approach, once the parties' negotiations culminated in the letter of intent and American induced Quake to incur costs preparing to perform, good business ethics support potential liability for failure to negotiate in good faith to complete the agreement.³³³ If, indeed, American began to doubt Quake's bona fides as an MBE, it had a good faith duty to raise the issue, giving Quake an opportunity to explain or address the concerns, and not unilaterally cancel on the pretext that the common law conferred the absolute right to walk away.

Professor Robert Scott takes a law and economics approach to analyze a case from the top down, seeking a rule that's supported by rational incentives.³³⁴ Large transactional and corporate actors who regularly engage in high dollar negotiations should be incentivized to act with care, avoiding sloppy language in their letters of intent. If they really want the right to cancel without liability, they need to take the time to make sure this is the correct bidder to get the contract. If one takes the contextual approach of relational contracts, epitomized by Professor Stewart Macaulay and Professor William Whitford, one should protect the naïve new entrant who may not be attuned to the wiles of high dollar negotiation and the customary view of precontractual costs as investments in getting the deal done.³³⁵ Particularly here, where the whole setting was infused with racial politics and Operation PUSH's pressure on American and unexplained decision to fast-track the project, Quake's alleged costs in preparing to perform should be reimbursed even though American arguably never made a true offer that Quake could accept.

CONCLUSION

Although the *Quake* case was rightly decided on the main contract issue regarding the letter of intent, the majority opinion allowing remand on promissory estoppel is troubling, both on the barren factual record and on broader policy grounds. Several Illinois cases after *Quake* have held that, despite the permissibility of alternative pleading, the contract and estoppel claims were mutually exclusive, at least when the matter

333. Knapp, *Enforcing the Contract to Bargain*, *supra* note 5.

334. Scott, *Hoffman v. Red Owl Stores and the Limits of the Legal Method*, *supra* note 30.

335. Whitford & Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, *supra* note 14, at 801, 836, 846 (justifying Wisconsin Supreme Court's decision in finding franchisor's authorized agent told prospective franchisee that he would get a store by investing \$18,000 and suggesting that deal ultimately failed was because of policy change in the corporate franchise department).

was presented for summary judgment.³³⁶ Allowance of the narrower contract claim made unnecessary the murkier promissory estoppel claim.³³⁷ Maybe those four paragraphs in Justice Calvo's opinion can be dismissed as overbroad *dicta* because justice could be reached under the contract to bargain. Lacking information on the *Quake* court's inner workings, we can only wish that the deliberative appellate process produced a narrower majority opinion that did not open the floodgates to unwieldy claims and ongoing confusion about Illinois law on promissory estoppel.

Justice Stamos was right—precautionary lawyer involvement would lower the risk of a successful challenge to prospective bargains. In *Quake*, it appears that Jones, acting for American, used standard form agreements without individualized input from legal counsel, both before awarding the contract to Quake and before terminating it. This raises a crucial professional responsibility point: Lawyers must train their clients on important times for communication, exercising due care before entering relationships that may have binding consequences, and before taking peremptory actions that could cause protracted litigation.³³⁸ A key takeaway of Stamos' opinion is that this long, expensive litigation could have been avoided if only there was effective communication between Jones or American and their respective legal counsel. Under the political circumstances at the time, it appears American hurriedly jumped into the deal without due regard for the potential legal consequences. Who knows what would have happened had Jones and the American representatives consulted with corporate counsel before awarding the contract. It is likely that American's corporate public relations staff were more concerned about immediate political controversies and did not anticipate the legal risks if the MBE award to Quake proved unwise. Client representatives may avoid consulting with counsel before entering a deal because they consider it unnecessary or because they view lawyers as over-cautious deal-breakers. Such hasty precontractual "cheap talk" risks that "disappointed potential traders" such as Quake can recover under promissory estoppel, despite the lack of clear contractual intent.³³⁹ Having embarked on an unduly casual contractual relationship, its hasty break-up was legally messy and expensive.

336. See generally notes 23–25.

337. See generally cases cited *supra* note 24.

338. See generally Barbara Wagner, *Defining Key Competencies for Business Lawyers*, 72 BUS. L. 101 (2017) (discussing findings from a report prepared in response to concerns from the American Bar Association).

339. Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 484 n.183, 496–97 n.209 (1999); see also Knapp, *Enforcing the Contract to Bargain*, *supra* note 5.

Once litigation began, lawyers had to enter the picture. Jones retained outside counsel for the defense, although presumably American's in-house counsel monitored the case. Initially I was bewildered at the defense strategy to seek dismissal on the pleadings, thus avoiding an answer on the merits, revealing their perception that Quake, which claimed MBE status, was a front for a non-minority company. In context, however, this strategy was sensible, reflecting routine defense strategies to avoid the merits by challenging sufficiency of the pleadings, and to avoid inflaming Chicago's volatile politics on its public construction works.

For future private and public actors seeking to use voluntary racial preferences, the ongoing Supreme Court litigation about reverse discrimination will further silence frank disclosure in acknowledging diversity-based motives for business decisions and will heighten the risk of precontractual liability for alleged reliance. What does this mean for contracting entities seeking to share resources fairly within the taxpayer base without risking unwanted juridical liability for promissory estoppel? The answer lies in good lawyering and well-trained clients: enter these deals with care and avoid bargaining sloppiness with clear drafting. If a relationship sours, proceed to terminate it with the wise guidance of counsel, documenting the underlying reasons, and ensuring that the termination communications pass legal muster.

What is *Quake's* significance for contract doctrine under promissory estoppel for precontractual liability? After unsuccessfully challenging the sufficiency of the pleadings, American settled the case for an undisclosed amount, the likely outcome for similar pleading challenges. In *Hoffman* and other promissory estoppel cases allowing recovery reliance, plaintiffs either proved or alleged genuine damages suffered in reasonable, substantial reliance on the faulty promises. At best, Quake's pleadings alleged the thinnest of reliance for eight days, setting a high water mark for such recovery. Commercial actors should view *Quake* with caution, presenting a clear legal risk of liability for bargaining sloppiness in using letters of intent without carefully and explicitly defining what needs to be finalized before concluding the deal. This is especially so when the other party is somewhat unsophisticated and may be lulled into starting to perform or preparing to perform before the formalized contract is complete.

APPENDIX A: JONES BROTHERS LETTER OF INTENT
TO QUAKE CONSTRUCTION INC.³⁴⁰

JONES BROTHERS	PLEASE RESPOND TO: JONES BROTHERS CONSTRUCTION CORPORATION POST OFFICE BOX 66501 ILLINOIS 60666	A.M.F. O'HARE 312/686-4356
April 18, 1985		
Quake Construction Inc. 1143 North Wells Street Chicago, Illinois 60610		
Attention: Mr. Lawrence Quamina		
Subject: AAL/ORD 618 OTE American Airlines Employee Facility and Auto Shop Expansion ORD No. 5503 PW No. 2711 JBCC No. 60071		
Gentlemen:		
We have elected to award the contract for the subject project to your firm as we discussed on April 15, 1985. A contract agreement outlining the detailed terms and conditions is being prepared and will be available for your signature shortly.		
Your scope of work as the general contractor includes the complete installation of expanded lunchroom, restroom and locker facilities for American Airlines employees as well as an expansion of American Airlines existing Automotive Maintenance Shop. The project is located on the lower level of "K" Concourse. A sixty (60) calendar day period shall be allowed for the construction of the locker room, lunchroom and restroom area beginning the week of April 22, 1985. The entire project shall be complete by August 15, 1985.		
Subject to negotiated modifications for exterior hollow metal doors and interior ceramic floor tile material as discussed, this notice of award authorizes the work set forth in the following documents at a lump sum price of \$1,060,568.00.		
a) Jones Brothers Invitation to Bid dated March 19, 1985. b) Specifications as listed in the Invitation to Bid. c) Drawings as listed in the Invitation to Bid. d) Bid Addendum #1 dated March 29, 1985.		
JONES BROTHERS 147 SAN VICENTE BOULEVARD	CONSTRUCTION CORPORATION BEVERLY HILLS CALIFORNIA 90211 213/853-0650	C 194

340. Letter of Intent from Jones Brothers to Quake Construction Inc. (Apr. 18, 1985) (on file with Author). This Letter of Intent was attached to all versions of Quake's Complaint.

APPENDIX A: JONES BROTHERS LETTER OF INTENT
TO QUAKE CONSTRUCTION INC.³⁴¹

JONES

April 18, 1985
Page 2

Mr. Lawrence Quamina
Quake Construction Inc.

Subject: AAL/ORD 618 OTE
American Airlines
Employee Facility and Auto Shop Expansion
ORD No. 5503 PW No. 2711 JBCG No. 60071

Quake Construction Inc. shall provide evidence of liability insurance in the amount of \$5,000,000 umbrella coverage and 100% performance and payment bond to Jones Brothers Construction Corporation before commencement of the work. The contract shall include MBE, WBE and EEO goals as established by your bid proposal. Accomplishment of the City of Chicago's residency goals as cited in the Invitation to Bid is also required. As agreed, certificates of commitment from those MBE firms designated on your proposal modification submitted April 13, 1985, shall be provided to Jones Brothers Construction Corporation.

Jones Brothers Construction Corporation reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement.

We look forward to working with you on this project.

Cordially,

JONES BROTHERS CONSTRUCTION CORPORATION

Charles J. Dyerker
Charles J. Dyerker
Project Engineer

CJD:ja

cc: Mr. Ken A. Bower
Mr. Fred Bailey
Mr. Robert N. Sanders
Mr. Don C. Garner

JONES BROTHERS CONSTRUCTION CORPORATION C 195
147 SAN VICENTE BOULEVARD BEVERLY HILLS CALIFORNIA 90211 213/853-0650

341. Letter of Intent from Jones Brothers to Quake Construction Inc. (Apr. 18, 1985) (on file with Author). This Letter of Intent was attached to all versions of Quake's Complaint.

**APPENDIX B: TIMELINE OF THE
QUAKE CONSTRUCTION V. AMERICAN AIRLINES LITIGATION**

Timeline				
March 19, 1985	April 3, 1985	April 9, 1985	April 13, 1985	April 1985
Invitation for bids	Washington Exec. Order 85-2 (30% public contracts to MBEs)	Quake bid	Jones date stamped	Oral notice of award
April 18, 1985	April 22, 1985	April 25, 1985	June 26, 1985	January 22, 1986
Jones sent letter of intent to Quake	Construction begins	Pre-construction meeting and letter of termination	Quake, Inc. incorporated	Suit Filed
December 1, 1987	December 23, 1987	January 11, 1989	March 29, 1989	May 3, 1989
3rd amended complaint dismissed with prejudice; ruled for defendants	Appeal to 1st Judicial Dist. App. Ill	Oral argument scheduled "waived"	2-1 reversed and remanded	Defendants petitioned for leave to appeal
December 3, 1990	February 19, 1992	April 1, 1992	April 12, 1992	August 19, 1994
Il. S. Ct. affirmed App. Ct. reversing trial court dismissal and remanded for further proceedings	Defendant American answer and affirmative defenses	Plaintiff general denial to American's affirmative defenses; discovery	American filed motion to file counter claim	Stipulated dismissal