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**GOOD FAITH AND FAIR DEALING - ALIVE AND WELL OR IS  
IT A MATTER OF BUSINESS JUDGMENT?**

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## **I. INTRODUCTION<sup>1</sup>**

Franchise agreements create an ongoing, long-term relationship between parties, with the franchisor often viewed as having disparate power in both entering into and performing the agreement. Additionally, in the franchise relationship, franchisees are required to comply with operations manuals that may change over time. Because it is impossible to define the parties' rights and responsibilities with express terms that would address every possible issue that may arise in the relationship and because the relationship may evolve and change over time, franchise agreements tend to give the parties—particularly franchisors—the right to exercise some discretion in performing the contract.

Franchisees expect that franchisors will perform any discretionary duties and make any system changes in good faith. Franchisors expect to have the freedom they need to develop and evolve the franchise system to grow and protect their brand. To further define and to protect the rights of the contracting parties, states will impose—whether by statute or common law, or both—an implied covenant of good faith and fair dealing. The implied covenant seeks to make sure the parties operate fairly so that both sides have their expectations met and obtain the fruits of their contract.

In response to the perceived vagueries of the implied covenant, some franchisors have sought more certainty for the standard by which their discretionary conduct will be judged. Borrowing from corporate law, some franchisors have argued for a business judgment rule standard for discretionary decisions, or even included such a rule in their franchise agreements, to try to invoke deference to the franchisor's decisions and avoid second-guessing by the courts.

This survey explores the duty of good faith and fair dealing and the business judgment rule in the franchise context. It confirms that the covenant of good faith and fair dealing is alive and well in franchise law—the duty still exists, parties still sue for its breach, and claims remain challenging, but not impossible, to prove. Attempts to rein in the duty of good faith with the business judgment rule have not yet gained traction in case law and, in some instances, are limited or foreclosed by statute. This survey contains an overview of the two doctrines—illustrating examples where these rules come into play in the performance of franchise agreements—discusses the current state of the law, and, in the Appendix, provides a state-by-state summary of the law in all fifty states.

## **II. THE DUTY OF GOOD FAITH AND FAIR DEALING IN THE FRANCHISE CONTEXT**

### **A. Source and Nature of the Duty of Good Faith and Fair Dealing**

“The duty of good faith has been around for centuries, but it did not receive wide-spread recognition in the United States until the mid-twentieth century, when it was written into the Uniform Commercial Code.”<sup>2</sup> Article 1 of the Uniform Commercial Code (“UCC”) provides that

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<sup>1</sup> The authors would like to thank the following for their help with this article: Nathaniel J. Ehrman and Beth Kavouras, Attorneys at Hahn Loeser & Parks LLP, Sarah Lewis, Teresa Hardymon, Kelsey Schiffer, Summer Clerks at Hahn Loeser & Parks LLP and Devona A. Reynolds Perez, Isabel Yague and Rashad M. Collins, Attorneys at Murray Law, P.A.

<sup>2</sup> Carmen D. Caruso, *Franchising's Enlightened Compromise: The Implied Covenant of Good Faith and Fair Dealing*, 26 Franchise L.J. 207 (Spring 2007).

“[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.”<sup>3</sup> Fifteen states have adopted UCC Article 1.<sup>4</sup>

The Restatement (Second) of Contracts similarly provides in section 205 that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”<sup>5</sup> Most jurisdictions, whether adopting the Restatement or through case law, recognize a common law duty of good faith and fair dealing in contracts. Many states have also enacted statutes specific to franchisors, distributors, and motor vehicle dealers to regulate the contracting parties’ relationship and to provide statutory duties and rights that may not be expressly stated in the parties’ contract. Thus, in virtually every state, courts have held that a franchise agreement includes an implied covenant of good faith and fair dealing as exists in commercial contracts.

The covenant of good faith and fair dealing “forbid[s] the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of [the] rule.”<sup>6</sup> Generally, the covenant provides that parties to a contract must act honestly and observe commercial standards of fair dealing in the trade. Where a franchise agreement gives a party discretion, the covenant will act to limit that discretion and make sure that it is exercised reasonably and consistent with the reasonable expectations of the parties. Also, if an agreement is ambiguous or leaves room for interpretation, the covenant may be invoked to clarify or supply a term—but it will not rewrite the parties’ agreement. “The covenant of good faith and fair dealing fills in gaps between contract provisions; it does not replace them.”<sup>7</sup> The covenant seeks to ensure that the parties fulfill the express contract terms in good faith.

The covenant is usually measured by the justifiable expectations of the parties. Parties may not act arbitrarily or capriciously, with an improper motive, or in a manner inconsistent with the reasonable expectation of the parties. The covenant also provides that neither party will act to deprive the other of the benefit of the contract. Although most case law deals with franchisors’ conduct, *both* parties to the agreement must act in good faith in interpreting and carrying out the terms of the agreement and their rights and obligations. Courts will often limit breaches of the duty to those instances where a party acted intentionally, not negligently.

Generally, the duty of good faith and fair dealing is not a free floating, independent duty. It does not create substantive terms where none exist, but rather requires the parties to perform their express contract duties in good faith. An exception to this general rule, however, can be found where states, by statute, impose good faith duties by statute, without regard to the contract’s express terms. For example, multiple states have enacted special statutes for motor

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<sup>3</sup> U.C.C. § 1-304 (Am. Law Inst. & Nat’l Conference of Comm’rs on Unif. State Laws 2016).

<sup>4</sup> States Adopting the UCC, <http://uniformcommercialcode.uslegal.com/states-adopting-the-ucc/> (last visited July 31, 2016) (listing the following states as having adopted UCC Article 1: Arizona, Arkansas, California, Georgia, Kansas, Kentucky, Louisiana, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma).

<sup>5</sup> Restatement (Second) of Contracts § 205 (Am. Law Inst. 1981).

<sup>6</sup> *Market St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991).

<sup>7</sup> *Newpaper, LLC v. Party City Corp.*, No. 13-1735 ADM/LIB, 2013 U.S. Dist. LEXIS 137396, at \*28 (D. Minn. Sept. 25, 2013).

vehicle dealerships that expressly override the terms of a contract and impose specific duties “[n]otwithstanding the terms of any franchise or other agreement”.<sup>8</sup>

## **B. What Does It Mean To Act With Good Faith and Fair Dealing?**

The UCC provides definitions of good faith that have evolved over time and have varied by UCC section.<sup>9</sup> As the Official Comments to UCC §1-201 explain:

Former Section 1-201(19) defined “good faith” simply as honesty in fact; the definition contained no element of commercial reasonableness. Initially, that definition applied throughout the Code with only one exception. Former Section 2-103(1)(b) provided that [for Article 2] ‘good faith’ in the case of a merchant means ‘honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.’... Over time,... amendments...brought the Article 2 merchant concept of good faith (subjective honesty and objective commercial reasonableness) into other Articles.... Only revised Article 5 [regarding letters of credit] defines “good faith” solely in terms of subjective honesty.....<sup>10</sup>

Thus, UCC § 1-201(b)(20) currently provides: “‘Good faith,’ except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.”<sup>11</sup>

Where states have codified the covenant outside of the UCC, statutory language similarly seeks to define good faith in terms of what is “fair.” For example:

- “act[ing] in a fair and equitable manner toward each other so as to guarantee each party freedom from coercion or intimidation.”<sup>12</sup>
- “honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing in the trade as evidence by all surrounding circumstances.”<sup>13</sup>

In case law, however, it is often hard for courts to define precisely what is “good faith” and the issue can be a source of frustration for both franchisors and franchisees. Courts will often set forth the general principal that where “one party acts arbitrarily, capriciously or

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<sup>8</sup> See, e.g., Oregon: OR. REV. STAT. § 650.140(2)(f) (2016) (“Notwithstanding the terms of any franchise or other agreement, it is unlawful for any manufacturer, distributor or importer to cancel, terminate or refuse to continue any franchise without showing good cause.”); Vermont: 9 V.T. STAT. ANN. § 4089(a) (2016) (provides, “Notwithstanding the terms, provisions, or conditions of any franchise or notwithstanding the terms or provisions of any waiver, no manufacturer shall cancel, terminate, or fail to renew any franchise with a licensed new motor vehicle dealer unless the manufacturer has . . . acted in good faith”).

<sup>9</sup> See Official Comments to U.C.C. § 1-201 (Am. Law Inst. & Nat’l Conference of Comm’rs on Unif. State Laws 2016).

<sup>10</sup> *Id.*

<sup>11</sup> U.C.C. § 1-201(b)(20) (Am. Law Inst. & Nat’l Conference of Comm’rs on Unif. State Laws 2016).

<sup>12</sup> Ohio Alcoholic Beverages Franchises Act, OHIO REV. CODE ANN. § 1333.82(E) (LexisNexis 2016).

<sup>13</sup> New Mexico Franchise Act, N.M. STAT. ANN. § 60-8A-7 (2016).

unreasonably, that conduct exceeds the justifiable expectations of the second party.”<sup>14</sup> But, of course, what conduct satisfies that standard is usually determined on a case-by-case basis with the determination of whether a party has acted in “good faith” often being governed by considerations of *bad faith*. That is, if bad faith is shown, then the party has breached the implied covenant and the absence of bad faith signals compliance with the duty. Although not in the franchise context, at least one court has defined the test in a way that leaves room for any number of acts to be considered to be in good faith, regardless of whether the parties’ expectations are satisfied: “[g]ood faith and fair dealing is satisfied where the conduct at issue is either expressly permitted or at least not prohibited.”<sup>15</sup>

Assuming “bad faith” as the yardstick by which conduct should be measured, the Restatement (Second) of Contracts provides examples of what would constitute bad faith in the performance of a contract:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.<sup>16</sup>

Because courts most often find that the parties acted in good faith or that there is insufficient proof of bad faith, examples of bad faith from case law are rare. Nonetheless, courts have suggested that bad faith may be found in attempting to force a dealer out of business,<sup>17</sup> concealing the true nature of the ownership of a franchise,<sup>18</sup> and refusing to operate 24-hours a day in compliance with a franchisor’s campaign.<sup>19</sup>

### **C. Express Contract Terms and the Waiver of the Implied Covenant**

Historically, franchisees enjoyed early victories in claims against franchisors for breach of the duty of good faith and fair dealing in, for example, the context of claims for encroachment.<sup>20</sup> In response, franchisors gained traction in the courts by relying upon express

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<sup>14</sup> See, e.g., *Nicholson v. United Pac. Ins. Co.*, 219 Mont. 32, 710 P.2d 1342, 1348 (Mont. 1985).

<sup>15</sup> *Jurin v. Google Inc.*, 768 F. Supp. 2d 1064, 1073 (E.D. Cal. 2011).

<sup>16</sup> Restatement (Second) of Contracts § 205, cmt. d (Am. Law Inst. 1981).

<sup>17</sup> *Tiller v. Amerada Hess Corp.*, 540 F. Supp. 160, 166 (D.S.C. 1981).

<sup>18</sup> *Newfield v. Gen. Motors Corp.*, 443 N.Y.S.2d 239, 84 A.D.2d 548, 549 (N.Y. App. Div. 1981).

<sup>19</sup> *Tiesling v. White Hen Pantry Div.*, 121 Wis. 2d 701 (Wis. Ct. App. 1984).

<sup>20</sup> Peter C. Lagarias & Edward Kushell, *Fair Franchise Agreements from the Franchisee Perspective*, 33 Franchise L.J. 3, 14 (Summer 2013).

contract provisions authorizing specific conduct negating the franchisee's territorial rights.<sup>21</sup> Still today the express terms of a contract remain the guidepost by which behavior is judged and most states recognize that the covenant will not contravene a contract if there are express terms addressing the particular issue.<sup>22</sup> Franchisors therefore rely on multiple drafting tools to try to limit or negate the implied covenant.

First, express terms permitting or foreclosing specified conduct or categories of conduct can help to limit the implied covenant. The closer that the express terms address the issue, the better chance there is of foreclosing a claim for breach of the implied covenant. For example, a court dismissed multiple claims for breach of the implied covenant based on express contract terms that permitted the challenged conduct, but allowed one claim to survive stating "[t]rue, the Franchise Agreement releases [the franchisor] from any liability for its efforts in assisting in lease negotiations, but that doesn't mean it also releases [the franchisor] from liability for *impeding* lease negotiations."<sup>23</sup>

Second, franchisors have also sought to curb or eliminate the implied covenant with contract terms purporting to waive the covenant. Such terms may state that a discretionary decision is within the franchisor's "sole" or "exclusive" or "absolute" discretion. Some commentators have suggested that because the covenant applies where there is discretion, such terms generally only highlight where the covenant applies and are not usually effective in waiving the covenant.<sup>24</sup> However, "sole discretion" terms have helped franchisors to avoid liability because the court will not imply a fair dealing requirement contrary to the express terms providing the franchisor with unbridled discretion.<sup>25</sup>

Third, franchisors may include waiver clauses in their franchise agreements that purport to waive the implied covenant. Such waiver clauses tend not to be enforced because most courts have held that the implied covenant cannot be waived.<sup>26</sup> This depends upon the particular state law at issue, however, as the United States Supreme Court has recognized

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<sup>21</sup> *Id.*; see also Caruso, *supra* note 2, at 209; Jeffrey C. Selman, *Applying the Business Judgment Rule to the Franchise Relationship*, 19 Franchise L.J. 111 (Winter 2000).

<sup>22</sup> Selman, *supra* note 21, at 174.

<sup>23</sup> *Dos Beaches, LLC v. Mail Boxes Etc., Inc.*, No. 09CV2401-LAB (RBB), 2012 U.S. Dist. LEXIS 73248, at \*11 (S.D. Cal. May 23, 2012) (emphasis original).

<sup>24</sup> Caruso, *supra* note 2, at 211.

<sup>25</sup> See *Keating v. Baskin-Robbins USA, Co.*, No. 5:99-CV-148-BR(3), 2001 U.S. Dist. LEXIS 26328, at \*30 (E.D.N.C. Mar. 22, 2001) (summary judgment for franchisor on claim of breach of implied covenant of good faith and fair dealing; "an implied promise to deal fairly has no relevance in this context" where franchise agreement "expressly allows franchisor to withhold consent to a transfer of the franchisee's interest in the franchise agreement 'arbitrarily and for any reason whatsoever.'"); *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 431 N.W.2d 721, 726 (Wis. Ct. App. 1988) (franchise agreement explicitly stated that the franchise was non-exclusive and the franchisor had the "sole choice and discretion" as to whether to enter another franchise agreement in the same community or any other; "[W]here, as here, a contracting party complains of acts of the other party which are specifically authorized in their agreement, we do not see how there can be any breach of the covenant of good faith. Indeed, it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties' contract as a 'bad faith' breach of that contract.").

<sup>26</sup> Caruso, *supra* note 2, at n.83 (collecting cases).

some states permit a party to contract out of the duties imposed by the implied covenant.<sup>27</sup> In *Northwest Inc. v. Ginsberg*, a frequent flyer program member alleged that an airline breached the implied covenant of good faith and fair dealing when it terminated his membership for abuse pursuant to a contract term giving the airline sole discretion to determine whether a participant had abused the program. The Court had to determine whether the plaintiff's implied covenant claim was based on a state-imposed obligation or simply one that the parties voluntarily undertook. The Court held that under Minnesota law, the implied covenant was a state imposed obligation that, despite the contractually reserved "sole discretion" standard, could not be waived or contracted around.<sup>28</sup> Multiple other states have statutes that apply to trump contrary contract terms, so any drafting must take into account the applicable state or federal law.

Finally, integration clauses may also be used in an attempt to exclude any implied terms such as the implied covenant. But, where the covenant interprets the express terms of an existing agreement rather than creating any separate terms, there are no extrinsic implied terms for the integration clause to foreclose.<sup>29</sup> Also, where statutes impose specific duties as a matter of law in a franchise agreement, an integration clause would not foreclose such statutory terms.

**D. The Tension Between Franchisors and Franchisees When It Comes To The Implied Covenant of Good Faith and Fair Dealing**

Franchisors and franchisees have many common goals for success, but they also have their own self-interests. If a franchise relationship becomes adversarial, franchisors, who desire strict and consistent interpretation of their franchise agreements, generally seek to avoid any duties or terms not expressly stated in the agreement. Franchisees, on the other hand, generally seek an interpretation of the contract that requires the franchisor to treat them fairly—even if it goes beyond the strict letter of the contract—to honor what they consider to be a partnership type of relationship. Courts have recognized this tension as well as the difficulty in judging whether the parties expectations have been met:

At the outset of a franchise relationship there is undoubtedly an expectation on the part of all concerned that the system will grow and prosper. Reasonable expectations obviously cannot be judged solely on the basis of the gains anticipated by the contracting parties. The downside also must be recognized, as must the need of franchisors to innovate and respond to general market conditions. Moreover, parties to a contract may have different expectations, further complicating a court's task in finding implied obligations to exercise discretion and judgment in a particular manner. As such, courts have tended to imply contract obligations only in very limited circumstances.<sup>30</sup>

When disputes arise, it is generally the franchisee who will raise the implied covenant. This is because franchisors typically have discretion with most matters and franchisees view the implied covenant as a catch-all means to address any perceived unfair treatment. Accordingly, franchisees who have been aggrieved by their franchisor will typically assert a breach of the

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<sup>27</sup> 134 U.S. 1422, 1432 n.2 (2014)

<sup>28</sup> *Id.* at 1432.

<sup>29</sup> Caruso, *supra* note 2, at 211.

<sup>30</sup> *Fleetwood v. Stanley Steamer Int'l, Inc.*, 725 F. Supp. 2d 1258, 1274-1276 (E.D. Wash. 2010).



covenant of good faith and fair dealing. Even where franchisees are sued for non-performance with the franchise agreement's terms, franchisees typically will assert a counterclaim for breach of the implied covenant.

Examples of where the covenant of good faith and fair dealing is most often seen are:

- Territorial encroachment through competing outlets or even another franchise system;
- Unjust termination of a franchise;
- The refusal to extend a franchise agreement;
- Limiting the franchisor's ability to sell through other distribution channels;
- Limiting the franchisor's ability to change policies and procedures;
- Enforcing contractual reasonableness requirements;
- Training of franchisees;
- Advertising;
- Introduction of new products or campaigns;
- Requiring franchisees to upgrade facilities;
- Discriminatory treatment and favoritism;
- System changes; and
- Withdrawals from a region or the entire market.

The prevailing view is that there is no independent cause of action for breach of the covenant.<sup>31</sup> Thus, a party invoking the covenant in litigation must show that there was bad faith in the performance of an express contract term. Although most states allow suits in contract for breach of the violation of good faith and fair dealing with respect to an express contract term, some states also permit suits in tort. Where states allow tort claims, it may be based on their consideration of the franchise relationship to be a special relationship, akin to those imposing fiduciary duties,<sup>32</sup> or on a statute expressly creating the cause of action.<sup>33</sup>

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<sup>31</sup> See, e.g., *Cummings v. Allstate Ins. Co.*, 832 F. Supp. 2d 469, 473 (E.D. Pa. 2011) (“[A] breach of the covenant of good faith is nothing more than a breach of contract claim and . . . separate causes of action cannot be maintained for each, even in the alternative”).

<sup>32</sup> See, e.g., *Ins. Co. of the West v. Gibson Title Co.*, 122 Nev. 455, 134 P.3d 698, 702 (Nev. 2006).

<sup>33</sup> See, e.g., *Mercedes-Benz USA, LLC v. Carduco, Inc.*, No. 13-13-00296-CV, 2016 Tex. App. LEXIS 3254 (Tex. App. Mar. 31, 2016) (TEX. OCC. CODE § 2301.478 (LexisNexis 2016) states “Each party to a franchise owes to the other party a duty of good faith and fair dealing that is actionable in tort.”)

### **III. THE BUSINESS JUDGMENT RULE IN THE FRANCHISE CONTEXT**

Franchisors have historically had concerns that the implied covenant is a problematic concept that should be abandoned because it invites second-guessing of their behavior—with a legal standard that is not black and white—and it can hamper decision making that the franchisor believes is in the best interest of the franchise as a whole. Where the franchisor may believe it is acting in good faith, what might be required in particular situations could be unclear and the results of any litigation or arbitration unpredictable. Additionally, because issues of good faith are inherently factual, well-pleaded claims for breach of the implied covenant have a good chance of surviving dispositive motions meaning that expensive and distracting litigation can drag out through trial. Commentators have recognized that in an attempt to gain more clarity for the parties' rights up front, franchisors in recent years have sought to replace or frame the good faith and fair dealing standard with a corporate law doctrine: the business judgment rule.<sup>34</sup>

#### **A. The Nature of the Business Judgment Rule From Corporate Law**

In corporate law, the business judgment rule sets a deferential standard for judicial review of business decisions made by corporate directors and officers who are sued personally for alleged breaches of their duty of care. The rule creates a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.<sup>35</sup> The party challenging the decision has the burden to establish facts rebutting the presumption.<sup>36</sup> The presumption can be rebutted by establishing that the decision maker was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of the company and all of its shareholders.<sup>37</sup> If the presumption is rebutted, the directors must prove that the transaction was fair and reasonable to the company.<sup>38</sup> The rule is a powerful tool to prevent courts from second-guessing the judgment of directors and officers with the rationale being that judges are not in a position to make business decisions as corporate officials are.<sup>39</sup>

#### **B. Translating the Business Judgment Rule to Franchise Law**

Taking a page from corporate law, commentator Jeffrey C. Selman has suggested that the presumptions of the business judgment rule can be applied to the franchise relationship by substituting the franchisor for the director and the franchise system for the company.<sup>40</sup> He proposes that in the franchise context, the business judgment rule would:

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<sup>34</sup> Brian B. Schnell & Ronald K. Gardner, Jr., *Battle over the Franchisor Business Judgment Rule and the Path to Peace*, 35 Franchise L.J. 167 (Fall 2015); see also Caruso, *supra* note 2, at 212.

<sup>35</sup> *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 838 (3d Cir. 2010) (Delaware law).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Selman, *supra* note 21, at 112, citing *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App. 3d 579, 641 N.E.2d 265, 273 (Ohio Ct. App. 1994).

<sup>39</sup> See, e.g., *Am. Soc'y for Testing & Materials v. Corpro Cos.*, 478 F.3d 557 (3d Cir. 2007).

<sup>40</sup> Selman, *supra* note 21, at 113.

- Protect decisions made by the franchisor;
- Presume that the franchisor acted with disinterestedness and independence in making decisions that affect an individual franchisee or the system as a whole;
- Presume decisions were made after a reasonable effort to become familiar with the relevant and available facts;
- Presume that the decision was made in good faith and with a reasonable belief that it was in the best interests of the franchise system; and
- Presume that a franchisor did not abuse its discretion.<sup>41</sup>

To bring such business judgment rule principles to their franchise relationship, franchisors may draft contractual standards of care for the exercise of discretion under the duty of good faith and fair dealing that mirror the business judgment rule. Accordingly, a franchise agreement may state that the standard is met if the franchisor's conduct or decision is intended to promote or benefit the system generally, even if it also promotes the franchisor's financial or other individual interests.<sup>42</sup> Commentators Brian B. Schnell and Ronald K. Gardner, Jr. have provided a sample clause to illustrate the type of language franchisors may use to incorporate the business judgment rule in franchise agreements:

**Our Reasonable Business Judgment.** Whenever we reserve discretion in a particular area or where we agree to exercise our rights reasonably or in good faith, we will satisfy our obligations whenever we exercise reasonable business judgment in making our decision or exercising our rights. Our decisions or actions will be deemed to be the result of reasonable business judgment, even if other reasonable or even arguably preferable alternatives are available, if our decision or action is intended, in whole or significant part, to promote or benefit the franchise system generally, even if the decision or action also promotes our financial or other individual interest. Examples of items that will promote or benefit the franchise system include, without limitation, enhancing the value of the trademarks, improving customer service and satisfaction, improving product quality, improving uniformity, enhancing or encouraging modernization, and improving the competitive position of the franchise system.<sup>43</sup>

Promoters of the business judgment rule opine that incorporating the rule in a franchise agreement does not give the franchisor free reign, but rather provides the contracting parties with more clarity on their respective roles and interests and gives franchisors more certainty and confidence that they will not be second-guessed as under the good faith and fair dealing standard.<sup>44</sup> Promoters, such as Jeffrey C. Selman, note the rationales for the business judgment rule that are applicable to franchise relationships such as: (1) not equating bad decision making with bad faith, (2) encouraging franchisors to take risks on behalf of the

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<sup>41</sup> Selman, *supra* note 21, at 114.

<sup>42</sup> Schnell & Gardner, Jr., *supra* note 34, at 167.

<sup>43</sup> *Id.* at 168-169.

<sup>44</sup> *Id.* at 174.

franchise system, (3) encouraging courts not to second-guess franchisors' business decisions, and (4) not having franchisees dictate franchisor's decision making through litigation.<sup>45</sup>

Although franchisors may like the perceived protections offered by a contractual business judgment rule, franchisees disfavor the rule as it inhibits their ability to oppose a franchisor's discretionary decisions. Commentators have suggested that, from the franchisee's viewpoint, the rule "inhibits opposition to franchisor discretionary decisions and changes to system standards and absolves any franchisor obligation to act in a commercially reasonable manner or to even consider the substantial impact its decisions may have on its franchisees."<sup>46</sup> They raise concerns that franchisors "have even more leeway to opportunistically extract additional revenue from its franchisees under the minimal standard of review the business judgment rule provides."<sup>47</sup>

What role the business judgment rule will have in franchising and whether the business judgment rule will set the standard for the implied covenant of good faith and fair dealing is still a developing issue. One commentator, Carmen D. Caruso, has opined that the business judgment rule "does not translate into franchising, at least not in a way that would protect franchisors from scrutiny under the implied covenant."<sup>48</sup> There are multiple reasons why the business judgment rule does not translate perfectly to franchise relationships.

First, franchisors have a self-interest in their discretionary decisions—which would tend to make the rule inapplicable.<sup>49</sup>

Second, corporate officers and directors owe fiduciary duties to their company, making it logical to afford them some deference in the decisions that they make, whereas most courts do not impose a fiduciary duty on franchisors and franchisors would be loath to create one.

Third, the business judgment rule provides a strong rebuttable presumption in favor of the corporate decision maker—assuming certain facts to be true unless someone proves otherwise. Thus, the claimant is not starting in a neutral position with respect to its burden of proof, but must overcome a presumption in favor of the opponent. Although a contract may seek to define through express terms an agreement that the franchisor's decisions cannot be second-guessed when performed in the exercise of business judgment, a contract does not create the same evidentiary presumption enjoyed by officers and directors in the corporate setting or alter the parties' burdens. Moreover, if it were necessary to undertake fiduciary obligations to obtain such presumptions,<sup>50</sup> the trade-off would likely not be worth it to franchisors because, as Jeffrey Selman notes, franchisees already have a burden of proof to establish a

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<sup>45</sup> Selman, *supra* note 21, at 112.

<sup>46</sup> Schnell & Gardner, Jr., *supra* note 34, at 186.

<sup>47</sup> *Id.*

<sup>48</sup> Caruso, *supra* note 2, at 212.

<sup>49</sup> *Id.*

<sup>50</sup> Selman notes that by use of the business judgment standard, franchisors would be expanding their duties to include diligence, loyalty, and obedience. Selman, *supra* note 21, at 117.

breach and courts already apply certain implicit presumptions that the conduct was above-board.<sup>51</sup>

Even if the business judgment rule could translate to franchising, franchisors should take a step back and consider whether they really want the rule to apply to them. Applying the rule could foreclose resolving cases on summary judgment because of the multiple, intensely factual factors go into analyzing the business judgment rule. Applying the rule could also have an unintended consequence of arguably imposing duties on a franchisor to investigate fully all relevant facts before making any decision. Finally, even under the business judgment rule, franchisors would not escape the standard of good faith because the traditional business judgment rule, just like the implied covenant, requires that judgment must be exercised in *good faith*. This leads to some circularity of and redundancy in defining the covenant of good faith and fair dealing with another good faith standard. But, this redundancy is unlikely to matter in practice because it is hard to conceive of any court or arbitrator approving acts taken in bad faith against a particular franchisee even if they are arguably in the interests of the franchise system as a whole.

Even where contracts do not expressly incorporate a business judgment rule, franchisors may look to the rule to frame their defense of their decision making. That is, a franchisor's decisions with respect to particular franchisees must inherently consider the franchise system overall. Any decision to place a new store near an existing franchisee, necessarily considers the impact on the franchisor's brand and overall sales. Any decision to terminate a particular franchisee, necessarily considers the impact that an underperforming franchisee has on other franchisees and the brand overall. Franchisors seeking to justify their discretionary decisions will naturally argue that the decision was made reasonably and in the interests of the franchise system. Accordingly, even in the absence of express contractual language seeking to defer to the franchisor's business judgment, practitioners can expect to see business judgment rule themes play out in any litigation or arbitration.

### **C. The Developing Law on the Business Judgment Rule**

Multiple states have enacted statutes relevant to the exercise of business judgment in specialty franchise contexts such as motor vehicle dealerships and alcoholic beverage franchises. Such statutes tend to recognize a right to use business judgment in establishing performance standards or establish the circumstances that must be considered in exercising decisions, such as terminating the parties' agreement only for cause. For example:

- Utah's Beer Industry Distribution Act provides that it does not restrict the right of a supplier to require its wholesalers to comply contractually with the supplier's operational standards of performance that are consistent with the statute and uniformly established for its wholesalers according to the supplier's good faith business judgment.<sup>52</sup>
- South Dakota has specific statutes for motor vehicle dealerships establishing the factors that must be considered in determining if there is just cause to

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<sup>51</sup> Selman, *supra* note 21, at 114.

<sup>52</sup> UTAH CODE ANN. § 32B-14-103(1) (LexisNexis 2016).

open additional franchises for the same lines—all of which shape the manufacturer's business judgment.<sup>53</sup>

Congress has also recognized the importance of a franchisor's business judgment in the federal Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2804, *et seq.*, which was intended to provide gasoline service station franchisors with flexibility to respond to changing market conditions and consumer preferences.<sup>54</sup> The PMPA precludes judicial second-guessing of the economic decisions of franchisors to terminate service station franchises if franchisors prove, by affirmative defense, that a decision to change the franchise terms was made (i) in good faith and in the normal course of business, and (ii) the changes were not made for the purpose of preventing the renewal of the franchise relationship.<sup>55</sup> The PMPA's "legislative history... indicates that courts should look to the franchisor's intent rather than to the effect of his actions, making this a subjective test."<sup>56</sup> Therefore, the fact that a franchisor's proposal to convert the service station from "full service" to "fast service" might make it difficult for the franchisee to remain in business and earn a profit is irrelevant to a finding of good faith.<sup>57</sup> "So long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith."<sup>58</sup>

Ohio's Alcoholic Beverages Franchise Act provides an example of how concepts of "good faith" and business judgment intersect in franchise law and indicates a willingness to defer to the franchisor's reasonable business judgment. The Act imposes duties of good faith and requires "just cause" in cancelling or failing to renew a franchise or in substantially changing a sales area or territory without the prior consent of the other party.<sup>59</sup> In case law, Ohio has recognized that the "just cause" determination requires some deference to the franchisor's business judgment, but, interestingly, proving "good faith" and proving "just cause" are not necessarily the same.<sup>60</sup>

In *AB & B, Inc. v. Banfi Products, Inc.*, a wine supplier terminated a distributorship agreement because the Ohio distributor failed to maintain a purported required inventory level

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<sup>53</sup> S.D. CODIFIED LAWS § 32-6B-48 (2016) (establishing circumstances to consider in determining whether cause is established for entering into an additional franchise for the same line-make); S.D. CODIFIED LAWS § 32-6E-5 (2016) (same).

<sup>54</sup> *Svela v. Union Oil Co.*, 807 F.2d 1494, 1501 (9th Cir. 1987).

<sup>55</sup> *Id. accord Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 771-772 (E.D. Pa. 1983) (Under the PMPA, the court refused to question the business judgment of a franchisor when they required gas service station franchisees to enter into a new agreement that required the franchisee to pay higher rent). See also *Amoco Oil Co. v. Burns*, 496 Pa. 336, 437 A.2d 381, 381 (Pa. 1981) (Pennsylvania Gasoline Act; A franchisor's good faith, business judgment decision to divest itself of an unprofitable property was a "reasonable and just" cause for termination of the franchise agreement).

<sup>56</sup> *Svela*, 807 F.2d at 1501.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> OHIO REV. CODE ANN. § 1333.84(A) (LexisNexis 2016); OHIO REV. CODE ANN. § 1333.85 (LexisNexis 2016).

<sup>60</sup> *AB & B, Inc. v. Banfi Products, Inc.*, 71 Ohio App. 3d 650, 594 N.E.2d 1151, 1153-1154 (Ohio Ct. App. 1991).

and failed to support the supplier's product lines. The distributor sued and after a bench trial, the trial court found that the distributor had not acted in "good faith" and that it did not have "just cause" for termination.<sup>61</sup> On appeal, the appellate court reversed the decision that the distributor did not act in "good faith" but upheld the finding of no "just cause" and, thus, affirmed the finding of liability.

The appellate court in *AB & B, Inc.* recognized that in defining good faith, the Ohio Act confined violations of good faith to coercion or intimidation:

'Good faith' means the duty of any party to any franchise, and all officers, employees, or agents thereof, to act in a fair and equitable manner toward each other so as to guarantee each party freedom from coercion or intimidation; except that recommendation, endorsement, exposition, persuasion, urging, or argument shall not be deemed to constitute a lack of good faith or coercion.<sup>62</sup>

The court held that the distributor had not alleged or presented any evidence of coercion or intimidation such that there could be no violation of the "good faith" requirement.<sup>63</sup>

Because the Ohio Act did not define "just cause," the appellate court looked to Ohio case law which recognized that if a decision to terminate the franchise was not arbitrary and was made for fundamental business reasons, the court would not "second-guess what was fundamentally [the franchisor's] business judgment" and would find the termination was for "just cause":

'[T]he issue of just cause is whether the manufacturer commits acts of actual coercion or intimidation, or, in the alternative, whether such acts were honest and reasonable business decisions of any one of the acts authorized in the applicable sections of the statute.'... [A] manufacturer should remain free to exercise business judgment in determining whether to cancel a franchise agreement. This business judgment need not be a good one or a well-reasoned one. 'The only legal requirement is that the decision not be arbitrary and without reason.'<sup>64</sup>

Although the appellate court recited a standard that deferred to the franchisor's business judgment, it nonetheless found that the supplier did not demonstrate "just cause" to terminate the distributor because the evidence did not support the franchisor's stated reasons for termination. The distributor failed to prove the existence and consistent applications of the policies the supplier had supposedly violated. Additionally, although attempting to reconcile before termination was not a necessary element of "just cause," it was "one more factor which showed there was no just cause."<sup>65</sup> Thus, although the supplier acted in good faith, it failed to justify its business decision and was liable under the Ohio Act.

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<sup>61</sup> *Id.* at 1152-1153.

<sup>62</sup> *Id.* at 1153.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1153-1154.

<sup>65</sup> *Id.* at 1154-1155.

Interestingly, unlike with the traditional business judgment rule in the corporate setting where the business decision is presumed to be valid and the *plaintiff* must rebut the presumption, *AB & B, Inc.* shows that, although the court was willing to defer to the supplier's business judgment, *the supplier* nonetheless had to prove that its business decision was not arbitrary or without reason.

In contrast to Ohio, Virginia has recognized, in the context of Virginia's Wine Franchise Act, that even where the good faith exercise of business judgment is established, it will not necessarily establish "good cause" for termination of a franchise. In *Sims Wholesale v. Brown-Forman Corp.*, a winery supplied its wines to plaintiff wine wholesalers for distribution in designated territories pursuant to written agreements.<sup>66</sup> The winery decided to streamline its marketing efforts by down-sizing to fewer wholesalers and unilaterally terminated the agreements with the plaintiffs. The Virginia Act required the winery to have "good cause" for the termination and set forth, without limitation, various circumstances that could establish good cause, such as revocation of the wholesaler's license, bankruptcy or receivership of the wholesaler, assignment for the benefit of creditors or similar disposition of the wholesaler's assets; and a wholesaler's failure to comply, without reasonable justification, with any written, material requirement imposed by the winery.<sup>67</sup> The Virginia Act also provided that good cause did not include specified circumstances such as the sale of the winery.<sup>68</sup>

The parties in *Sims Wholesale* stipulated to the facts, including the fact that the winery had exercised its business judgment in good faith, as follows:

This case has been litigated upon a stipulation of facts.... The winery, exercising its business judgment, determined that its brands could be more effectively marketed by fewer wholesalers over broader geographic areas. The winery's experience had been that consolidation of its brands into fewer wholesalers increases 'market penetration,' sales of its products, and profits for both the winery and its wholesalers.... The winery's termination notices did not allege any deficiencies on the part of the wholesalers. The winery's decision to market its brands through fewer wholesalers over broader geographic areas, when viewed from the winery's perspective, was in its economic self interest. The winery's decision that its own economic self interest is served by the consolidation, while erroneous from the wholesalers' perspective, is not clearly arbitrary, capricious, or irrational from the winery's perspective. The winery's decision was made in good faith and constitutes a good faith exercise of business judgment.<sup>69</sup>

The parties also "stipulated that the sole issue presented [was] whether the good faith exercise of business judgment by the winery, absent any evidence of deficiencies in the wholesalers' performances, is 'good cause' pursuant to the [Virginia Wine Franchise] Act for the winery to terminate unilaterally its agreements with the wholesalers without reasonable compensation."<sup>70</sup>

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<sup>66</sup> *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 468 S.E.2d 905, 907 (Va. 1996).

<sup>67</sup> *Id.* at 906-907.

<sup>68</sup> *Id.* at 907.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*



Interpreting the Virginia Act, the Supreme Court of Virginia rejected the wholesaler's position that "good cause" always requires a supplier to establish a wholesaler's deficiency but also rejected the winery's position that "good cause" always exists when a winery unilaterally cancels a wholesaler agreement in the good faith exercise of its business judgment.<sup>71</sup> The Court recognized that the winery's approach would mean that any decision to terminate that was not made in bad faith or arbitrarily would establish "good cause" rendering the Act meaningless.<sup>72</sup> The Court recognized that under the Act, the sale of a winery to another winery—which might give the purchaser legitimate reasons to want to consolidate wholesalers—was not "good cause" for termination of agreements. If down-sizing wholesalers was not allowed in those circumstances by statute, then the desire to down-size could not constitute "good cause" in ordinary circumstances.<sup>73</sup> Therefore, the winery's good faith exercise of business judgment, in the absence of deficiencies in the wholesalers' performances, was not "good cause" under the Virginia Act for the winery to terminate the agreements without reasonable compensation.<sup>74</sup>

Where statutes establish, rein in, or guide a franchisor's business judgment and good faith, specified statutory factors should reasonably be expected to trump ordinary business judgment.<sup>75</sup> But what about those instances where there is no such statute? Commentators have noted a dearth of case law discussing the business judgment rule as a standard of discretion in the franchise context.<sup>76</sup> *In re Sizzler Restaurants International*<sup>77</sup> remains the key case that illustrates how the business judgment rule may apply as a standard for the application of the implied covenant of good faith and fair dealing in situations where there is no statute guiding the parties' conduct.

In *Sizzler*, the franchisee alleged that the franchisor breached the license agreements in multiple ways: by failing to provide management assistance, by failing to provide promised advertising support, by abandoning its support of a buffet court and grill marketing concept, by being grossly negligent in its handling of purported E-Coli outbreaks, and by being negligent in approving sites selected by the franchisee.<sup>78</sup> The claims involved either a breach of an express covenant of the license agreements, a breach of the implied covenant of good faith and fair dealing, or both.<sup>79</sup> The franchisee contended that the franchisor had breached various

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<sup>71</sup> *Id.* at 909.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* The court noted that the act had been amended for future litigants to provide that "good cause" shall not be construed to exist without a finding of a material deficiency for which the wholesaler is responsible. *Id.* at 910.

<sup>75</sup> See, e.g., *Volkswagen of Am., Inc. v. Smit*, 266 Va. 444, 587 S.E.2d 526, 532 (Va. 2003) ( The Supreme Court of Virginia held that the appellate court had erroneously interpreted VA. CODE ANN. § 46.2-1569(7) (2016) and consequently improperly focused on the business judgment of the distributor in how vehicles were distributed rather than limiting the inquiry to the relevant factors prescribed by the statute.).

<sup>76</sup> *Id.*

<sup>77</sup> 225 B.R. 466 (Bankr. C.D. Cal. 1998).

<sup>78</sup> *Id.* at 473.

<sup>79</sup> *Id.*

provisions of the license agreements that vested discretion in the franchisor. The court held that to defeat the franchisor's motion for summary judgment, the franchisee "must offer evidence that [the franchisor], to the extent that it made discretionary decisions pursuant to the license agreements, acted dishonestly or outside of accepted commercial practices, or with an improper motive or in an unreasonable manner that was arbitrary, capricious, or inconsistent with the reasonable expectations of the parties."<sup>80</sup> The court stated that the inquiry into the franchisor's decision-making process "is not an inquiry that looks to results, but more appropriately should examine the actual decision-making process to determine whether it was legitimate, *i.e.*, honest or within accepted commercial practices."<sup>81</sup> Echoing the concept of the business judgment rule, the court "decline[d] to second-guess the result reached, as long as the decision-making process was honest or was within accepted commercial practices."<sup>82</sup>

Since *Sizzler*, at least one court has embraced the notion that "bad faith is not synonymous with erroneous judgment"—in the context of adjudicating a breach of contract claim—but considered whether the franchisor's conduct constituted a breach of the implied covenant of good faith and fair dealing to be "a separate issue."<sup>83</sup> Ultimately, because the court found for the franchisor on both the breach of contract and implied covenant claim on the same grounds—that there was an express term granting the franchisor the right to withhold consent to a transfer of the franchisee's interest in the franchise agreement "arbitrarily and for any reason whatsoever"—it is unclear how helpful that case will be for practitioners trying to invoke the business judgment rule.

Also since *Sizzler*, at least one court has embraced a contractual business judgment term in granting a motion to dismiss a claim for breach of the duty of good faith and fair dealing.<sup>84</sup> In *Miller Auto Corp. v. Jaguar Land Rover LLC*, an automobile dealer alleged breach of a dealership agreement in connection with the franchisor's failure to approve a relocation request that was allegedly in the best interest of the dealer and Jaguar owners in the area.<sup>85</sup> The court recognized that the agreement provided that "the question whether a relocation is in the best interest of [dealer] and the Jaguar owners in its area is committed to the exercise of [the franchisor's] 'good faith business judgment.'"<sup>86</sup> The agreement stated:

Dealer understands that in evaluating any proposed site [for relocation], the Company will consider various factors, including, but not limited to, the adequacy of the site for a dealership of the size contemplated, the convenience and accessibility of the site to existing and potential Jaguar owners and the type and quality of the residential buildings and commercial enterprises located in the geographic area adjacent to and surrounding the site. ... The Company will

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<sup>80</sup> *Id.* at 474.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Keating*, 2001 U.S. Dist. LEXIS 26328, at \*30.

<sup>84</sup> *Miller Auto. Corp. v. Jaguar Land Rover N. Am., LLC*, 471 F. App'x 37, 38-39 (2d Cir. 2012).

<sup>85</sup> *Id.* at 39.

<sup>86</sup> *Id.*

approve the proposed relocation only if, based upon all the relevant factors, the Company in the exercise of its good faith business judgment considers the proposed relocation to be in the best interests of Dealer and of Jaguar owners in the area in which [Dealer] is located.<sup>87</sup>

In dismissing the claim, the court stated that the agreement required the dealer to allege more than a mere failure by the franchisor to agree that the relocation request was in the best interests of the relevant parties, “but a failure, instead, to have done so ‘in the exercise of its good faith business judgment.’”<sup>88</sup> The court held that the franchisor was permitted, in making such a judgment, to take into account “relevant factors,” including whether the parties could successfully negotiate a new performance agreement, pursuant to which the dealer would undertake renovations and alterations to the facilities at the new location.<sup>89</sup> The court held that the complaint “simply fails to allege facts sufficient to state a plausible claim that [the manufacturer] did not exercise good faith business judgment in declining to permit the relocation.”<sup>90</sup> Accordingly, *Miller Auto Corp.* is an example of a contractual business judgment rule clause making it harder for franchisees to state a claim for breach of the covenant of good faith and fair dealing.

#### **IV. MODERN TRENDS**

##### **A. A Survey of Recent Decisions and Trials Involving Good Faith and Fair Dealing Shows The Duty Is Alive and Well**

Our survey revealed that the implied covenant of good faith and fair dealing is still very much alive and well and generally imposed in almost every state whether by statute or common law. Suits alleging violations of the breach are also still quite common—with such claims brought mostly by franchisees, but also, occasionally, by franchisors.<sup>91</sup> However, claims for breach of the implied covenant remain very hard to prove and whether plaintiffs can win on such claims remains unpredictable. Indeed, some cases are resolved in favor of the franchisor on motions to dismiss based on contrary express terms<sup>92</sup> or deficient pleadings.<sup>93</sup> Other cases are

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., *Get in Shape Franchise, Inc. v. TFL Fishers, LLC*, No. 15-12997-PBS, 2016 U.S. Dist. LEXIS 30132 (D. Mass. Mar. 9, 2016) (franchisor sued former franchisee alleging trademark infringement, breach of contract, breach of the covenants of good faith and fair dealing, unjust enrichment, unfair competition, and fraud.)

<sup>92</sup> See, e.g., *Bull Int'l, Inc. v. MTD Consumer Grp, Inc.*, No. 15-2438, 2016 U.S. App. LEXIS 11871 (3d Cir. June 29, 2016); *Kumon N. Am., Inc. v. Timban*, No. 13-4809 (RBK/KMW), 2014 U.S. Dist. LEXIS 84907, at \*23-24 (D.N.J. June 23, 2014); *AMTX Hotel Corp. v. Holiday Hospitality Franchising, Inc.*, No. 2:12-CV-035-J, 2012 U.S. Dist. LEXIS 79139, at \*10-11 (N.D. Tex. June 7, 2012).

<sup>93</sup> See, e.g., *Fabbro v. Drx Urgent Care, LLC*, 616 F. App'x 485, 488 (3d Cir. 2015) (failure to allege bad motive or intention); *UPS Store, Inc. v. Hagan*, 99 F. Supp. 3d 426, 436 (S.D.N.Y. 2015) (failed to adequately plead contractual obligations); *Red Roof Franchising, LLC v. AA Hospitality Northshore, LLC*, 877 F. Supp. 2d 140, 157 (D.N.J. 2012) (no allegation of breach or destruction of right to receive the fruits of the contract).

resolved on motions for summary judgment.<sup>94</sup> Some cases proceed beyond motions to dismiss<sup>95</sup> and even beyond summary judgment,<sup>96</sup> with most cases settling before trial.

Research located at least three actions that went to trial on claims of breach of the implied covenant, with the court ultimately ruling in favor of the franchisor in all three actions either because the franchisor's conduct was justified or because the franchisor's conduct was a breach of the implied covenant but was not the proximate cause of the franchisee's alleged damages.<sup>97</sup>

In yet a fourth action that went to trial, *Mercedes-Benz USA, LLC v. Carduco, Inc.*, a Texas court of appeals upheld a jury verdict awarding the franchisee damages of over \$15.3 million in benefit-of-the-bargain damages, over \$6.0 million in out-of-pocket damages, and \$115 million in punitive damages on claims of fraud and negligent misrepresentation.<sup>98</sup> Although the claims tried to the jury did not include a claim for breach of the good faith and fair dealing, a

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<sup>94</sup> See, e.g., *HLT Existing Franchise Holding LLC v. Worcester Hosp. Grp., LLC*, 609 F. App'x 669 (2d Cir. 2015); *7-Eleven, Inc. v. Sodhi*, No. 13-3715 (MAS) (JS), 2016 U.S. Dist. LEXIS 70794, at \*17-18 (D.N.J. May 31, 2016); *Steak N Shake Enters. v. Globex Co., LLC*, 110 F. Supp. 3d 1057, 1079-1080 (D. Colo. 2015); *Jack in the Box Inc. v. Mehta*, No. 5:13-cv-04444-EJD, 2016 U.S. Dist. LEXIS 80759, at \*28 (N.D. Cal. June 21, 2016); *Century 21 Real Estate LLC v. All Prof'l Realty, Inc.*, 600 F. App'x 502 (9th Cir. 2015); *Best Western Int'l, Inc. v. AV Inn Assocs. 1, LLC*, 464 F. App'x 568 (9th Cir. 2011); *Samica Enters. LLC v. Mail Boxes Etc., Inc.*, 460 F. App'x 664 (9th Cir. 2011); *Wynn v. Lukoil N. Am., LLC*, No. 15-166, 2015 U.S. Dist. LEXIS 114313, at \*14-15 (E.D. Pa. Aug. 28, 2015); *Century 21 Real Estate LLC v. All Professional Realty, Inc.*, 889 F. Supp. 2d 1198, 1236 (E.D. Cal. 2012); *HLT Existing Franchise Holding LLC v. Worcester Hospitality Group LLC*, 994 F. Supp. 2d 520, 538 (S.D.N.Y. 2014).

<sup>95</sup> See, e.g., *Tervon, LLC v. Jani-King of Cal., Inc.*, No. 14-cv-2648 BAS (JMA), 2015 U.S. Dist. LEXIS 91473, at \*10-11 (S.D. Cal. July 8, 2015) (action subsequently jointly dismissed); *Dallas & Lashmi, Inc. v. 7-Eleven, Inc.*, 112 F. Supp. 3d 1048, 1062 (C.D. Cal. 2015) (settled after denial of motion to dismiss); *Aston Martin Lagonda of N. Am., Inc. v. Lotus Motorsports, Inc.*, No. 13-cv-11213, 2014 U.S. Dist. LEXIS 35909, at \*22 (D. Mass. Mar. 18, 2014) (same); *Wojcik v. InterArch, Inc.*, No. 13-cv-1332, 2013 U.S. Dist. LEXIS 157853, at \*30-31 (N.D. Ill. Nov. 4, 2013) (franchisor's motion to dismiss granted in part and denied in part; declining to dismiss breach of good faith and fair dealing claim based on discretionary aspects of performance; subsequent settlement with bankruptcy estate);

<sup>96</sup> See, e.g., *Devayatan, LLC v. Travelodge Hotels, Inc.*, No. 6:14-cv-561-Orl-41TBS, 2016 U.S. Dist. LEXIS 83041, at \*27 (M.D. Fla. June 24, 2016) (set for bench trial); *Smith v. FCA US LLC*, No. CV-13-01732-PHX-NVW, 2016 U.S. Dist. LEXIS 38638 (D. Ariz. Mar. 24, 2016) (settled); *Micro Man Distribs., Inc. v. Louis Glunz Beer, Inc.*, No. 8:13-cv-00639-T-27MAP, 2014 U.S. Dist. LEXIS 108983, at \*27 (M.D. Fla. Aug. 7, 2014) (settled Day 2 of jury trial); *Juarez v. Jani-King of Cal., Inc.*, No. 09-3495 SC, 2012 U.S. Dist. LEXIS 7406, at \*26-28 (N.D. Cal. Jan. 23, 2012) (settled); *Dos Beaches, LLC v. Mail Boxes Etc., Inc.*, No. 09CV2401-LAB (RBB), 2012 U.S. Dist. LEXIS 73248 (S.D. Cal. May 23, 2012) (settled); *JJM Sunrise Auto., LLC v. Volkswagen Group of Am., Inc.*, 997 N.Y.S.2d 270, 46 Misc. 3d 755, 776-778 (N.Y. Sup. Ct. 2014) (still pending).

<sup>97</sup> *Dunkin' Donuts Franchising, LLC v. Claudia I, LLC*, No. 12-cv-2010, 2014 U.S. Dist. LEXIS 149347, at \*43 (E.D. Pa. Oct. 20, 2014) (two-day bench trial; adequate reasons not to grant relocation; franchisor is not the guarantor of franchisee's success); *Meltzer/Austin Rest. Corp. v. Benihana Nat'l Corp.*, Case No. A-11-CV-542-LY-AWA, 2014 U.S. Dist. LEXIS 85321 (W.D. Tex. June 24, 2014) (jury trial held; no liability on termination claim); *DRL, LLC v. Dunkin' Brands, Inc.*, 89 Mass. App. Ct. 1102, 43 N.E.3d 727 (Mass. App. Ct. 2016) (five-day bench trial; franchisor breached covenant by failing to tell plaintiffs of the previous unsuccessful franchisee at the location, but the breach was not the proximate cause of the plaintiff's financial losses).

<sup>98</sup> *Mercedes-Benz USA, LLC v. Carduco, Inc.*, No. 13-13-00296-CV, 2016 Tex. App. LEXIS 3254 (Tex. App. Mar. 31, 2016) (jury found franchisor and employees liable for fraud in the inducement and found employees liable for negligent misrepresentation.)

statutory duty of good faith for car dealership relationships played a key role in the appellate court's decision to affirm the judgment.<sup>99</sup>

In *Mercedes-Benz USA, LLC v. Carduco, Inc.*, the franchisee alleged that the franchisor and three of its employees fraudulently induced the franchisee to become a Mercedes-Benz dealer in Harlingen, Texas by allowing the franchisee to believe that its bargain included rights to move the dealership from Harlingen to McAllen and to have the exclusive right to sell Mercedes-Benz vehicles in the Rio Grande Valley.<sup>100</sup> The franchisor installed another dealer near McAllen, Texas and sought refuge in the contract's plain terms. The franchisor contended that the Dealer Agreement specifically stated that the franchisee would operate in Harlingen, could not move without the franchisor's written consent, and had no right to geographic exclusivity.<sup>101</sup> The franchisor contended that the Dealer Agreement gave it "absolute right to deny [the dealer] written permission to move to McAllen, and that [the dealer] could not rely on any [contrary] oral representations."<sup>102</sup> However, the appellate court relied on statutory protections specific to car dealerships to trump the contract's plain language. The appellate court recognized that automobile dealerships are heavily regulated in Texas and the Texas Occupations Code applied, including a provision that a franchisor owes a franchisee a duty of good faith and fair dealing that is actionable in tort.<sup>103</sup> Thus, the contract required the franchisor to act in a manner that would not have harmed its dealers' businesses.<sup>104</sup> The court would not read the contract as granting the franchisor the right to alter the franchisee's area of influence or to add new dealerships in a manner that would harm the franchisee.<sup>105</sup> Additionally, although the franchisor argued that the contract allowed it the absolute right to deny the franchisee permission to relocate, the Texas Occupations Code provided that the franchisor could not deny a relocation request unless it had proven, among other things, it had reasonable grounds to deny the relocation.<sup>106</sup> There was no evidence that reasonable grounds existed for the franchisor to deny the move *prior* to the franchisor's deal with another franchisee and the jury was free to infer that there were no reasonable grounds from the franchisor's conduct of allowing the franchisee to believe it would be relocating and secretly dealing with another franchisee.<sup>107</sup>

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<sup>99</sup> A review of the appellate briefing indicates that the issue of good faith and fair dealing was not briefed by the parties on appeal, suggesting that the court raised the statutory duty *sua sponte*.

<sup>100</sup> 2016 Tex. App. LEXIS 3254.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at \*55.

<sup>103</sup> *Id.* at \*42 citing TEX. OCC. CODE ANN. § 2301.478 (2016).

<sup>104</sup> *Id.* at \*52.

<sup>105</sup> *Id.* at \*52-53.

<sup>106</sup> *Id.* at \*55, citing TEX. OCC. CODE ANN. § 2301.464(a)(2) (2016).

<sup>107</sup> *Id.* at \*55.

**B. Cycle City, Ltd. v. Harley-Davidson Is Not Likely A Move Away From Honoring Express Contract Terms**

Express contract terms play a key role in determining the expectations of the parties and whether they have been met, but there has been no movement in the law to do away with the duties of good faith and fair dealing that overlie express contractual duties.

Commentators have suggested that a recent Hawaii case, *Cycle City, Ltd. v. Harley-Davidson*, may give franchisees a novel possibility of prevailing on statutory or contractual claims for violations of duties that are otherwise inconsistent with or contradict express contract language.<sup>108</sup> However, the circumstances of that case suggest that it could be readily distinguished and that it does not signal any death knell for protections provided by express contract terms generally.

*Cycle City*<sup>109</sup> involved a dispute between a distributor and a motorcycle manufacturer over the manufacturer's decision not to renew the parties' distributorship agreement. The distributor had served as Harley-Davidson's exclusive Hawaii distributor for forty-eight years, pursuant to several distributorship agreements that were renewed automatically.<sup>110</sup> The distributor also had a separate license agreement to manufacture certain goods with the Harley-Davidson trademark.<sup>111</sup> The distributor alleged that it had invested millions of dollars and countless hours towards the development of the Harley-Davidson brand and goodwill, the development of the Harley-Davidson dealer network, and the operation of the distributor's business in Hawaii.<sup>112</sup> The distributor contended that it had built an extensive customer base and dealer network, exponentially increased the manufacturer's brand awareness, goodwill, popularity and reputation, and caused sales to surge.<sup>113</sup> Although the distributor had enjoyed a 48-year relationship with Harley-Davidson, the manufacturer declined to renew the distribution and license agreements and they expired by their own terms.<sup>114</sup> Thereafter, Harley-Davidson continued to sell products to the distributor, but at allegedly "significantly and unreasonably" increased prices.<sup>115</sup>

Fighting the failure to renew, the complaint in *Cycle City* alleged claims for (1) violations of the Hawaii Motor Vehicle Industry Licensing Act, (2) declaratory relief, and (3) breach of the

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<sup>108</sup> Robert Zarco & Morgan Ben-David, *Cycle City, Ltd. v. Harley-Davidson Motor Company: Can Statutory Law or the Implied Covenant of Good Faith and Fair Dealing Override Express Provisions of a Contract?*, 35 Franchise L.J. 47 (Summer 2015) (providing a detailed analysis of the *Cycle City* case).

<sup>109</sup> See *Cycle City, Ltd. v. Harley-Davidson Motor Co.*, 81 F. Supp. 3d 993 (D. Haw. 2014); *Cycle City, Ltd. v. Harley-Davidson Motor Co.*, No. 14-00148 HG-RLP, 2015 U.S. Dist. LEXIS 68674 (D. Haw. May 26, 2015).

<sup>110</sup> *Cycle City*, 81 F. Supp. 3d at 998-999.

<sup>111</sup> *Id.* at 999.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1000.

distributorship agreement.<sup>116</sup> For its breach of distributorship agreement claim, the distributor contended that the manufacturer's failure to renew and price increases breached the implied covenant of good faith and fair dealing.<sup>117</sup> Arguing against plain contract terms, the distributor contended that (1) a term allowing automatic expiration without any notice or prior action was unlawful and (2) a term allowing Harley-Davidson, without prior notice, to change prices, discounts, charges and terms of purchase was breached maliciously, arbitrarily and capriciously with increased prices.<sup>118</sup> Harley-Davidson moved to dismiss contending that the distributorship agreement's express language provided for automatic termination and unilateral price changes. The court refused to find that Harley-Davidson could not be liable as a matter of law for failing to renew or for imposing increased prices on its distributor.

It is clear that the Hawaii Motor Vehicle Industry Licensing Act (HMVILA)<sup>119</sup>—which applies to entities and agreements relating to the sale and distribution of motor vehicles—was key to the court's decision regarding the failure to renew. The court expressly recognized that the parties' agreement stated that the HMVILA controls in the event of a conflict and held that the HMVILA modified the contract term that allowed for automatic termination by setting forth specific requirements for non-renewal.<sup>120</sup> This result is unsurprising given that HMVILA expressly rejects parties attempts to contract around the Act's protections, stating: "Any condition, stipulation, or provision in a franchise or distributorship agreement purporting to bind any person acquiring or holding any franchise or distributorship to waive compliance with any provision of this chapter or any other law of the State is void..."<sup>121</sup> The court confirmed that the distributor was "not attempting to use the implied duty of good faith 'to create new, independent rights or duties beyond those agreed to by the parties.'"<sup>122</sup>

With respect to the alleged breach of the duty of good faith and fair dealing regarding price increases, the court considered the distributorship agreement to provide Harley-Davidson with "limited discretion with regard to price changes"—providing that standard pricing shall apply reserving to the manufacturer the right to change prices.<sup>123</sup> Because the contract gave the manufacturer discretion, that discretion had to be exercised in good faith and the distributor adequately stated a claim for breach.<sup>124</sup> The court's analysis is fairly consistent with other court's—particularly on a motion to dismiss standard—that have layered the duty of good faith on top of discretionary contract terms.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1006.

<sup>118</sup> *Id.*

<sup>119</sup> HAW. REV. STAT. § 437-1 *et seq.* (2016).

<sup>120</sup> *Cycle City*, 81 F. Supp. 3d at 1013.

<sup>121</sup> HAW. REV. STAT. § 437-3.6 (2016).

<sup>122</sup> *Cycle City*, 81 F. Supp. 3d at 1013.

<sup>123</sup> *Id.* at 1014.

<sup>124</sup> *Id.*

Although the case settled before summary judgment motions and before any decision on the merits could be made,<sup>125</sup> *Cycle City* suggests a *potential* willingness of courts to elevate the implied duty of good faith and fair dealing even where that covenant would be otherwise inconsistent with or contradict express language in their contracts. But this willingness seems limited to situations where there is a specific basis to do so such as where contractual duties expressly trump contrary contract terms. Our survey of case law from the fifty states shows that in typical common law situations where there is no such statutory protections, courts continue to hold that the implied covenant cannot *contradict* express contract language, but it can be considered in how the express term is performed.

### **C. Novel Theories of Breach of the Implied Covenant**

Claimants also continue to push the envelope on the types of conduct that violate the duty of good faith and fair dealing. For example, a retail franchisee recently brought claims against a franchisor alleging breach of the covenant of good faith and fair dealing.<sup>126</sup> Because express contract terms authorized the franchisor's conduct, the court dismissed claims based on allegations that (1) the franchisor forced the franchisee to accept customer returns for merchandise purchased online; (2) the franchisor used the franchisee's advertising contributions to promote the franchisor's website, and thus deprive the franchisee of business; and (3) the franchisor forced the franchisee to purchase increasingly large percentages of products from one distributor and denied the ability to purchase products from other distributors.<sup>127</sup>

The court, however, allowed one claim to survive dismissal: a claim that the franchisor underpriced the franchisee's retail sales through its online store, which forced the franchisee to match online pricing and coupons and reduced profit margins.<sup>128</sup> The court held that "[s]uch competition could amount to an evasion of the spirit of the bargain, and potentially an abuse of [the franchisor's] discretion to set terms under the Franchise Agreement."<sup>129</sup>

In later addressing the franchisee's amended complaint, which sought to expand the alleged breaches of the duty of good faith and fair dealing, the court rejected a claim that the franchisor breached the duty by "ceasing franchisee development efforts" because no contract term required the franchisor to expand the system.<sup>130</sup> The court similarly rejected claims of breach based on developing a competing brand, imposing a vertical integration sales model, and failing to offer "new and/or improved" products until older products are sold because there was no applicable contract term.<sup>131</sup>

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<sup>125</sup> *Cycle City, Ltd. v. Harley-Davidson Motor Co.*, United States District Court District of Hawaii Case No. 14-00148 HG-RLP, Docket No. 84 (Feb. 4, 2016).

<sup>126</sup> *Newspaper, LLC v. Party City Corp.*, No. 13-1735 ADM/LIB, 2013 U.S. Dist. LEXIS 137396 (D. Minn. Sept. 25, 2013).

<sup>127</sup> *Id.* at \*24-26.

<sup>128</sup> *Id.* at \*29-30.

<sup>129</sup> *Id.* at \*30.

<sup>130</sup> *Newspaper, LLC v. Party City Corp.*, No. 13-1735 ADM/LIB, 2014 U.S. Dist. LEXIS 89321, at \*17 (D. Minn. July 1, 2014).

<sup>131</sup> *Id.* at \*11-17.



## **V. STATE-BY-STATE SURVEY**

In the Appendix, we have summarized the law of each state with respect to the duty of good faith and fair dealing. And, although no state has truly embraced the business judgment rule as envisioned by commentators, the survey seeks to note the intersection of that rule with franchising where applicable.

## **VI. CONCLUSION**

The covenant of good faith and fair dealing is still very much alive and it continues to govern franchising relationships nationwide. Franchisees and franchisor remain bound by duties of good faith and fair dealing so that each may enjoy the fruits of their agreement. Franchise cases in which violation of the implied covenant of good faith and fair dealing is claimed remain plentiful—albeit hard to prove. The business judgment rule has not yet set the standard for discretionary conduct of the parties to the franchise agreement, but recognition of a franchisor's business judgment can be found in various statutes and case law, with some deference accorded to it so long as the franchisor comports with the statute and the parties' agreement. As ever, express contract terms remain the best defense against claims of violation of the duty of good faith and fair dealing, with courts remaining unwilling to override the parties' own agreement.

## APPENDIX

### 50 State Survey on the Duty of Good Faith and Fair Dealing and the Business Judgment Rule in Franchising

#### ALABAMA

In Alabama, there is an implied obligation of good faith in every contract under common law. Additionally, this obligation is expressly recognized in Alabama's Uniform Commercial Code<sup>1</sup> for sales contracts, and for the case of automobile dealers, in the Alabama Motor Vehicle Franchise Act.<sup>2</sup> "Good faith" under the Alabama Motor Vehicle Franchise Act means: "Honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade as is defined and interpreted in paragraph (1)(b) of Section 7-2-103 [...]"<sup>3</sup> A franchisor must also use good faith under the Alabama Motor Vehicle Franchise Act when terminating a franchise agreement.<sup>4</sup> Section 7-2-103(1)(b) of Alabama's Uniform Commercial Code defines "good faith" in the case of a merchant as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."<sup>5</sup>

However, "the failure to act in good faith in the performance or enforcement of contracts does not state a claim for relief that may be granted in Alabama."<sup>6</sup> The obligation of good faith is "not actionable absent an identifiable breach in the performance of specific terms of the contract."<sup>7</sup> "A duty of good faith in connection with a contract is directive, not remedial."<sup>8</sup> Also, the fact that a duty is expressed in a contract as opposed to implied in a contract does not create a higher duty or makes the duty more actionable than if it just an implied duty.<sup>9</sup> In other words, a breach of the covenant generally is as actionable as a breach of an express term of the contract.

#### ALASKA

As a general rule, Alaska law recognizes an implied covenant of good faith and fair

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<sup>1</sup> ALA. CODE §7-2-103 (1975).

<sup>2</sup> ALA. CODE §8-20-4 (1975); ALA. CODE §7-2-103 (1975).

<sup>3</sup> ALA. CODE §8-20-3(8) (1975); *Smith's Sports Cycles, Inc. v. American Suzuki Motor Corp.*, 82 So.3d 682 (Ala. Oct. 14, 2011); *Smith's Sports Cycles Inc. v. American Suzuki Motor Corp.*, Case No. 1100400 Bus. Franchise Guide (CCH) ¶14,711, at 7 (Ala. 2011).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (holding that franchisor acted reasonably in terminating the franchise agreement based, in part, on the appearance of and the deteriorating condition of franchisee's dealership facility).

<sup>6</sup> *Gary G. Tanner v. Church's Fried Chicken, Inc.*, No. 89-1407, Bus. Franchise Guide (CCH) ¶9,873, at 2 (Ala. 1997); *Chandler v. Hunter*, 340 So.2d 818 (Ala. Civ. App. 1976) (citing *Government Street Lumber Co. v. AmSouth Bank*, 553 So.2d 68 (Ala. 1989)).

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* (citing *Government Street Lumber Co. v. AmSouth Bank*, 553 So.2d 68 (Ala. 1989)).

<sup>9</sup> *Id.* (citing *Broyles v. Brown Engineering Co.*, 275 Ala. 35, 151 So.2d 767 (1963)).

dealing in every contract.<sup>10</sup> The purpose of the covenant is to respect the parties' reasonable expectations under the agreement at hand.<sup>11</sup> The covenant has subjective and objective elements, both of which must be satisfied for the party in question to be considered in compliance with the covenant.<sup>12</sup> "The subjective element prohibits one party from acting to deprive the other of the benefit of the contract."<sup>13</sup> "The objective element requires each party to act 'in a manner that a reasonable person would regard as fair'."<sup>14</sup> There are no statutes imposing an obligation of good faith and fair dealing in the franchise relationship.

### **ARIZONA**

In Arizona, the covenant of good faith and fair dealing is implied in every contract.<sup>15</sup> Arizona courts allow a plaintiff to bring a tort action for breach of the implied covenant when a special relationship exists between the parties derived from other factors such as, public interest, adhesion, and fiduciary responsibility.<sup>16</sup> Arizona courts have not yet expressly decided whether a plaintiff may sue in tort for an alleged breach of the covenant of good faith derived from a distributor or franchise agreement<sup>17</sup>. Generally, a party claiming a breach of an implied covenant is limited to a contract action<sup>18</sup>.

### **ARKANSAS**

The Arkansas Franchise Practices Act establishes an obligation for every franchisor to deal with its franchisees in a commercially reasonable manner and in good faith.<sup>19</sup> In the Act, "good faith" is defined as "honesty in fact in the conduct or transaction concerned".<sup>20</sup> The Act

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<sup>10</sup> *Anchorage Chrysler Center, Inc., v. DaimlerChrysler Motors Corp.*, Case No. S-12702, Bus. Franchise Guide (CCH) ¶14,298, at 13 (Alaska 2009) (citing *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (citing *McConnell v. State, Dep't of Health & Social Serv., Div. of Med. Assistance*, 991 P.2d 178, 184 (Alaska 1999) (citing *Chijide v. Maniilaq Ass'n*, 972 P.2d 167, 172 (Alaska 1999)).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (quoting *Chijide*, 972 P.2d at 172).

<sup>15</sup> *Chocolates by Bernard, LLC, et al. v. Chocolaterie Bernard Callebaut Ltd., et al.*, No. 2:10-cv-01298 JWS, Bus. Franchise Guide (CCH) ¶15,119, at 4 (D. Ariz. 2013).

<sup>16</sup> *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, No. 90-16171, Bus. Franchise Guide (CCH) ¶10,002, at 5 (9th Cir. 1992) (stating that the wine distributor could not show a special relationship).

<sup>17</sup> *Id.* (citing *R.L.M. Dist. Co. v. W.A. Taylor, Inc.*, 723 F. Supp. 421, 428-29 (D. Ariz. 1988)).

<sup>18</sup> *Id.* (citing *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 813 P.2d 710, 720 (Ariz. 1991)).

<sup>19</sup> ARK. CODE ANN. § 4-72-206 (2010). See also *Southeastern Distributing Co., v. Miller Brewing Co.*, Case No. 05-969, Bus. Franchise Guide (CCH) ¶13,379 (Ark. 2006) (preventing the franchisee from obtaining offers for purchase of its franchise other than the franchisor's preferred buyer demonstrates the existence of a material issue of fact on whether franchisor's actions constituted a refusal to deal with the franchise in a commercially reasonable manner and in good faith). See also *Miller Brewing Company, v. Ed Roleson, Jr., Inc.*, Case No. 04-1163, Bus. Franchise Guide ¶13,239, (Ark. 2006) (holding that "a franchisor's attempt to force a franchisee out of business may constitute a failure to deal with a franchise in a commercially reasonable manner and in good faith").

<sup>20</sup> ARK. CODE ANN. § 4-72-202 (8) (2010).

also imposes a duty of good faith in the performance of the contract<sup>21</sup> To establish a breach of the obligation to perform in good faith under the contract, the plaintiff must demonstrate that the defendant was not honest in fact and that he or she acted with a bad motive <sup>22</sup> Case law in Arkansas analyzes and applies the Act to the particular facts presented in each case to determine if franchisors acted within the terms of the Act.

### **CALIFORNIA**

In California, the covenant of good faith and fair dealing is implied in every contract.<sup>23</sup> The purpose of the covenant is to “prevent one contracting party from unfairly frustrating the other party’s right to receive the benefits of the agreement actually made.”<sup>24</sup> The covenant is of special importance in situations where one party is granted a discretionary power affecting the rights of another.<sup>25</sup> Under California law, there are two important notions regarding the covenant of good faith and fair dealing.<sup>26</sup> First, the covenant of good faith can be breached even if there is no other provision of the agreement in question which was breached. <sup>27</sup> Second, “the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract”.<sup>28</sup> Although the terms of the covenant are informed by the terms of the agreement, the covenant cannot serve as an additional limitation or prohibition on or add duties to the contracting parties beyond what the contract states.<sup>29</sup>

There are five elements to a breach of the implied covenant of good faith and fair dealing: “(1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant’s performance occurred; (4) the defendant unfairly interfered with the plaintiff’s rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant’s conduct.”<sup>30</sup>

*First United, Inc. v. General Motors, LLC*, a recent case in California, explored the issue

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<sup>21</sup> ARK. CODE ANN. § 4-1-203 (2010).

<sup>22</sup> *Southern Implement Company v. Deere Co.*, 122 F.3d 503 (8th Cir. 1997) citing *JRT, Inc. v. TCBY Systems, Inc.*, 52 F.3d 734, 736 (8th Cir.1995) (stating that a jury could find that the franchisor had an obligation to investigate and prevent an unapproved vendor from operating an unauthorized facility).

<sup>23</sup> *Dos Beaches, LLC v. Mail Boxes Etc., Inc.*, No. 09CV2401-LAB (RBB), 2012 WL 1903905, at \*33 (S.D. Cal. 2012).

<sup>24</sup> *Id.* (citing *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 349, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (Cal. 2000)).

<sup>25</sup> *Id.* citing *Carma Developers, Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th 342, 372, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (Cal. 1992); *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 363, 66 Cal. Rptr. 2d 921 (Cal. Ct. App. 1997).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at \*33-34.

<sup>28</sup> *Id.* at \*34 (citing *Carma Developers, Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th 342, 372, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (Cal. 1992)).

<sup>29</sup> *Id.* (citing *Guz*, 24 Cal. 4th at 349).

<sup>30</sup> *Tervon, LLC v. Jani-King of California, Inc.*, Case No. 14-cv-2648 BAS (JMA), Bus. Franchise Guide (CCH) ¶15,589, at 4 (S.D. Cal. 2015) citing *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010)).

of the business judgment rule in connection with a dealership agreement.<sup>31</sup> The court in *First United* declined to use the business judgment rule as a way to give deference to the manufacturer with respect to its decisions involving the relocation of a dealership and the addition of new lines of products for such dealer. The court simply reaffirmed that the business judgment rule is more applicable to shareholders' derivative actions.<sup>32</sup>

### **COLORADO**

Under Colorado law, there is an implied duty of good faith and fair dealing in every contract.<sup>33</sup> "The purpose of the implied covenant is to effectuate the intent and reasonable expectations of the parties."<sup>34</sup> However, the implied covenant of good faith and fair dealing cannot be used to contradict the express terms of an agreement.<sup>35</sup> The courts in Colorado have expressly stated that the duty of good faith and fair dealing applies "when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time,"<sup>36</sup> which often arises in the franchisor-franchisee or manufacturer-dealer context.

### **CONNECTICUT**

As a general rule, under Connecticut law, every contract contains an implied duty of good faith and fair dealing.<sup>37</sup> The covenant ensures that neither party will "do anything that will injure the right of the other to receive the benefits of the agreement." As Connecticut courts have expressed, the covenant cannot be interpreted to contradict any of the express terms of a contract, unless they are contrary to public policy.<sup>38</sup> Courts have also established that in an action involving a breach of the covenant of good faith and fair dealing "what is in dispute is a party's discretionary application of a contract term."<sup>39</sup> "To constitute a breach of the implied covenant of good faith and fair dealing, the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the

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<sup>31</sup> No. D061563, 2013, Cal. App. Unpub LEXIS 2518 (Cal. Ct. App. Apr. 9, 2013).

<sup>32</sup> *Id.* at \*25-26.

<sup>33</sup> *Amoco Oil Co. v. Dale A. Ervin*, No. 94SC452, Bus. Franchise Guide ¶10,818, at 4 (Colo. 1995).

<sup>34</sup> *Steak N Shake, LLC v. Globex Company, LLC*, No. 13-cv-01751-RM-CBS, Bus. Franchise Guide (CCH) ¶15,550, at 33 (D. Colo. 2015).

<sup>35</sup> *Id.* citing *Genova v. Banner Health*, 734 F.3d 1095, 1103 (10th Cir. 2013) (quoting *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995)). See also *RHC, LLC v. Quizno's Franchising, LLC.*, No. 04CV985, Bus. Franchise Guide (CCH) ¶13,119 (D. Colo. 2005) (holding that imposing an implied duty of good faith on the franchisor towards its franchisees with respect to its acceptance of a site would modify the contract and would be opposite to the parties' intentions and their reasonable expectations under the contract).

<sup>36</sup> *Amoco Oil Co. v. Dale A. Ervin*, No. 94SC452, Bus. Franchise Guide (CCH) ¶10,818 (Colo. 1995) (holding that there was sufficient evidence at trial to support the jury's finding that, by duplicate charging, Amoco did not perform the contracts to the dealers' reasonable expectations, and, therefore breached the duty of good faith and fair dealing). See also *Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 876 (5th Cir.), *cert. denied*, 493 U.S. 978 (1989).

<sup>37</sup> *The Final Cut, LLC v. Sharkey*, No. X05CV085007365S, 2012 WL 310752, at \*15 (Conn. Super. Ct. Jan. 3, 2012) (citing *Gupta v. New Britain General Hospital*, 239 Conn. 574, 598, 687 A.2d 111 (1996)).

<sup>38</sup> *The Final Cut, LLC v. Sharkey*, 2012 W L 310752, at \*16 (citing *LaSalle National Bank v. Freshfield Meadows, LLC*, 69 Conn. App. 824, 834, 798 A.2d 445 (2002)).

<sup>39</sup> *Id.*

contract must have been taken in bad faith.”<sup>40</sup>

In *Miller Auto Corp. v. Jaguar Land Rover N. Am., LLC*,<sup>41</sup> a Connecticut federal court held that the manufacturer’s refusal to allow a dealer to relocate its dealership was merely a business decision subject to the manufacturer’s business judgment. The court in *Miller Auto Corp.* also found that in order to challenge the manufacturer’s decision, the dealer-plaintiff needed to show that the manufacturer acted in bad faith, which the plaintiff failed to do.<sup>42</sup>

### **DELAWARE**

The Delaware Franchise Security Law<sup>43</sup> regulates franchise and dealer relationships. Section 2552 of the Act, which is entitled “Unjust Termination of, or Failure to Renew, a Franchise,”<sup>44</sup> governs franchise terminations and failures to renew by declaring in subsection (a) that “[t]ermination of a franchise by a franchisor shall be deemed to be “unjust,” or to have been made “unjustly,” if such termination is without good cause or in bad faith.”<sup>45</sup> The Act deals similarly with failures to renew a franchise.<sup>46</sup> For example, a franchisor was found to have good cause to terminate a franchise when the franchisee failed to execute a renewal lease demanding additional rent for the possible setting up of environmental control equipment.<sup>47</sup>

### **FLORIDA**

Under Florida law, every contract includes an implied duty of good faith.<sup>48</sup> However, this duty does not give rise to an independent cause of action.<sup>49</sup> A plaintiff may state a claim for breach of the duty as part of a breach of contract claim, but the plaintiff must also allege the breach of an express contractual obligation.<sup>50</sup> The covenant of good faith and fair dealing attaches only to the performance of a specific contractual obligation; and therefore, where there is no duty, there is no duty to perform in good faith.<sup>51</sup> Franchisee associations in Florida may

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<sup>40</sup> *Id.* at 16-17 (citing *Renaissance Management Co., v. Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A. 2d 290 (2007)).

<sup>41</sup> *Miller Automobile Corp. v. Jaguar Land Rover North America, LLC*, No. 3:09-CV-1291 (EBB), 2011 WL 4430842, at \*\*8-9 (D. Conn. Sept. 16, 2011).

<sup>42</sup> *Id.* (citing *Buckman v. People Express, Inc.*, 205 Conn. 166, 171, 530 A.2d 596 (1987); *Stern v. General Electric Co.*, 924 F.2d 472 n.8 (2d Cir. 1991)).

<sup>43</sup> DEL. CODE ANN. tit. 6, § 2551 et seq. (1980); Bus. Franchise Guide (CCH) ¶¶4080.0 et seq.

<sup>44</sup> DEL. CODE ANN. tit. 6, § 2552 (1980).

<sup>45</sup> DEL. CODE ANN. tit. 6, § 2552(a) (1980).

<sup>46</sup> DEL. CODE ANN. tit. 6, § 2552(b) (1980).

<sup>47</sup> *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956 (Del. 1978).

<sup>48</sup> *Burger King Corp. v. Ashland Equities, Inc.*, 217 F.Supp. 2d 1266, 1278 (S.D. Fla. 2002).

<sup>49</sup> *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315-18 (11th Cir. 1999).

<sup>50</sup> *Id.*

<sup>51</sup> *Britt Green Trucking v. FedEx Nat’l, LTL, Inc.*, Case No. 8: 09—cv-445-T-33TBM, 2014 U.S. Dist. LEXIS 95418, at \*26 (M.D. Fla. July 14, 2014) (citing *Johnson Enters of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1314 (11th Cir. 1998)).

have standing to bring an action for breach of the implied duty.<sup>52</sup> Franchisors may consider business considerations in exercising their discretion.<sup>53</sup>

### **GEORGIA**

A duty of good faith and fair dealing is implied in all contracts under Georgia law pursuant to common law as well as Georgia's UCC statute, O.C.G.A., §11-1-203. However, under both the UCC and common law, the requirement of good faith and fair dealing is not an independent source of duties for the parties to a contract.<sup>54</sup> In order to state a claim for breach of the implied duty of good faith, a plaintiff must tie the alleged breach to a specific contractual provision.<sup>55</sup> The actual breach of an express term of a contract may preclude a claim for breach of the implied covenant of good faith.<sup>56</sup> When a contract gives a party sole and absolute discretion, no duty of good faith is implied in that decision.<sup>57</sup>

### **HAWAII**

Generally, Hawaii law does not recognize tort claims for breach of good faith or fair dealing outside the insurance context.<sup>58</sup> Under the Hawaii Motor Vehicle Industry Licensing Act ("HMVILA"), manufacturers have a good faith obligation to renew distributorship agreements.<sup>59</sup> Although the implied covenant of good faith and fair dealing has generally had limited

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<sup>52</sup> *Nat'l Franchisee Assoc. v. Burger King Corp.*, Case No. 09-23435-CIV, Bus. Franchise Guide (CCH) ¶14,387 (S.D. Fla. May 20, 2010)

<sup>53</sup> *Britt Green Trucking v. FedEx Nat'l, LTL, Inc.*, Case No. 8: 09—cv-445-T-33TBM, 2014 U.S. Dist. LEXIS 95418, at \*26 (M.D. Fla. July 14, 2014).

<sup>54</sup> *Am. Casual Dining, L.P. v. Moe's Southwest Grill, L.L.C.*, 426 F. Supp. 2d 1356, 1370 (N.D. Ga. April 5, 2006) (citing *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F. 2d 1414, 1429 (11th Cir. 1990)).

<sup>55</sup> *Id.*

<sup>56</sup> See *Ga. Operators Self-Insurers Fund v. PMA Mgmt, Corp.*, Case No. 1:12-cv-2578-JSA, 2015 U.S. Dist. LEXIS 31226, at \*67 n.22 (N.D. Ga. February 19, 2015) (A Georgia federal court denied plaintiff's breach of good faith claims because the Defendant breached the clear terms of the contract and it was therefore not necessary to view the contract "through the lens of the covenant of good faith.").

<sup>57</sup> *Faith Enters. Group. v. Avis Budget Group, Inc.*, Case No. 1:11-CV-3166-TWT, 2012 U.S. Dist. LEXIS 56181, at \*19 (N.D. Ga. April 20, 2012). "If an agreement by its express terms grants a party absolute or uncontrolled discretion in making a decision, then no duty of good faith is implied as to that decision." *Hunting Aircraft, Inc. v. Peachtree City Airport Auth*, 281 Ga. App. 450, 453, 636, S.E. 2d 139 (2006). In *Charles v. Leavitt*, 264 Ga. 160, 442 S.E.2d 241 (1994), the defendant argued that a divorce settlement agreement gave him absolute discretion, negating the duty of good faith. The agreement provided that the defendant would be the "sole judge" of his financial condition. The court held that the defendant's "evaluation of his financial condition was left to his unfettered control and discretion and need not have been exercised in good faith." *Id.*

Here, Faith alleges that the Defendants breached the implied duty of good faith and fair dealing by failing to provide sufficient rental cars. The Agreement provides that Avis Rent A Car "shall furnish [Faith] with the vehicles . . . which [Avis RentACar], in its sole discretion deems to be sufficient in quantity and class." (Compl., Ex. A., at 2) (emphasis added). As in Charles, the Agreement explicitly provides that Avis Rent A Car will have "sole discretion." See *Charles*, 264 Ga. At 160 (provision making defendant "sole judge" did not imply duty of good faith.) Thus, the Agreement does not imply a duty of good faith and fair dealing. For this reason, the Plaintiff's breach of the implied duty of good faith and fair dealing claim is dismissed.

<sup>58</sup> *Gold Refinery, LLC v. Aloha Island Gold, LLC*, 2012 U.S. Dist. LEXIS 18898, at \*22 (D. Haw. February 15, 2012).

<sup>59</sup> HAWAII REV. STAT. § 437-28(a)(21)(A), (C).

application under Hawaiian law outside of insurance contracts, the *Cycle City* case may have breathed new life into this cause of action as it applies to franchise cases that fall under the HMVILA. In *Cycle City*, a Hawaiian federal court held that a distributor sufficiently stated a claim against a manufacturer for violation of its good faith obligations to renew a distributorship agreement and for exercising its discretion in bad faith by “maliciously, arbitrarily, and capriciously increasing wholesale prices to force the distributor to relinquish its rights under the HMVILA and the distributorship agreement.”<sup>60</sup> Even where a party has reserved discretion regarding certain contractual rights, that party must still exercise such discretion in good faith.<sup>61</sup>

### IDAHO

In Idaho, the implied covenant of good faith and fair dealing is a covenant implied by law between parties to a contract.<sup>62</sup> However, Idaho courts will not inject new substantive terms or conditions to the contract under the guise of the implied covenant of good faith.<sup>63</sup> Provisions in operating manuals cannot be used to alter the clear terms of franchise agreements.<sup>64</sup> A party’s delay in executing the purchase of a franchise before it was forced to close its doors does not violate the implied covenant of good faith.<sup>65</sup>

### ILLINOIS

In Illinois the covenant of good faith is implied in every contract absent express disavowal.<sup>66</sup> The implied covenant also restricts franchisors’ discretion in terminating franchise agreements to those cases where good cause exists.<sup>67</sup> Discretion must be exercised “with proper motive.”<sup>68</sup> If a contracting party invokes a reasonable contract term dishonestly to achieve a purpose “contrary to that for which the contract had been made,” such a course would amount to bad faith.<sup>69</sup> Good cause has been defined as a failure to comply substantially with the

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<sup>60</sup> *Cycle City, Ltd. v. Harley-Davidson Motor Co.*, 81 F. Supp. 3d 993, 1013-1014 (D. Haw. 2014).

<sup>61</sup> *Id.* (citing *Damabeh v. 7-Eleven Inc.*, No. 12-CV-1739-LHK, 2013 U.S. Dist. LEXIS 66565, at \*6 n.4. (N.D. Cal. May 8, 2013).

<sup>62</sup> *Mote v. Quizno’s Franchising, LLC*, No. 03 Civ. 2829 (KMW) (GWG), 2007 U.S. Dist. LEXIS 15 (D. Idaho January 9, 2007) (citing *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738 (2000).

<sup>63</sup> *Mote v. Quizno’s Franchising, LLC* at \*21.

<sup>64</sup> *Id.* at 23.

<sup>65</sup> *Q Mgmt. v. Snake River Equip. Co.*, No. CV 05-322-E-MHW, 2008 U.S. Dist. LEXIS 5359, at \*16-22 (D. Idaho, January 24, 2008) (Although franchisee’s duty of good faith claim based on improper motive could have been foreclosed using the business judgment rule, the court simply ruled that requiring defendant to purchase the business prior to December 31, 2006 was simply contrary to the express terms of the settlement agreement.) *Q Mgmt. v. Snake River Equip Co.* was a dispute regarding a breach of a settlement agreement which involved a landlord and a franchisee. Landlord agreed to purchase the business as long as it was going concern by a certain date. Franchisee wanted them to purchase earlier because business was failing. Landlord refused to purchase before deadline and franchisee ended up closing and losing franchise agreement. The court ruled that the landlord had no duty to purchase before business closed and was only required to purchase business if it continued to be a “going concern.”

<sup>66</sup> *Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc.*, Case No. 99-3927, Bus. Franchise Guide (CCH) ¶11,930, at 7 (7th Cir. 2000).

<sup>67</sup> *Dayan v. McDonald’s Corp.*, 466 N.E.2d 958, 973 (Ill. App. Ct. 1984).

<sup>68</sup> See *Interim Health Care* at 7 (citing *Dayan*).



obligations under the agreement.<sup>70</sup> A party may pursue a claim for breach of the implied covenant of good faith as a separate cause of action and be awarded damages for that breach.<sup>71</sup>

## INDIANA

In Indiana, the implied duty of good faith applies only to employment agreements, insurance contracts, contracts under the UCC, and contracts that are ambiguous as to the application of the covenants.<sup>72</sup> However, the UCC's good faith provision may not be used to override explicit contract terms.<sup>73</sup> There is some case law to support the argument that a covenant of good faith and fair dealing under Indiana's UCC §26-1-1-203 applies to a franchise agreement that involves both goods and services.<sup>74</sup> However, the UCC's good faith provision may not be used to override explicit contract terms.<sup>75</sup> In weighing "bad faith" in the context of the UCC, courts may consider a defendant's discretion to use its best business judgment.<sup>76</sup> The "absence of justification" "is established only if the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another."<sup>77</sup>

## IOWA

Iowa recognizes an implied duty of good faith and fair dealing in all contracts.<sup>78</sup> But, the implied covenant does not "give rise to new substantive terms that do not otherwise exist in the contract."<sup>79</sup> Courts are reluctant to find a breach of the implied covenant of good faith against a

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<sup>69</sup> *Interim Health Care* at 7 (citing *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273 (7th Cir. 1992))

<sup>70</sup> *Id.*

<sup>71</sup> *7-Eleven, Inc. fna The Southland Corporation v. K. Musley Dar*, Case No. 1-99-2788, Bus. Franchise Guide (CCH) ¶12, 057 (Ill. App. Ct. 2001).

<sup>72</sup> *Arcangelo, Inc. v. DirectBuy, Inc.*, No. 3:13CV104-PPS/CAN, 2013 U.S. Dist. LEXIS 164941 (N.D. Ind. November 20, 2013).

<sup>73</sup> *Mfr. Direct LLC*, 2006 U.S. Dist. LEXIS 55433, at \*12 (citing *Frank Lyon Co. v. Maytag Corp.*, 715 F. Supp. 922 (E.D. Ark. 1989) (applying Indiana law) (holding written distributor sales agreement was not subject to the implied duty of good faith under common law or the U.C.C. because the clear language of the contract provided that the agreement could be terminated at any time after notice)).

<sup>74</sup> See *id.* at \*9 (citing *Sally Beauty Co., Inc. v. Nexxus Prod. Co., Inc.*, 801 F.2d 1001, 1005-06 (7th Cir. 1986) (holding the UCC applies to distributorship agreements); *Corenswet Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129 (5th Cir. 1979) ("Although most distributorship agreements, like franchise agreements, are more than sales contracts, the courts have not hesitated to apply the Uniform Commercial Code to cases involving such agreements.")).

<sup>75</sup> *Id.* at \*12 (citing *Frank Lyon Co. v. Maytag Corp.*, 715 F. Supp. 922 (E.D. Ark. 1989) (applying Indiana law) (holding written distributor sales agreement was not subject to the implied duty of good faith under common law or the U.C.C. because the clear language of the contract provided that the agreement could be terminated at any time after notice)).

<sup>76</sup> *United Consumers Club, Inc. v. Bledsoe*, 441 F. Supp. 2d 967, 981-982 (N.D. Ind. 2006).

<sup>77</sup> *Id.* at 981 (citing *Bilimoria Computer Sys. LLC v. Am. Online, Inc.*, 829 N.E. 2d 150, 156-157 (Ind. Ct. App. 2005)).

<sup>78</sup> See *Urbandale Best, LLC v. R & R Realty Group, LLC*, 2015 Iowa App. LEXIS 158, at \*66 (Iowa Ct. App. February 25, 2015) (citing *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 34 (Iowa 2012)).

<sup>79</sup> *Id.*

party for filing a lawsuit to enforce its interpretation of a contract.<sup>80</sup> However, under Iowa Code §322A.12, franchisors are required to approve an assignment of a dealership unless the new franchisee does not obtain a license, notwithstanding any contract term in the franchise agreement.<sup>81</sup> Franchisors must also have good cause to terminate a franchise agreement.<sup>82</sup> A franchisor's action "passes muster so long as it is 'rationally based' upon a legitimate business objective."<sup>83</sup> The Iowa Supreme Court has suggested that the business judgment rule is not applicable in a good faith analysis under Iowa Code §322A.<sup>84</sup>

### **KANSAS**

Under Kansas law, a duty of good faith and fair dealing is implied in every contract.<sup>85</sup> This duty requires the parties to an agreement to refrain from intentionally and purposely doing anything to prevent the other party from carrying out its part of the agreement, or doing anything that will have the same effect of destroying or injuring the right of the other party to receive the fruits of the contract.<sup>86</sup> The covenant cannot be used to create new contract terms or enforce oral representations barred by the statute of frauds or a merger clause.<sup>87</sup>

### **KENTUCKY**

In Kentucky, there is an implied covenant of good faith and fair dealing in every contract; indeed, it may be said that contracts impose on the parties thereto a duty to do everything necessary to carry them out.<sup>88</sup> A party can violate the implied covenant of good faith and fair dealing even without breaching any specific provisions of a contract.<sup>89</sup> In order to show a violation of the implied covenant of good faith and fair dealing, the party asserting the violation must "provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties."<sup>90</sup> In the franchise context, a Kentucky court has ruled that a franchisee "cannot use the implied covenant of good faith and fair dealing to second-guess [a] legitimate business decision."<sup>91</sup>

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<sup>80</sup> See *id.* at \*67-68.

<sup>81</sup> *Midwest Auto. III, LLC v. Iowa DOT*, 646 N.W.2d 417, 423 (Iowa 2002).

<sup>82</sup> *Id.* at 424 (citing IOWA CODE § 322A.2(1) (1999)).

<sup>83</sup> *Id.* at 426.

<sup>84</sup> See *id.* at 426-428.

<sup>85</sup> *Lone Star Steakhouse & Saloon, Inc v. Liberty Mutual Ins. Group*, 343 F. Supp. 2d 989 (D. Kan. 2004).

<sup>86</sup> *Id.*

<sup>87</sup> See *Terra Venture, Inc. v. JDN Real Estate*, 340 F. Supp. 2d 1189, 1201 (D. Kan. 2004).

<sup>88</sup> *Ranier v. Mount Sterling Nat. Bank*, 812 S.W.2d 154,156 (Ky. 1991).

<sup>89</sup> *Mountain Motorsports Paving & Constr. LLC v. Yamaha Motor Corp., U.S.A.*, No. 14-76-ART, 2014 U.S. Dist. LEXIS 149433, at \*12 (E.D. Ky. Oct. 20, 2014).

<sup>90</sup> *James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC*, Civil Action No. 5: 11-374-DCR, 2014 U.S. Dist. LEXIS 68981, at \*13-14 (E.D. Ky. May 20, 2014) (quoting *O'Kentucky Rose B. Ltd. P'ship v. Burns*, 147 F. App'x. 451, 458 (6th Cir. 2005)).

<sup>91</sup> *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 643 (Ky. Ct. App. 2003).

## LOUISIANA

As a general rule, Louisiana recognizes an implied covenant of good faith and fair dealing in every contract.<sup>92</sup> However, “the implied obligation to execute a contract in good faith usually modifies the express terms of the contract and should not be used to override or contradict them.”<sup>93</sup> Parties complaining of a violation of good faith and fair dealing must produce evidence of bad faith or ill motive on the part of defendant<sup>94</sup> as “[a] mere failure to fulfill an obligation, without a showing of intent or ill will, does not constitute a breach of good faith.”<sup>95</sup> The Louisiana Civil Code requires contracts to be performed in good faith.<sup>96</sup> The Code does not expressly define “good faith” but does describe “bad faith” as “an intentional and malicious failure to perform.”<sup>97</sup> Bad faith requires finding “more than mere bad judgment or negligence, it implies the conscious doing of a wrong for dishonest or morally questionable motives.”<sup>98</sup> Louisiana courts analyze the performance of a contract in terms of “bad faith” and “good faith,” with no middle ground.<sup>99</sup> If the actions of a party are permitted under the express terms of the agreement, “that party cannot as a matter of law be acting in breach of the implied covenant of good faith and fair dealing.”<sup>100</sup>

## MAINE

Maine common law does not recognize the implied covenant of good faith and fair dealing in contracts, except in special fiduciary circumstances such as insurance contracts.<sup>101</sup>

## MARYLAND

Maryland law recognizes an implied covenant of good faith and fair dealing in all negotiated contracts.<sup>102</sup> However, Maryland does not recognize a separate cause of action for the breach of implied duty of good faith and fair dealing.<sup>103</sup> This duty simply prohibits one party

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<sup>92</sup> *Brill v. Catfish Shaks of America*, 727 F. Supp. 1035, 1039 (E.D. La.1989); *Bonanza Int'l, Inc. v. Restaurant Management Consultants, Inc.*, 625 F. Supp. 1431, 1445 (E.D. La.1986).

<sup>93</sup> *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 485 (5th Cir.1984); see also *Clark v. Am.'s Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).

<sup>94</sup> *Clark v. Am.'s Favorite Chicken Co.*, 110 F.3d at 298.

<sup>95</sup> *Brill v. Catfish Shaks of America*, 727 F. Supp. 1035, 1041 (E.D. La. 1989).

<sup>96</sup> LA. CIV. CODE art.1983.

<sup>97</sup> *Id.* at Comment (b).

<sup>98</sup> *MKR Servs., L.L.C. v. Dean Hart Constr., L.L.C.*, 16 So. 3d 562, 566 (La. App. July 8, 2009).

<sup>99</sup> *Woman's Hosp. Found. v. Nat'l Pub. Fin. Guar. Corp.*, No. 11-cv-00014, 2012 WL 956622, at \*4 (M.D. La. Mar. 20, 2012).

<sup>100</sup> *Id.* at \*2.

<sup>101</sup> See generally *Me. Farms Venison, Inc. v. Peerless Ins. Co.*, 2004 Me. 80 (Me. 2004); *Chartier v. Farm Family Life Ins. Co.*, 2015 Me. 29 (Me. 2015).

<sup>102</sup> *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. Pshp.*, 213 F.3d 175, 182-83 (4th Cir. 2000); *Julian v. Christopher*, 320 Md. 1, 575 A.2d 735, 739 (Md. 1990); *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 200 A.2d 166, 173-74 (Md. 1964).

<sup>103</sup> *CapitalSource Fin. LLC v. Pittsfield Weaving Co.*, 571 F. Supp. 2d 668, 673 (D. Md. 2006).

to a contract from acting in such a manner as to prevent the other party from performing its obligations under the contract.<sup>104</sup> However, it does not require affirmative action not mandated by the contract,<sup>105</sup> even if inclusion of the obligation is thought to be logical and wise.<sup>106</sup> An implied duty is simply a recognition of conditions inherent in expressed promises.<sup>107</sup> Stated otherwise, under the covenant of good faith and fair dealing, a party impliedly promises to refrain from doing anything that will have the effect of injuring or frustrating the right of the other party to receive the fruits of the contract between them.<sup>108</sup> Under limited circumstances, such as in a profit sharing agreement, the covenant of good faith and fair dealing as recognized in Maryland includes an implied duty to refrain from destructive competition.<sup>109</sup>

## **MASSACHUSETTS**

Massachusetts law implies in every contract a covenant of good faith and fair dealing between the parties.<sup>110</sup> It requires that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.<sup>111</sup> Where one party has the right to exercise discretion under the contract, it is bad faith to use that discretion to recapture opportunities foregone on contracting as determined by the other party's reasonable expectations.<sup>112</sup> When the claim of bad faith or unfairness involves a contract termination, a court should look at the consequences of the termination to determine if it resulted in a deprivation of earnings, loss of good will, or loss of investment, and if the plaintiff was subject to unfair dealing.<sup>113</sup> A mere finding that there was no good reason for the termination in the absence of other indicia of lack of honesty, taking unfair advantage or bad faith, is insufficient to support a claim.<sup>114</sup> The absence of good cause is not the equivalent of an absence of good faith.<sup>115</sup> Although franchise agreements are not generally subject to the UCC in Massachusetts, the Massachusetts Supreme Court has relied on the UCC to analyze the franchisor's obligations when it determined that the defendant's termination of its franchise agreement with the plaintiff was lawful because the termination provision was reasonable, and

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<sup>104</sup> *Id.*

<sup>105</sup> *Parker v. Columbia Bank*, 91 Md. App. 346, 604 A.2d 521, 531 (Md. Ct. Spec. App. 1992).

<sup>106</sup> *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. Pshp.*, 213 F.3d 175, 184 (4th Cir. 2000).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 200 A.2d 166, 173-74 (Md. 1964); *Automatic Laundry Service, Inc. v. Demas*, 216 Md. 544, 141 A.2d 497, 501 (Md. 1958). (The duty to refrain from destructive competition obligates each party "not to render valueless his contract with [the other party] by permitting . . . destructive competition.")

<sup>110</sup> *Anthony's Pier Four, Inc. v. HBC Associates*, 583 N.E.2d 806 (1991).

<sup>111</sup> *Id.*

<sup>112</sup> *Piantes v. Pepperidge Farm*, 875 F. Supp. 929, 937-38 (D. Mass. 1995).

<sup>113</sup> *Gram v. Liberty Mutual Insurance Co.*, 429 N.E.2d 21 (1981).

<sup>114</sup> *Id.*

<sup>115</sup> *Piantes v. Pepperidge Farm*, 875 F. Supp. 929, 937-38 (D. Mass. 1995).

the defendant did not engage in unfair, deceptive, or bad faith conduct in terminating the agreement.<sup>116</sup>

### **MICHIGAN**

In Michigan, “the covenant of good faith and fair dealing is an implied promise in every contract.”<sup>117</sup> The covenant is a promise that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”<sup>118</sup> However, the implied covenant of good faith and fair dealing does not override the express terms of a contract.<sup>119</sup> And for this reason, Michigan law does not recognize an independent action for an alleged breach of a contract’s implied covenant of good faith and fair dealing.<sup>120</sup> Nevertheless, in addition to reviewing whether a party’s actions have improperly destroyed or injured the right of the other to receive the fruits of the contract, Michigan courts will recognize an action for breach of an implied covenant of good faith and fair dealing “where a party makes the manner of its performance a matter of its own discretion.”<sup>121</sup> In other words, a breach of contract may be found “where bad faith or unfair dealing exists in the performance of a contractual term even when the manner of performance was discretionary.”<sup>122</sup>

### **MINNESOTA**

Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not 'unjustifiably hinder' the other party's performance of the contract or withhold its benefits.<sup>123</sup> The implied covenant of good faith and fair dealing governs the parties' performance and prohibits a party from failing to perform for the purpose of thwarting the other party's rights under the contract.<sup>124</sup> When one party breaches the duty of good faith and fair dealing and unjustifiably hinders the other party's performance, the other party's performance under the contract is excused.<sup>125</sup> The implied duty of good faith and fair dealing extends only “to actions within the scope of the underlying enforceable contract.”<sup>126</sup>

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<sup>116</sup> *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370 (1980).

<sup>117</sup> *People v. Vanreyendam*, No. 266511, 2007 WL 1201832, at \*2 (Mich. App. Apr. 24, 2007) (quoting *Hammond v. United of Oakland, Inc.*, 483 N.W.2d 652, 655 (Mich. App. 2002)).

<sup>118</sup> *Hammond v. United of Oakland, Inc.*, 483 N.W.2d at 655 (citing *Dumas v. Auto. Club Ins. Ass'n*, 473 N.W.2d 652, 665 n.3 (Mich. App. 1991) (Boyle, J., concurring)).

<sup>119</sup> *Clark Bros. Sales Co. v. Dana Corp.*, 77 F. Supp. 2d 837, 852 (E.D. Mich. 1999).

<sup>120</sup> *Ulrich v. Fed. Land Bank of St. Paul*, 480 N.W.2d 910, 911 (Mich. Ct. App. 1991).

<sup>121</sup> *Verderese v. Q Lube, Inc.*, No. 199084, 1998 WL 1991608, at \*4 (Mich. Ct. App. May 26, 1998).

<sup>122</sup> *Liggett Restaurant Group, Inc. v. City of Pontiac*, No. 256571, 2005 WL 3179679, at \*1 (Mich. App. Nov. 29, 2005).

<sup>123</sup> *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995).

<sup>124</sup> *Coddon v. Youngkrantz*, 562 N.W.2d 39, 43 (Minn. Ct. App. 1997) (holding that since the implied covenant of good faith and fair dealing is part of contract, a vendor of property in contract for deed cannot refuse payments in an attempt to create a default).

<sup>125</sup> *Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984).

<sup>126</sup> *Cox v. Mortg. Elec. Registration Sys., Inc.*, 685 F.3d 663, 670 (8th Cir. 2012).

However, plaintiffs “need not first establish an express breach of contract claim” in order to establish breach of the implied duty, as “a claim for breach of an implied covenant of good faith and fair dealing implicitly assumes that the parties did not expressly articulate the covenant allegedly breached.”

### **MISSISSIPPI**

All contracts contain an implied covenant of good faith and fair dealing in performance and enforcement.<sup>127</sup> Good faith has been described as “faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party,” while bad faith has been characterized as “more than bad judgment or negligence. Rather, bad faith implies some conscious wrongdoing because of dishonest purpose or moral obliquity.”<sup>128</sup> Stated otherwise, a breach of the covenant is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness.<sup>129</sup> A mere exercise of a contractual right will not be found to breach the implied covenant of good faith and fair dealing.<sup>130</sup> “[T]o have a breach of the duty of implied good faith and fair dealing there must first be an existing contract and then a breach of that contract.”<sup>131</sup> The implied covenant of good faith and fair dealing “runs, however, with respect to the ‘performance and enforcement’ of the contract, not to its negotiation or formation.

### **MISSOURI**

Under Missouri law, “There is a promise implied in every contract not to prevent or hinder performance by the other party and a breach of this implied promise constitutes a breach of contract.”<sup>132</sup> The duty of good faith and fair dealing under Missouri law “prevents one party to the contract from exercising a judgment conferred by the express terms of [the] agreement in such a manner as to evade the spirit of the transaction or so as to deny the other party the expected benefit of the contract.”<sup>133</sup> “[T]he implied duty of one party to cooperate with the other party to a contract to enable performance and achievement of expected benefits is an enforceable right.”<sup>134</sup> Although the implied duty of good faith and fair dealing is “incapable of altering the express terms of [an] agreement” and “cannot give rise to new obligations not otherwise contained in a contract’s express terms,”<sup>135</sup> a proper claim for breach of the duty of

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<sup>127</sup> *Morris v. Macione*, 546 So. 2d 969, 971 (Miss.1989).

<sup>128</sup> *Limbirt v. Miss. Univ. for Women Alumnae Assoc., Inc.*, 998 So. 2d 993, 998 (Miss. 2008).

<sup>129</sup> *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992)(citing RESTATEMENT (SECOND) OF CONTRACTS § 205, 100 (1979)).

<sup>130</sup> See *Lambert v. Baptist Mem’l Hosp.-N. Miss., Inc.*, 67 So. 3d 799, 804 (Miss. Ct. App. 2011).

<sup>131</sup> *Daniels v. Parker & Assocs., Inc.*, 99 So. 3d 797, 801 (Miss. Ct. App. 2012).

<sup>132</sup> *Housley v. Mericle*, 57 S.W.3d 360, 363 (Mo. Ct. App. 2001).

<sup>133</sup> *Amecks, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 240, 243 (Mo. Ct. App. 1996).

<sup>134</sup> *Stone Motor Co. v. General Motors Corp.*, 293 F.3d 456, 467 (8th Cir. 2002).

<sup>135</sup> *Id.* at 466.

good faith and fair dealing is a contractual claim.<sup>136</sup> In order to succeed on a breach of contract, a plaintiff must show the making of a valid enforceable contract between the plaintiff and defendant, the right of the plaintiff and obligation of the defendant under the contract, a violation by the defendant, and damages resulting to the plaintiff from the breach.<sup>137</sup> "The party claiming breach of the implied covenant of good faith must present substantial evidence that it has been violated."<sup>138</sup>

### **MONTANA**

By both statute and common law, Montana imposes an implied covenant of good faith and fair dealing for contracts.<sup>139</sup> When "one party acts arbitrarily, capriciously or unreasonably, that conduct exceeds the justifiable expectations of the second party."<sup>140</sup> In general, intentional, not negligent, conduct is required to prove a breach.<sup>141</sup> Parties may be able to contract around the covenant because an implication should not be made contrary to express terms.<sup>142</sup> However, even where the franchisor has the "exclusive right" to determine, for example, site location, the reasonableness of the franchisor's conduct will still be evaluated in light of the reasonable expectations of the parties to the franchise agreement.<sup>143</sup>

### **NEBRASKA**

Nebraska has codified the covenant of good faith and fair dealing for contracts under the UCC and specifically for franchise relationships among car manufacturers, distributors, and dealers.<sup>144</sup> By common law, it implies the covenant to the express terms "in every contract," so that no party injures the right to receive the contract's benefit.<sup>145</sup> The covenant is measured by the parties' justifiable expectations such that parties may not act "arbitrarily, capriciously, or unreasonably."<sup>146</sup> A party violates the implied covenant "only when a party violates, nullifies, or significantly impairs any benefit of the contract."<sup>147</sup> The scope of conduct prohibited is

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<sup>136</sup> *Hardee's Food Sys., Inc. v. Hallbeck*, 776 F. Supp. 2d 949, 952 (E.D. Mo. 2011)(citing *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 413 (Mo. Ct. App. 2000)).

<sup>137</sup> *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 412 (Mo. Ct. App. 2000)).

<sup>138</sup> *Schell v. LifeMark Hosps. of Missouri*, 92 S.W.3d 222, 230 (Mo. Ct. App. 2002).

<sup>139</sup> MONT. CODE ANN. § 28-1-211 (LexisNexis1987); *Phelps v. Frampton*, 339 Mont. 330, 170 P.3d 474, 482 (Mont. 2007).

<sup>140</sup> *Nicholson v. United Pac. Ins. Co.*, 219 Mont. 32, 710 P.2d 1342 1348 (Mont. 1985).

<sup>141</sup> *Heltborg v. Modern Mach.*, 244 Mont. 24, 795 P.2d 954, 962 (Mont. 1990).

<sup>142</sup> *Farris v. Hutchinson*, 254 Mont. 334, 838 P.2d 374, 377 (Mont. 1992).

<sup>143</sup> *Dunfee v. Baskin-Robbins Inc.*, 221 Mont. 447, 720 P.2d 1148 (Mont. 1986) (franchisor acted unreasonably in failing to consider franchisee's relocation request after changed conditions forced store closure).

<sup>144</sup> NEB. REV. ST. ANN. U.C.C. § 1-304 (West 2006); NEB. REV. ST. ANN. § 60-1401.01 (West 2010).

<sup>145</sup> *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 655 N.W.2d 390, 400 (Neb. 2003).

<sup>146</sup> *Coffey v. Planet Group, Inc.*, 287 Neb. 834, 845 N.W.2d 255, 263 (Neb. 2014).

<sup>147</sup> *RSUI Indem. Co. v. Bacon*, 282 Neb. 436, 810 N.W.2d 666, 674 (Neb. 2011).

circumscribed by the purposes and express terms of the contract.<sup>148</sup>

### **NEVADA**

The implied covenant of good faith and fair dealing “exists in *all* contracts” in Nevada by common law.<sup>149</sup> It “prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other.”<sup>150</sup> Liability can attach where there is literal compliance with contract terms, but one party deliberately contravenes the intention and spirit of the contract.<sup>151</sup> A party fails to act in good faith when it performs “a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied.”<sup>152</sup>

Nevada allows tort actions for a breach of the implied covenant where relationships require “a special element of reliance or fiduciary duty.”<sup>153</sup> Nevada considers franchise relationships to be among such relationships.<sup>154</sup> “[O]rdinary contract damages” are considered inadequate to make the party in the “superior or entrusted position,” such as the franchiser, “account adequately for grievous and perfidious misconduct” and they “do not make the aggrieved, weaker, ‘trusting’ party ‘whole.’”<sup>155</sup> Although Nevada permits a tort action for breach of the covenant in the franchise context, no case has yet addressed such a claim.

### **NEW HAMPSHIRE**

New Hampshire has codified the implied covenant of good faith and fair dealing for contracts under the UCC.<sup>156</sup> Also, by common law, every agreement includes “an implied covenant that the parties will act in good faith and fairly with one another.”<sup>157</sup> In New Hampshire, there is not merely one rule of implied good-faith duty, but a series of doctrines, each of which serves different functions.<sup>158</sup> The various implied good-faith obligations fall into three general categories: (1) contract formation; (2) termination of at-will employment agreements; and (3) limitation of discretion in contractual performance. The third category is comparatively narrow, although it functions broadly “to prohibit behavior inconsistent with the parties’ agreed-upon common purpose and justified expectations as well as with common standards of decency, fairness and reasonableness.”<sup>159</sup>

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<sup>148</sup> *Coffey*, 845 N.W.2d at 263; *Spanish Oaks*, 655 N.W.2d at 400.

<sup>149</sup> *A.C. Shaw Constr. v. Washoe Cty.*, 105 Nev. 913, 784 P.2d 9, 10 (Nev. 1989).

<sup>150</sup> *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420, 427 (Nev. 2007).

<sup>151</sup> *Hilton Hotels Corp. v. Butch Lewis Prods.*, 107 Nev. 226, 808 P.2d 919, 922-23 (Nev. 1991).

<sup>152</sup> *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335, 338 (Nev. 1995).

<sup>153</sup> *Great Am. Ins. Co. v. General Builders, Inc.*, 113 Nev. 346, 934 P.2d 257, 263 (Nev. 1997).

<sup>154</sup> *Insurance Co. of The West v. Gibson Title Co.*, 122 Nev. 455, 134 P.3d 698, 702 (Nev. 2006).

<sup>155</sup> *K Mart Corp. v. Ponsock*, 103 Nev. 39, 732 P.2d 1364, 1371 (Nev. 1987) (employer liable for bad faith tort when it dismissed employee to avoid paying retirement benefits).

<sup>156</sup> See, e.g., N.H. REV. STAT. ANN. § 382-A:1-304 (LexisNexis 2007).

<sup>157</sup> *Livingston v. 18 Mile Point Drive, Ltd.*, 158 N.H. 619, 972 A.2d 1001, 1005 (N.H. 2009).

<sup>158</sup> *Id.* at 1006.

<sup>159</sup> *Birch Broad., Inc. v. Capitol Broad. Corp., Inc.*, 161 N.H. 192, 13 A.3d 224, 230 (N.H. 2010).



## NEW JERSEY

Every contract in New Jersey contains an implied covenant of good faith and fair dealing.<sup>160</sup> “[N]either party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”<sup>161</sup> In order to prevail on a claim for a breach of the duty of good faith, a party must prove “bad motive or intention” by the opposing party.<sup>162</sup> Although New Jersey does recognize a cause of action for breaching the covenant, the covenant cannot be used to supersede the express terms of a valid contract.<sup>163</sup> The party claiming a breach must provide evidence sufficient to support a conclusion that the other party has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.<sup>164</sup>

New Jersey has adopted laws pertaining to termination and nonrenewal of franchises in all businesses. The New Jersey Franchise Practices Act regulates both the ongoing franchise relationship and its termination.<sup>165</sup> A franchise agreement can only be terminated if the franchisor had “good cause” consisting of franchisee’s failure substantially to perform its contractual obligations. Otherwise, a franchisor is “powerless” to terminate a franchisee, no matter what good business reasons it may have.<sup>166</sup> Accordingly, “a franchisor acting in good faith for a bona fide business reason who terminates or fails to renew a franchise ‘for any reason other than the franchisee’s substantial breach of its obligations has violated’ the Franchise Practices Act.”<sup>167</sup>

## NEW MEXICO

New Mexico has codified the duty of good faith in the franchise context with the New Mexico Franchise Act.<sup>168</sup> By common law, New Mexico also provides that “whether express or

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<sup>160</sup> *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 690 A.2d 575, 587 (N.J. 1997).

<sup>161</sup> *Id.*

<sup>162</sup> *Intervet, Inc. v. Mileutis, Ltd.*, No. 15-1371 (FLW)(TJB), 2016 U.S. Dist. LEXIS 22165, at \*12-13 (D.N.J. Feb. 24, 2016); *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 864 A.2d 387 (N.J. 2005) (“Proof of ‘bad motive or intention’ is vital to an action for breach of a covenant.”) (quoting *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 773 A.2d 1121 (N.J. 2001)).

<sup>163</sup> See, e.g., *Mylan Inc. v. SmithKline Beecham Corp.*, No. 10-4809, 2012 U.S. Dist. LEXIS 23264, at \*18 (D.N.J. Feb. 23, 2012); *Sons of Thunder v. Borden, Inc.*, 148 N.J. 396, 690 A.2d 575 (1997).

<sup>164</sup> *Brunswick Hills Racquet Club*, 864 A.2d at 396 (internal citations omitted); see also *Badiali v. New Jersey Mfrs. Ins. Group*, 220 N.J. 544, 107 A.3d 1281, 1287 (N.J. 2015).

<sup>165</sup> See N.J. REV. STAT. ANN. §§ 56:10-1 *et seq.* The major substantive provisions of the Act are N.J. REV. STAT. ANN. § 56:10-5 (LexisNexis 1999), dealing with termination, and N.J. REV. STAT. ANN. § 56:10-7 (LexisNexis 1999), listing certain practices in which a franchisor may not engage. The act requires that franchises can only be terminated for good cause.

<sup>166</sup> *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc.*, 408 N.J. Super. 461, 975 A.2d 510, 519, 521-522, (N.J. Super. Ct. App. Div.2009) (“the statutory requirement of ‘good cause’ prohibits a franchisor from terminating for other reasons, even if they reflect a sound and nondiscriminatory business strategy.”).

<sup>167</sup> *Id.* (citing *Westfield Ctr. Serv. v. Cities Serv. Oil Co.*, 86 N.J. 453, 432 A.2d 48, 57 (N.J. 1981)).

<sup>168</sup> The New Mexico Franchise Act governs all franchise and trade practices. The statute explicitly defines good faith as “honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing in the trade as evidence by all surrounding circumstances.” N.M. STAT. ANN. § 60-8A-7 (LexisNexis 2003) and *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 775 P.2d 233, 235 (N.M.

not, every contract imposes upon the parties a duty of good faith and fair dealing in its performance and enforcement.”<sup>169</sup> That duty is a covenant that prohibits a party from depriving the benefits of the contract to the other party.<sup>170</sup> Both parties are permitted to agree and set reasonable standards “by which application of the covenant is to be measured,” but the parties are not “permitted to disclaim the covenant of good faith” altogether.<sup>171</sup> New Mexico courts do not use the covenant to imply a term when one is missing from the contract.<sup>172</sup> When a contract is ambiguous, the standard for good faith is what the parties reasonably intended by the terms.<sup>173</sup> However, the duty of good faith and fair dealing cannot be invoked to override or negate express contract terms.<sup>174</sup>

### **NEW YORK**

New York has codified the duty of good faith and fair dealing for UCC contracts and for motor vehicle dealerships.<sup>175</sup> Also, by common law, “[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance.”<sup>176</sup> Good faith and fair dealing includes “any promises that a reasonable promisee would understand to be included” in the contract.<sup>177</sup> For example, “[w]here the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion.”<sup>178</sup> The implied covenant of good faith and fair dealing is not without limits and “can be implied only where the implied term is consistent with other mutually agreed upon terms in the contract.”<sup>179</sup>

### **NORTH CAROLINA**

Every contract in North Carolina carries an implied covenant of good faith and fair

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1989); N.M. STAT. ANN. § 60-8A-8 (LexisNexis 2003) (“it is a violation of sections 60-8A-7 through 60-8A-11 NMSA 1978 for the supplier, directly or through any officer, agent or employee, to fail to act in good faith...in terminating, canceling, or not renewing a franchise with a wholesaler, unless such termination, cancellation or failure to renew is done in good faith and for good cause.”).

<sup>169</sup> *Watson Truck & Supply Co. v. Males*, 111 N.M. 57, 801 P.2d 639, 642 (N.M. 1990).

<sup>170</sup> *Romero v. Mervyn's*, 109 N.M. 249, 784 P.2d 992, 1000 (N.M. 1989).

<sup>171</sup> *Id.* at 999.

<sup>172</sup> *Males*, 801 P.2d at 642.

<sup>173</sup> *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 127 N.M. 1, 976 P.2d 1, 14 (N.M. 1998).

<sup>174</sup> *Sanders v. FedEx Ground Package Sys.*, 144 N.M. 449, 188 P.3d 1200, 1203 (N.M. 2008).

<sup>175</sup> N.Y. U.C.C. LAW § 1-203 (Consol. 1964); N.Y. VEH. & TRAF. LAW § 463 (Consol. 2014).

<sup>176</sup> *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 663 N.E.2d 289, 291 (N.Y. 1995).

<sup>177</sup> *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 662 N.E.2d 763, 769 (N.Y. 1995).

<sup>178</sup> *Dalton*, 663 N.E.2d at 291.

<sup>179</sup> *Horn v. New York Times*, 100 N.Y.2d 85, 790 N.E.2d 753, 756 (N.Y. 2003); *Lake Erie Distribs. v. Martlet Importing Co.*, 634 N.Y.S.2d 599, 221 A.D.2d 954, 956 (N.Y. App. Div. 1995) (franchise agreement was terminable at will; manufacturer could terminate without cause and was not subject to the covenant; cannot imply a covenant inconsistent with contract terms); *Legend Autorama, Ltd., v. Audi of Am., Inc.*, 954 N.Y.S.2d 141, 100 A.D.3d 714, 716 (N.Y. App. Div. 2012) (franchisor did not violate implied covenant in exercising contractual discretion to establish competing dealership near existing franchises).

dealing.<sup>180</sup> The covenant provides “that neither party will do anything which injures the right of the other to receive the benefits of the agreement.”<sup>181</sup> All parties “must act upon principles of good faith and fair dealing to accomplish the purpose of an agreement.”<sup>182</sup> “[A] contract contains all terms that are necessarily implied to effect the intention of the parties and which are not in conflict with the express terms.”<sup>183</sup>

### **NORTH DAKOTA**

By statute, North Dakota applies a duty of good faith in the franchise context.<sup>184</sup> By common law, not every contract has an implied duty of good faith and fair dealing. The implied duty does not apply in the employment context.<sup>185</sup> However, it is inherent in every insurance contract.<sup>186</sup> The implied duty cannot override or negate the express terms of the contract, nor can it “alter the material terms,” or create additional terms.<sup>187</sup> Instead, the covenant is a “limitation on contractual discretion.”<sup>188</sup> When a contract’s terms, or lack thereof, grants a party to the contract discretion, the duty of good faith and fair dealing prohibits that party from exercising unreasonable discretion.<sup>189</sup>

### **OHIO**

Ohio has enacted a statutory duty of good faith and fair dealing in the franchise context, including the Ohio Motor Vehicle Dealers Act<sup>190</sup> and the Alcoholic Beverages Franchise Act.<sup>191</sup> For example, under the Alcoholic Beverages Franchise Act, a distributor must act in good faith

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<sup>180</sup> *Sunset Beach Dev., LLC v. Amec, Inc.*, 196 N.C. App. 202, 675 S.E.2d 46, 57 (N.C. Ct. App. 2009).

<sup>181</sup> *Id.*

<sup>182</sup> *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 607 S.E.2d 286, 291 (N.C. Ct. App. 2005).

<sup>183</sup> *Id.*

<sup>184</sup> N.D. CENT. CODE, § 51-07-01.1(2) (LexisNexis 2015) (requiring a manufacturer, wholesaler or distributor to act in good faith when terminating, cancelling, or failing to renew a contract with the retailer); *Williston Farm Equip. v. Steiger Tractor*, 504 N.W.2d 545, 549 (N.D. 1993) (termination of a retail contract UNDER N.D. CENT. CODE § 51-07-01.1 (LexisNexis 2015) “evidence about a manufacturer’s treatment of other similarly situated dealerships may have some probative value to establish ‘good cause’ and ‘good faith’ for the termination of a dealership contract.”).

<sup>185</sup> *Erickson v. Brown*, 2008 ND 57, 747 N.W.2d 34, 51 (N.D. 2008).

<sup>186</sup> *Smith v. American Family Mut. Ins. Co.*, 294 N.W.2d 751, 758 (N.D. 1980).

<sup>187</sup> *WFND, LLC v. Fargo Marc, LLC*, 2007 N.D. 67, 730 N.W.2d 841, 851 (N.D. 2007).

<sup>188</sup> *Cavendish Farms, Inc. v. Mathiason Farms, Inc.*, 2010 N.D. 236, 792 N.W.2d 500, 506 (N.D. 2010).

<sup>189</sup> *Id.*

<sup>190</sup> See OHIO REV. CODE ANN. § 4517.01 et seq. Franchisors have a statutory duty to act in good faith, “in acting or purporting to act under the terms, provisions, or conditions of a franchise or in terminating, canceling, or failing to renew a franchise.” OHIO REV. CODE ANN. 4517.59(A) (LexisNexis 2010). *Transamerica Servs. Tech. Supply, Inc. v. GMC*, No 02 JE 48, 2004 Ohio App. LEXIS 529, at \*7 (Ohio Ct. App. Feb. 6, 2004).

<sup>191</sup> See OHIO REV. CODE ANN. § 1333.82 et seq. “Under this act, ‘good faith’ requires all parties to a franchise agreement “to act in a fair and equitable manner toward each other so as to guarantee each party freedom from coercion or intimidation. . .” OHIO REV. CODE ANN. §1333.82(E) (LexisNexis 2006)

in cancelling or failing to renew a franchise agreement.<sup>192</sup> Under Ohio common law, “every contract contains an implied duty of good faith and fair dealing.”<sup>193</sup> The implied duty requires “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”<sup>194</sup> The implied duty cannot be breached by acting as allowed by the specific terms of the contract, even if the franchisor’s actions are detrimental to the franchisee.<sup>195</sup> The duty of good faith and fair dealing may not be invoked to override express contract terms.<sup>196</sup> The case law shows that the franchise contract is the most important component to examine the behavior of a party in Ohio.<sup>197</sup>

## **OKLAHOMA**

Oklahoma has statutes that apply a duty of good faith in the franchise context, including for new motor vehicles<sup>198</sup> and breweries<sup>199</sup>. Under the common law, “there is an implied covenant of good faith and fair dealing in every contract.”<sup>200</sup> The duty of good faith and fair dealing applies to the express terms and provisions of the contract. However, “express covenants control over implied covenants” so the implied duty of good faith cannot be invoked to override express contract terms.<sup>201</sup> Further, “the central terms of the contract upon which the minds of the parties have not met cannot be supplied by the implication of good faith and fair dealing.”<sup>202</sup> Thus, when a contract is silent on a term or provision, the court may not use the duty of good faith and fair dealing to supply the contract with a clause.<sup>203</sup>

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<sup>192</sup> *AB & B, Inc. v. Banfi Products, Inc.*, 71 Ohio App. 3d 650, 594 N.E.2d 1151, 1153 (Ohio Ct. App., 1991).

<sup>193</sup> *Wells Fargo Bank, N.A. v. Daniels*, Nos. C-110209, C-110215, 2011 Ohio App. LEXIS 5419, at \*9 (Ohio Ct. App., Dec. 21, 2011).

<sup>194</sup> *Wendy's Int'l, Inc. v. Saverin*, 337 F. App'x 471, 476 (6th Cir. 2009) (citing *Littlejohn v. Parrish*, 163 Ohio App. 3d 456, 839 N.E.2d 49, 54 (Ohio Ct. App. 2005)).

<sup>195</sup> *Id.* (citing *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St. 3d 433, 662 N.E.2d 1074, 1082-83 (Ohio 1996)).

<sup>196</sup> *Burda v. Wendy's Int'l, Inc.*, No. 2:08-cv-246, 2012 U.S. Dist. LEXIS 145447, at \*27 (S.D. Ohio Oct. 9, 2012); *Ed Schory & Sons v. Francis*, 662 N.E.2d at 1082 (As the Supreme Court of Ohio has explained, “[f]irms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of good faith.”).

<sup>197</sup> *Saverin*, 337 F. App'x at 476 (no breach of the implied duty for a franchisor to enforce its right to terminate due to franchisee going into receivership even though doing so was detrimental to the franchisee.); *Jim White Agency Co. v. Nissan Motor Corp.*, 126 F.3d 832, 835, (6th Cir. 1997) (no breach of the implied duty for a franchisor to deny a franchisee’s request to relocate a car dealership, based on the terms of the franchise agreement.)

<sup>198</sup> 47 OKLA. STAT. ANN. TIT. § 565.2 (LexisNexis 2014) (duty for a manufacturer to act in good faith when terminating, cancelling, or failing to renew a franchise agreement with a new motor vehicle dealer).

<sup>199</sup> 47 OKLA. STAT. ANN. TIT. § 565.1 (LexisNexis 2014) (A manufacturer or distributor has a duty of good faith to honor “the succession to a dealership by any legal heir or devisee under the will of a new motor vehicle dealer or under the laws of descent and distribution.”).

<sup>200</sup> *Hall v. Farmers Ins. Exch.*, No. 59,584, 1984 Okla. Civ. App. LEXIS 149, at \*10 (Okla. Ct. App. June 19, 1984).

<sup>201</sup> *Id.* at \*11-12.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

## OREGON

Oregon has codified a duty of good faith in the franchise context, including for motor fuel franchises<sup>204</sup> and the termination of motor vehicle dealerships.<sup>205</sup> Under Oregon law, the duty of good faith and fair dealing applies to all contracts and is used to “prohibit improper behavior in the performance and enforcement of contracts.”<sup>206</sup> However, the covenant of good faith and fair dealing is only implied if a contract lacks express terms on the disputed issue; “the reasonable expectations of the parties are irrelevant if the parties have agreed to express terms governing the issue.”<sup>207</sup> Oregon courts use the duty of good faith and fair dealing “to effectuate the reasonable contractual expectations of the parties.” When a contract is silent on a term or issue, a party that exercises its discretion in a way that was not expected by the other party has thus acted in bad faith.<sup>208</sup>

## PENNSYLVANIA

Pennsylvania has statutory provisions concerning termination of franchises and the duty of good faith for the sale of automobiles,<sup>209</sup> malt beverages,<sup>210</sup> petroleum products and motor vehicle accessories.<sup>211</sup> By common law, “[e]very contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement.”<sup>212</sup> A franchise agreement is a contract to be interpreted under contract principles.<sup>213</sup> A party to a franchise agreement “has an obligation to conduct itself with good faith and in a commercially reasonable manner.”<sup>214</sup> Some cases suggest the duty may be somewhat limited.<sup>215</sup> “Some courts predict that the Pennsylvania Supreme Court would limit the duty to the termination context.... others predict

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<sup>204</sup> OR. REV. STAT. ANN § 650.140(2)(f) (LexisNexis 2011) (“Notwithstanding the terms of any franchise or other agreement, it is unlawful for any manufacturer, distributor or importer to cancel, terminate or refuse to continue any franchise without showing good cause.”).

<sup>205</sup> OR. REV. STAT. ANN § 650.245 (LexisNexis 1987) (“Without limiting the other provisions of ORS 650.200 to 650.250, the principle of good faith shall govern the relationship and dealings of the parties with each other.”).

<sup>206</sup> *Best v. United States Nat'l Bank*, 303 Ore. 557, 739 P.2d 554, 557 (Or. 1987).

<sup>207</sup> *Or. Univ. Sys. v. Or. Pub. Emples. Union, Local 503*, 185 Ore. App. 506, 60 P.3d 567, 569-570 (Or. Ct. App. 2002).

<sup>208</sup> *Id.* at 558.

<sup>209</sup> See 63 PA. STAT. ANN. § 818.8, 818.11-818.14, 818.15 (LexisNexis 2000).

<sup>210</sup> 47 PA. STAT. ANN § 4-431(d)(4) (LexisNexis 2016).

<sup>211</sup> 73 PA. STAT. ANN. § 202-3 (LexisNexis 1975).

<sup>212</sup> *Hanaway v. Parkesburg Grp., LP*, 132 A.3d 461, 469 (Pa. Super. Ct. 2015) (citing *Baker v. Lafayette College*, 350 Pa. Super. 68, 504 A.2d 247 (Pa. Super. Ct. 1986)).

<sup>213</sup> *Mace v. Atl. Ref. & Mktg. Corp.*, 567 Pa. 71, 785 A.2d 491, 496 (Pa. 2001).

<sup>214</sup> *LJL Transp., Inc. v. Pilot Air Freight Corp.*, 599 Pa. 546, 962 A.2d 639, 648 (Pa. 2009)(citing *Atlantic Richfield v. Razumic*, 480 Pa. 366, 390 A.2d 736, 742 (Pa. 1978)).

<sup>215</sup> *Creeger Brick and Building Supply, Inc. v. Mid-State Bank and Trust Co.*, 385 Pa. Super. 30, 560 A.2d 151, 153 (Pa. Super. Ct. 1989) (concluding that “[i]n this Commonwealth the duty of good faith has been recognized in limited situations”).

that the duty would be extended to all aspects of the franchise relationship.”<sup>216</sup> However, “it seems unlikely that the Pennsylvania appellate courts will limit the franchisor’s duty to deal in good faith to situations of franchise termination when the issue is squarely presented.”<sup>217</sup> A recent case applied the duty broadly stating a franchisor can violate the duty if it engages in “abuse of power to specify terms” of the parties’ relationship.<sup>218</sup> A breach of the covenant gives rises to a breach of contract action.<sup>219</sup>

In the franchise context, where a party is required to “act in good faith” and make decisions “in the normal course of business” this is not an invitation for the court to scrutinize business decisions.<sup>220</sup> This language is intended to “provide adequate protection of franchisees from arbitrary or discriminatory termination or nonrenewal” of its franchise agreement, while at the same time affording the franchisor the protection of the business judgment rule and avoiding judicial scrutiny of the decision.<sup>221</sup> The court is limited to the narrow question, of “whether the franchisor’s determination was ‘the result of the franchisor’s normal decision making process.’” Additionally, absent a provision to the contrary, a franchisor cannot arbitrarily terminate a franchise agreement as it would be a disregard of franchisee’s interests under the agreement.<sup>222</sup>

### **RHODE ISLAND**

By statute, Rhode Island imposes a duty of good faith on manufacturers who enter into franchise agreements with dealers such that the manufacturer may not cancel, terminate, or fail to renew any franchise without good cause and good faith.<sup>223</sup> By common law, “the duty of good faith and fair dealing [is] implied in every contract.”<sup>224</sup> The duty furthers the parties’ “contractual objectives” and ensures that neither party is deprived of its contractual benefits because of the other party’s action or inaction.<sup>225</sup> The duty does not create an independent cause of action apart from a claim for breach of contract.<sup>226</sup> At least one court has suggested that good faith may require a party to give notice that it is relying on strict compliance with

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<sup>216</sup> *Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC*, No. 16-01237, 2016 U.S. Dist. LEXIS 90630, at \*29-30 (E.D. Pa. July 13, 2016).

<sup>217</sup> *AAMCO Transmissions, Inc. v. Harris*, 759 F. Supp. 1141, 1148-49 (E.D. Pa. 1991).

<sup>218</sup> *Dunkin’ Donuts Franchising, LLC v. Claudia I, LLC*, No. 13-13-00296-CV, 2014 U.S. Dist. LEXIS 149347 (E.D. Pa. Oct. 20, 2014).

<sup>219</sup> *Hanaway*, 132 A.3d at 471.

<sup>220</sup> *Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 771-772 (E.D. Pa. 1983) (court refused to question the business judgment of a franchisor when they required franchisees to enter into a new agreement that required the franchisee to pay higher rent); see also *Amoco Oil Co. v. Burns*, 496 Pa. 336, 437 A.2d 381, 381 (Pa. 1981) (A franchisor’s good faith, business judgment decision to divest itself of an unprofitable property was a “reasonable and just” cause for termination of the franchise agreement).

<sup>221</sup> *Id.*

<sup>222</sup> *Razumic*, 390 A.2d at 742.

<sup>223</sup> R.I. GEN. LAWS § 31-5.1-4(b)(4) (LexisNexis 2014).

<sup>224</sup> *Lajayi v. Fafiyebi*, 860 A.2d 680, 687 (R.I. 2004).

<sup>225</sup> *McNulty v. Chip*, 116 A.3d 173, 185 (R.I. 2015).

<sup>226</sup> *Id.*

contract terms before it cancels a contract, particularly where that party's conduct suggests otherwise.<sup>227</sup>

### **SOUTH CAROLINA**

Under South Carolina's common law, "there exists in every contract an implied covenant of good faith and fair dealing."<sup>228</sup> The implied covenant means "that neither party will do anything to impair the other's rights to receive benefits under the contract."<sup>229</sup> A claim for a breach of the implied covenant of good faith and fair dealing "is not an independent cause of action separate from the claim for breach of contract."<sup>230</sup> "[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do."<sup>231</sup>

### **SOUTH DAKOTA**

For every contract under the UCC, South Dakota, by statute, requires parties to act in good faith.<sup>232</sup> South Dakota also codified the duty of good faith in the franchise context, including a franchisor's efforts in operating an additional franchise "for the same line-make" of vehicles and snowmobiles.<sup>233</sup> By common law, the duty of good faith and fair dealing is implied in every contract that prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract.<sup>234</sup> The covenant provides recourse for the injured party in a breach of contract claim who was "limited or completely prevented...from receiving the expected benefits of the bargain" because of the adversary's "lack of good faith."<sup>235</sup> The duty applies even if the reason for the breach of contract was unrelated to any express terms.<sup>236</sup> South Dakota does not provide for a separate cause of action in tort for a breach of the duty.<sup>237</sup> The duty does not survive absent a contract.<sup>238</sup> The

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<sup>227</sup> *1800 Smith St. Assocs., LP v. Gencarelli*, 888 A.2d 46, 56 (R.I. 2005) (defendant lessee seeking to build a donut shop acted in bad faith by failing to diligently attempt to satisfy conditions precedent of obtaining permits and obtaining financing within 120 days and then declaring contracts null and void because contingencies were not satisfied; court suggested that good faith required defendant to notify lessor that he intended to strictly enforce the 120-day contingency).

<sup>228</sup> *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28, 36 (S.C. Ct. App. 2000).

<sup>229</sup> See *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.2d 52, 53 (S.C. 1996).

<sup>230</sup> *Rotec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 597 S.E.2d 881, 884 (S.C. Ct. App. 2004); *Tadlock*, 473 S.E.2d at 54-55 (South Carolina allows tort recovery for a breach of the implied covenant of good faith and fair dealing in the limited context of insurance contracts).

<sup>231</sup> *Adams v. G.J. Creel & Sons*, 320 S.C. 274, 465 S.E.2d 84, 85 (S.C. 1995).

<sup>232</sup> S.D. CODIFIED LAWS § 57A-1-304 (2008).

<sup>233</sup> S.D. CODIFIED LAWS § 32-6B-48 (1986) (establishing circumstances to consider in determining whether cause is established for entering into an additional franchise for the same line-make); S.D. CODIFIED LAWS § 32-6E-5 (19954) (same).

<sup>234</sup> *Garrett v. Bankwest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) (citing RESTATEMENT (SECOND) OF CONTRACTS, § 205 (1981)).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Nelson v. Web Water Dev. Ass'n*, 507 N.W.2d 691, 697 (S.D. 1993).

covenant does not supplement or override the express terms of the contract.<sup>239</sup> Thus, South Dakota will not use the duty of good faith and fair dealing to “construe intent...if the express language of a contract addresses an issue.”<sup>240</sup> South Dakota’s Supreme Court ruled that a fiduciary duty does not exist in a franchise relationship.<sup>241</sup>

## TENNESSEE

In Tennessee, by statute, the duty of good faith is incorporated into the termination, nonrenewals or modifications of franchises requiring “good cause asserted in good faith”,<sup>242</sup> and the denial, suspension or revocation of motor vehicle sales licenses.<sup>243</sup> By common law, Tennessee imposes a covenant of good faith and fair dealing in every contract.<sup>244</sup> The Tennessee Supreme Court has further added the presumption that every contracting party is aware of this implied duty.<sup>245</sup> Tennessee recognizes a “reasonableness standard” that is also implied alongside the duty of good faith and fair dealing.<sup>246</sup> The duty of good faith and fair dealing does not override or modify the express terms of a contract, nor does the duty “create additional contractual rights or obligations.”<sup>247</sup> Generally, Tennessee uses the duty of good faith and fair dealing to analyze the intent of the parties on a silent term in bargaining the contract.<sup>248</sup> The covenant is not an independent cause of action, as Tennessee considers a breach of the duty to be inextricably tied to breach of contract claim.<sup>249</sup>

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<sup>238</sup> *Garrett*, 459 N.W.2d at 843 (S.D. 1990); *Home Fed. Bank v. Haahr*, No. CIV. 06-2230, 2008 S.D. Cir. LEXIS 4, at \*46-47 (S.D. Cir. Ct. Sept. 11, 2008). (claim for breach of the implied duty cannot be without the *existence* of a valid contract; but South Dakota case law does not suggest the claim fails *unless* plaintiff *also* asserts a breach of contract claim).

<sup>239</sup> *Farm Credit Servs. of Am. v. Dougan*, 2005 S.D. 94, 704 N.W.2d 24, 28 (S.D. 2005) (citing *Garrett* 459 N.W.2d at 841).

<sup>240</sup> *Id.* (citing *Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028, 1032 (8th Cir 1996)) (quoting *Continental Bank, N.A. v. Everett*, 964 F.2d 701, 705 (7th Cir 1992)).

<sup>241</sup> *Groseth Int’l v. Tenneco, Inc.*, 410 N.W.2d 159, 169 (S.D. 1987) (noting that the only duty a court can impose on a franchise relationship is the duty of good faith).

<sup>242</sup> TENN. CODE ANN. § 47-25-1503 (LexisNexis 1989) and TENN. CODE ANN. § 47-25-1502 (LexisNexis 1989).

<sup>243</sup> TENN. CODE ANN. § 55-17-114 (LexisNexis 2016).

<sup>244</sup> *Dick Broad. Co. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 660 (Tenn. 2013) (quoting *Wallace v. Nat’l Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996)).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 668.

<sup>247</sup> *Healthmart USA, LLC v. Directory Assistants, Inc.*, No. M2012-00606-COA-R3-CV, 2013 Tenn. App. LEXIS 307, at \*12 (Tenn. Ct. App. Apr. 29, 2013).

<sup>248</sup> *Id.*

<sup>249</sup> *Jones v. LeMoyné-Owen College*, 308 S.W.3d 894, 908 (Tenn. Ct. App. 2009).



## TEXAS

Texas codified the covenant of good faith and fair dealing under the UCC.<sup>250</sup> In the franchise context, by statute, Texas Code requires a duty of good faith and fair dealing between manufacturers and dealers of motor vehicles, which is actionable in tort.<sup>251</sup> Texas common law does not recognize an implied covenant of good faith and fair dealing in every contract.<sup>252</sup> There are, however, certain exceptions if the parties have a “special relationship.”<sup>253</sup> This special relationship may arise from the trust necessary to accomplish the goals of the contract, or because of an imbalance of bargaining power.<sup>254</sup> Texas courts have declined to extend the common law duty of good faith and fair dealing to all franchise agreements, holding that a franchisor does not exert control over its franchisee’s business comparable to the control an insurer exerts over its insured’s claim.<sup>255</sup> Further, Texas courts will only determine if the threshold of bad faith is reached when a breach of contract is accompanied by an independent tort.<sup>256</sup>

## UTAH

Utah codified the covenant of good faith and fair dealing as an obligation imposed by law in every UCC contract.<sup>257</sup> In the franchise context, the Utah Beer Industry Distribution Act promotes good faith and fair dealing in business relationships between suppliers, wholesalers, and retailers.<sup>258</sup> Under Utah common law, “the implied covenant of good faith assumes the parties intended that the duties and rights created by the contract should be performed and exercised in good faith.”<sup>259</sup> However, the covenant cannot establish new rights or be used to nullify a right.<sup>260</sup> The obligation of good faith is to be “consistent with the agreed common

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<sup>250</sup>TEX. BUS. & COM. CODE § 1.304 (LexisNexis 2003); TEX. BUS. & COM. CODE § 1.201(20) (LexisNexis 2015) (“good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing”).

<sup>251</sup> TEX. OCC. CODE § 2301.478(B) (LexisNexis 2003).

<sup>252</sup> *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983) (“This concept is contrary to our well-reasoned and long established adversary system.”).

<sup>253</sup> *Arnold v. Nat’l City. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (duty may arise in “the relationships between an insured and insurer, principal and agent, joint venturers, or partners”).

<sup>254</sup> *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 675 (Tex. App. 1996).

<sup>255</sup> *Barrand, Inc. v. Whataburger, Inc.*, 214 S.W.3d 122, 139 (Tex. App. 2006) (if duty exists, it is by virtue of the parties’ relationship as franchisor and franchisee; regardless of whether a franchisor-franchisee relationship is the type of “special relationship” giving rise to the duty, it would defeat the purpose of the very agreement if we were to hold that the duty obligates the franchisor to enter additional contracts); *Mattei v. Int’l Conf. of Funeral Serv. Examining Bds.*, No. 1-15-CV-139 RP, 2015 U.S. Dist. LEXIS 116009, at \*13 (W.D. Tex. Sept. 1, 2015) (Texas courts have declined to recognize a duty of good faith and fair dealing for franchisors-franchisees).

<sup>256</sup> *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17-18 (Tex. 1994); *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225-226 (Tex. 2002) (noting the statutory duty of good faith for car dealer franchises and recognizing an actionable tort for a breach).

<sup>257</sup>UTAH CODE § 70A-1A-304 (LexisNexis 1953); UTAH CODE § 70A-1A-201(T) (LexisNexis 2007).

<sup>258</sup> UTAH CODE § 32B-14-101(A) (LexisNexis 2010).

<sup>259</sup> *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991).

<sup>260</sup> *Id.*

purpose” of the contract.<sup>261</sup> Further, its function is to infer a duty to perform in a good faith manner that the parties would have agreed to if they had foreseen the circumstance giving rise to their dispute.<sup>262</sup> In the franchise context, the business judgment rule has been codified in the Utah Beer Industry Distribution Act.<sup>263</sup>

### VERMONT

Vermont codified the covenant of good faith and fair dealing under the UCC.<sup>264</sup> There is also a circumstance where there is a statutory duty of good faith and fair dealing in motor vehicle manufacturers, distributors, and dealers franchising.<sup>265</sup> Under Vermont common law, the purpose of the implied covenant of good faith and fair dealing is to “ensure that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”<sup>266</sup> The covenant protects against types of conduct involving bad faith because they “violate community standards of decency, fairness or reasonableness.”<sup>267</sup> “[E]ach party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement.”<sup>268</sup>

### VIRGINIA

Virginia codified the covenant of good faith and fair dealing under the UCC.<sup>269</sup> Virginia's Wine Franchise Act and Beer Franchise Act require good faith in every agreement.<sup>270</sup> “Good cause” as used in Virginia's Wine Franchise Act means more than merely a well-founded reason and it does not always exist when a winery unilaterally cancels a wholesaler agreement in the good faith exercise of its business judgment.<sup>271</sup> Virginia common law recognizes that every contract imposes an obligation of good faith in its performance.<sup>272</sup> In Virginia, a party cannot breach an implied covenant of good faith and fair dealing by exercising explicit rights under a

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<sup>261</sup> *Christiansen v. Farmers Ins. Exch.*, 2005 UT 21, 116 P.3d 259, 262 (Utah 2005); *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 200 (Utah 1991).

<sup>262</sup> *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, 266 P.3d 814, 816 (Utah 2011).

<sup>263</sup> UTAH CODE § 32B-14-103(1) (LexisNexis 2010) (provides that a supplier has the right to contractually require its wholesalers to comply with the supplier's uniformly established operational standards of performance according to the supplier's good faith business judgment.)

<sup>264</sup> VT. STAT. ANN. TIT. 9A, § 1-304 (LexisNexis 2007); VT. STAT. ANN. TIT. 9A, § 1-201(20) (LexisNexis 2015)

<sup>265</sup> VT. STAT. ANN. TIT. 9A, § 4089(A) (LexisNexis 2009).

<sup>266</sup> *Monahan v. GMAC Mortg. Corp.*, 179 Vt. 167, 893 A.2d 298, 310 (Vt. 2005).

<sup>267</sup> *Carmichael v. Adirondack Bottled Gas Corp.*, 161 Vt. 200, 635 A.2d 1211, 1216 (Vt. 1993)

<sup>268</sup> *Id.*

<sup>269</sup> VA. CODE ANN. § 8.1A-304 (LexisNexis 2003); VA. CODE ANN. § 8.1A-201(20) (LexisNexis 2004).

<sup>270</sup> VA. CODE ANN. § 4.1-418(A) (LexisNexis 1993); VA. CODE ANN. § 4.1-517(A) (LexisNexis 1993).

<sup>271</sup> *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 468 S.E.2d 905, 909 (Va. 1996) (Since the franchisees did not perform deficiently, the winery's good faith exercise of business judgment to consolidate its brands was not “good cause” under the Act for the winery to unilaterally terminate the agreements without reasonable compensation.)

<sup>272</sup> *Charles E. Brauer Co. v. Nations Bank of Virginia, N.A.*, 251 Va. 28, 466 S.E.2d 382, 385 (Va. 1996).

contract even though it may be in a manner the other party does not like.<sup>273</sup> Virginia courts have established that the failure to act in good faith does not amount to an independent tort, but only gives rise to an action for breach of contract.<sup>274</sup>

### **WASHINGTON**

Washington codified the covenant of good faith and fair dealing under the UCC.<sup>275</sup> The statutory duty of good faith is also codified in the Washington Franchise Investment Protection Act (“FIPA”), which directs both franchisor and franchisee to “deal with each other in good faith.”<sup>276</sup> Additionally, Washington Code requires manufacturers of motor and motorsport vehicles to exercise good faith in the cancellation or nonrenewal of a franchise agreement.<sup>277</sup> By common law, “there is in every contract an implied duty of good faith and fair dealing.”<sup>278</sup> Although this duty obligates the parties to cooperate so that each may obtain the full benefit of performance, it does not obligate a party to accept a material change in the terms of its contract.<sup>279</sup> Rather, it requires only that the parties perform in good faith the obligations in connection with terms agreed to by the parties and neither creates rights not contracted for, nor overrides the express terms of a contract.<sup>280</sup> In the franchise context, motor vehicle dealers have a statutory duty to invest capital with reasonable and prudent business judgment.<sup>281</sup>

### **WEST VIRGINIA**

Under West Virginia law, franchise agreements are governed by the UCC, and therefore, an obligation of good faith in performance or enforcement is imposed on the transacting parties.<sup>282</sup> The test of good faith in the franchise setting is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.<sup>283</sup> West Virginia common law “implies a covenant of good faith and fair dealing in every contract for the purposes of evaluating a party's performance of that contract.”<sup>284</sup> The implied covenant “cannot give

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<sup>273</sup> *Sun Hotel v. Summitbridge Credit Invs. III, LLC*, 86 Va. Cir. 189, 196 (Va. Cir. Ct. 2013).

<sup>274</sup> *Charles E. Brauer Co*, 466 S.E.2d at 385; *Brenco Enters. v. Takeout Taxi Franchising Sys.*, No. 177164, 2003 Va. Cir. LEXIS 86, at \*15 (Va. Cir. Ct. May 2, 2003) (essential purpose of the contract was not breached, therefore the one year non-compete restrictive covenant was enforceable).

<sup>275</sup> WASH. REV. CODE § 62A.1-304 (LexisNexis 2012); WASH. REV. CODE § 62A.1-201(20) (LexisNexis 2012).

<sup>276</sup> WASH. REV. CODE § 19.100.180(1) (LexisNexis 2011).

<sup>277</sup> WASH. REV. CODE § 46.70.180(14)(b) (LexisNexis 2012); WASH. REV. CODE § 46.93.030 (LexisNexis 2003).

<sup>278</sup> *Badgett v. Sec. State Bank*, 116 Wash. 2d 563, 807 P.2d 356, 360 (Wash. 1991); *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wash. 2d 102, 323 P.3d 1036, 1041 (Wash. 2014).

<sup>279</sup> *Badgett*, 807 P.2d at 360.

<sup>280</sup> *Id.*; See *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wash. App. 630, 700 P.2d 338, 342 (Wash. Ct. App. 1985); *Doyle v. Nutrilawn U.S., Inc.*, No. C09-0942JLR, 2010 U.S. Dist. LEXIS 48613, at \*22-23 (W.D. Wash. May 17, 2010).

<sup>281</sup> WASH. REV. CODE § 46.70.180(14)(b) (LexisNexis 2012).

<sup>282</sup> *Barn-Chestnut, Inc. v. CFM Dev. Corp.*, 193 W. Va. 565, 457 S.E.2d 502, 504 (W. Va. 1995).

<sup>283</sup> *Id.*; W. VA. CODE § 46-1-304 (LexisNexis 2006); W. VA. CODE § 46-1-201(20) (LexisNexis 2006).

<sup>284</sup> *Hoffmaster v. Guiffrida*, 630 F. Supp. 1289, 1290-1291 (W. Va. 1986).

contracting parties rights which are inconsistent with those set out in the contract.”<sup>285</sup> The covenant does not provide a cause of action apart from a breach of contract claim.<sup>286</sup> Failure to allege a breach of contract is fatal to a claim for a breach of the implied covenant.<sup>287</sup>

## WISCONSIN

Wisconsin enacted a Fair Dealership Law to govern franchise agreements.<sup>288</sup> Wisconsin also requires, by statute, good faith in the franchise context for motor vehicle dealers.<sup>289</sup> By common law, “[t]he rule that parties to a contract act in good faith is universal . . . [e]very contract implies good faith and fair dealing between the parties to it.”<sup>290</sup> Good faith also includes a duty of cooperation among the parties.<sup>291</sup> In essence, “by entering into the contract, each party implicitly promises ‘that he [or she] will not intentionally and purposely do anything to prevent the other party from carrying out his [or her] part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’”<sup>292</sup> Where a party acts consistently with the terms specifically authorized in their agreement, there cannot be a breach of the covenant of good faith and fair dealing.<sup>293</sup> Additionally, “[a] party may not . . . employ the good faith and fair dealing covenant to undo express terms of an agreement.”<sup>294</sup> A franchisor cannot reserve the right to change a

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<sup>285</sup> *Barn-Chestnut, Inc.*, 457 S.E.2d at 509.

<sup>286</sup> *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 746 S.E.2d 568, 578 (W. Va. 2013).

<sup>287</sup> *Evans v. United Bank, Inc.*, 235 W. Va. 619, 775 S.E.2d 500, 501 (W. Va. 2015); see also *Powell v. Bank of Am., N.A.*, 842 F. Supp. 2d 966, 981 (W. Va. 2012); *Barn-Chestnut, Inc.*, 457 S.E.2d at 504 (implied covenant did not require franchisor to offer a successive lease at reasonable terms absent express renewal provisions).

<sup>288</sup> See WIS. STAT. § 135.01 et seq. *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 431 N.W.2d 721, 724, (Wis. Ct. App. 1988)(The law was enacted to “promote the compelling [public] interest . . . in fair business relations between dealers and grantors” and to “protect dealers against unfair treatment by grantors . . . .”) (citing Sec. 135.025(2)(a) and (b)); Wis. Stat. § 135.03 (The Statute at 135.03 provides that “[n]o grantor . . . may . . . substantially change the competitive circumstances of a dealership agreement without good cause.”); *Remus v. Amoco Oil Co.*, 794 F.2d 1238, 1240 (7th Cir 1986)(applying Wisconsin law) (franchisor oil company did not violate contract with franchisee-dealer by adopting a system-wide “discount for cash” program, even though the change was potentially detrimental to some dealers, because it acted with good cause.)

<sup>289</sup> See WIS. STAT. §§ 218.0101- 218.0163 (LexisNexis 2005).

<sup>290</sup> *Beidel v. Sideline Software, Inc.*, 348 Wis. 2d 360, 842 N.W.2d 240, 245 (Wis. 2013).

<sup>291</sup> *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 431 N.W.2d 721, 726 (Wis. Ct. App. 1988) (citing *Estate of Chayka*, 47 Wis. 2d 102, 176 N.W.2d 561, 564 (Wis. 1970)).

<sup>292</sup> *AnchorBank, FSB v. Kleinheinz*, No. 2015AP970, 2016 Wisc. App. LEXIS 117, at \*11 (Wis. Ct. App. 2016)(citing *Metropolitan Ventures, LLC v. GEA Assocs.*, 291 Wis. 2d 393, 717 N.W.2d 58 (Wis. 2006)).

<sup>293</sup> *Super Valu Stores, Inc.* 431 N.W.2d at 726 (“it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties’ contract as a ‘bad faith’ breach of that contract.”); *M&I Marshall & Ilsley Bank v. Schlueter*, 258 Wis. 2d 865, 655 N.W.2d 521, 525 (Wis. Ct. App. 2002)(“where the contracting party complains of acts of the other party that are specifically authorized in their agreement, we cannot see how there can be any breach of good faith and fair dealing.”); cf. *Foseid v. State Bank*, 197 Wis. 2d 772, 541 N.W.2d 203, 212 (Wis. Ct. App. 1995) (a party may be liable for breach of the implied contractual covenant of good faith even though all the terms of the written agreement may have been fulfilled.).

<sup>294</sup> *Ikaria, Inc. v. Montgomery*, No. 2015AP568, 2016 Wis. App. LEXIS 132, at \*11 (Wis. Ct. App. 2016)(citing *Beidel*, 842 N.W.2d at 251); *Super Valu Stores, Inc.*, 431 N.W.2d at 726.

franchisee's area as a "business judgment" as it would force the franchisee to waive the remedy and protections available to it under Wis. Stat. § 218.0116(8).<sup>295</sup> Franchisors have no fiduciary duty to franchisees.<sup>296</sup>

### **WYOMING**

Wyoming codified the covenant of good faith and fair dealing under the UCC.<sup>297</sup> A statutory duty of good faith and fair dealing is applied in the franchise context involving the relations between malt beverage distributors and manufacturers.<sup>298</sup> By common law, the implied covenant of good faith and fair dealing requires that "neither party to a commercial contract act in a manner that would injure the rights of the other party to receive the benefit of the agreement."<sup>299</sup> Courts evaluate whether a party's actions are "consistent with the agreed common purpose and justified expectations of the other party."<sup>300</sup> When a breach is premised on the existence of a special relationship created by unequal bargaining power between the parties—such as with insurers and insureds—compensatory and punitive damages can be recovered.<sup>301</sup>

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<sup>295</sup> *Racine Harley-Davidson v. State Div. of Hearings & Appeals*, 292 Wis. 2d 549, 717 N.W.2d 184, 207 (Wis. 2006).

<sup>296</sup> *Brosahd of Milwaukee, Inc. v. Dion Corp.*, No. 87-C-1349, 1990 U.S. Dist. LEXIS 19992, at \*69 (E.D. Wis. Jan. 12, 1990).

<sup>297</sup> WYO. STAT. ANN. § 34.1-1-203 (LexisNexis 2015); WYO. STAT. ANN. § 34.1-1-201(xx) (LexisNexis 2015).

<sup>298</sup> WYO. STAT. ANN. § 12-9-105 (LexisNexis 1996) ("A manufacturer shall not cause a distributor to resign from an agreement, or cancel, terminate, fail to renew or refuse to continue under an agreement unless the manufacturer has . . . acted in good faith.")

<sup>299</sup> *City of Gillette v. Hladky Constr., Inc.*, 2008 Wyo. 134, 196 P.3d 184, 190 (Wyo. 2008).

<sup>300</sup> *Scherer Constr. LLC v. Hedquist Constr., Inc.*, 2001 Wyo. 23, 18 P.3d 645, 654 (Wyo. 2001).

<sup>301</sup> *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813, 816 (Wyo. 1994) (Although there is not a fiduciary duty, a special relationship exists which is created by the unequal bargaining power that an insurer has over an insured which could lead to breach of duty of good faith and fair dealing).

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Erica is partner at Hahn Loeser & Parks LLP, a full-service law firm representing clients across the U.S. and abroad from offices in Cleveland, Columbus, Akron, Naples, Fort Myers, San Diego, and Chicago. She is a complex commercial litigator with twenty-two years' experience representing entities of varying size in state and federal trial and appellate courts across the country and in arbitration. In the franchising context, Erica represents franchisors, distributors, joint ventures, limited liability companies, and partnerships. Litigation matters have involved a wide variety of legal topics impacting businesses such as trademark infringement, business torts, contract disputes, employment disputes, vicarious liability claims, fraud claims, and non-competition agreements.

Erica has also had substantial first chair experience in defending against high-stakes, statewide and nationwide consumer class actions all over the country including victories in two multi-week class action bench trials. Erica has a successful track record of early victories in class actions achieved through defeat of class certification, securing dismissal of or summary judgment on the claims of the class representatives, and negotiating favorable settlements.

Erica is listed in the 2011-16 editions of Ohio Super Lawyers as well as the publication's 2005-07 lists of "Ohio Rising Stars." She has been a member of Hahn Loeser's Board of Directors since 2006. She is also AV® Preeminent™ Rated by Martindale-Hubbell, its highest available rating for legal ability and professional ethics. She is also a member of the Forum on Franchising's Litigation and Dispute Resolution Division (LADR) Committee.

### **Recent Representations:**

#### **Chultem v. Ticor Title Insurance/Colella v. Chicago Title Insurance, Co., Cook County Illinois Circuit Court**

Defense of title insurers against plaintiffs' challenge to the split of title insurance premiums between title insurers and their agents as illegal kickbacks and unearned fees to the agents under RESPA as incorporated by the Illinois Title Insurance Act. Took over the defense of two consolidated class actions after the classes were certified. Served as lead defense counsel in a two-week bench trial where plaintiff consumers sought damages in excess of \$250 million, trebled. The Court entered judgment in favor of defendants and judgment was affirmed on appeal. Continuing in the defense of the appeal in the Illinois Supreme Court.

#### **Villanueva v. Fidelity National Title, Co., Santa Clara County, CA**

Co-lead defense counsel defending escrow holder in four-week certified class action bench trial. Plaintiffs challenged, under California's unfair competition law, the propriety of escrow consumers having to pay for overnight delivery fees and document preparation fees. Trial victory defeating claims for over \$35 million and plaintiffs' demand for \$9 million in attorneys' fees. Prior to the bench trial, successfully eliminated, through dispositive motion practice, six additional claims, including a claim for punitive damages, against the defendant and two additional, affiliated companies. Continuing in defense of appeal.

## Jason M. Murray

Jason M. Murray is the President and CEO of Murray Law, P.A. He practices in the area of franchise and distribution law and provides counsel and assistance with creating, managing, licensing, protecting and enforcing franchised business relationships, product distribution systems and dealership networks. His franchise and distribution law practice specifically relates to licensing and development, regulation and compliance, and dispute resolution through mediation, arbitration and litigation. Additionally, he practices in the areas of general commercial litigation in state and federal courts including intellectual property, real property, trade secrets & non-compete litigation as well as business litigation and trade regulation matters. Jason is a member of the American Arbitration Association Commercial Arbitrator Panel and serves as an arbitrator for Franchise Arbitration and Mediation Services.

He is an active member of the American Law Institute and the American Bar Association. In addition, Jason is a Fellow of the American Bar Foundation. He has served with distinction as an editor for several ABA publications and has authored a number of articles and papers. Additionally, Jason is an active member of The Florida Bar and has served as Chairman of a number of Bar Committees. He served on the Florida Supreme Court Task Force on Management of Cases Involving Complex Litigation and is a former member of the Eleventh Judicial Circuit Ad Hoc Committee on Complex Business Litigation Section. He is also a past Chairman of the Eleventh Judicial Circuit Grievance Committee "B" and a former member of the United States District Court, Southern District of Florida Ad Hoc Committee on Attorney Admissions, Peer Review and Attorney Grievance. Jason is an active member of the Dade County Bar Association and recently served as the organization's 99th President. In addition, Jason served as the 17<sup>th</sup> President of the Wilkie D. Ferguson, Jr. Bar Association. He is AV rated by *Martindale-Hubbell*<sup>®</sup> and is listed in *The Best Lawyers in America*<sup>®</sup>; *Florida Super Lawyers*<sup>®</sup>; and *Franchise Times*<sup>®</sup> magazine's Legal Eagles<sup>®</sup>. He also was named *Best Lawyers' 2013 "Lawyer of the Year"* for Franchise Law in Miami.

Jason is a frequent lecturer and author both in the substantive areas of law in which he practices as well as in areas related to promoting equal opportunities in the legal profession for minority lawyers and the economic empowerment of minority communities. He served as the Diversity Chair for an Am Law 200 law firm for 10 years and received Diversity Best Practices' 2008 Diversity Officer Leadership Award. Jason also is the recipient of The Florida Bar Young Lawyers Division's 2003 Diversity and Gender Sensitivity Award. Jason has served as a mentor for many minority lawyers and members of South Florida's diverse legal community.

He is active in his local community and is a former member of Miami-Dade County's Black Affairs Advisory Board. Jason served as President of Miami Midnight Basketball League, Inc. which was a not-for-profit social-service program that used basketball as a way of reaching out to at-risk youth in Overtown and Miami's inner-city. Currently, Jason serves as an ordained minister and assistant pastor in Opa-Locka's inner-city at Soul Saving Station Church where his father, Dr. James M. Murray, is the senior pastor. He is a Twelve Good Men 2001 Ronald McDonald House Honoree and is a recipient of both the 1999 and 1995 Pro Bono Service Award from "Put Something Back," a joint pro bono project of the Eleventh Judicial Circuit and the Dade County Bar Association.

Jason is a native of Miami and a product of our public school system. He graduated from Duke University in 1988 with a B.A. degree in History, Political Science and English. Jason received his law degree from the

University of Virginia School of Law in 1991. After graduating from law school, he served as a judicial clerk for the Honorable Joseph W. Hatchett, United States Circuit Judge, United States Court of Appeals for the Eleventh Circuit from 1991 to 1992. Jason is married to Dale Ellen Murray and they are the proud parents of Jason M. Murray, Jr. and Miles J. Murray.