

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2026-P-0649

BENJAMIN EDELMAN,

Plaintiff-Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Defendant-Appellee.

On Appeal from a Judgment of the Suffolk Superior Court

REPLY BRIEF OF PLAINTIFF-APPELLANT
BENJAMIN EDELMAN

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I. ARGUMENT

The Superior Court resolved disputed questions of material fact about the parties' reasonable understanding of contractual documents and motives against the non-moving party. That is reversible error.

In order to obtain summary judgment, Harvard needed to demonstrate that no reasonable jury could find in Plaintiff Benjamin Edelman's favor. But the evidence and reasonable inferences would support findings that the FRB Procedures were binding, that Harvard breached them, that Harvard breached the covenant of good faith and fair dealing, and that Plaintiff suffered harm as a result. Harvard failed to satisfy its burden to show no material dispute. Harvard did not explain why a jury must overlook HBS's purpose in creating the FRB Procedures (Blue Br. 7); the context of the Procedures' distribution (*id.*, 8); and language promising procedural fairness for FRB subjects (*id.*, 8-9). Nor did Harvard demonstrate that no jury could find that Harvard violated Plaintiff's reasonable expectations that Harvard should provide him with an allegation that defined the scope of the FRB inquiry, give him the evidence gathered, and exclude FRB matters from the Standing Committee's consideration. And notwithstanding Dean Nohria's self-

serving affidavit, a jury could conclude that following the FRB Procedures would have impacted Harvard's consideration of Plaintiff's tenure application. Given this evidence, summary judgment on the contract claim must be reversed.

On good faith, too, a jury could find breach based on the FRB's goal of obstructing Edelman's candidacy and manipulation of evidence toward that goal. (Blue Br. 14-17.) This evidence is manifestly material and creates a disputed jury question. Harvard's Statement of Facts makes no claim that this evidence is immaterial, and, instead, simply ignores it. (*See* Red Br. 4-17.)

The judgment must be reversed.

A. A JURY COULD FIND THE FRB PROCEDURES BINDING

A jury must decide whether a contract has formed. *Ferguson v. Host Int'l, Inc.*, 53 Mass. App. Ct. 96, 103 (2001) (factfinder to weigh factors and decide whether party reasonably believed manual contained enforceable promise); *accord Jackson v. Action for Bos. Cmty. Dev., Inc.*, 403 Mass. 8, 9 (1988) ("jury" to decide whether "implied contract was formed"). Harvard sidesteps this blackletter rule and, like the Superior Court, ignores many factors laid out by *O'Brien v. New England Tel. &*

Tel. Co., 422 Mass. 686 (1996) (hereinafter “*O’Brien*”). The *O’Brien* factors support Plaintiff – at the very least a jury could so find.

Harvard is silent on the “most persuasive” *O’Brien* factor, namely “the context of the [policy’s] preparation and distribution.” *O’Brien* at 694, quoting *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 299, *modified on other grounds*, 101 N.J. 10 (1985). HBS adopted the FRB Procedures because faculty believed a previous tenure review was handled unfairly and sought an improved process for concerns.

(RAI/266, 167-168.) HBS leaders sought input from faculty, developed the FRB Procedures, and presented them at a faculty meeting for discussion. (RAI/307, RAI/139-147.) Only after positive feedback were they implemented. (RAI/269¶4) *See Decker v. Worcester Junior College*, 369 Mass. 960, 961 (1975) (“If a college adopted [] a formal procedure and communicated it to its faculty, the college could be bound to the terms of that procedure.”).

Plaintiff was at the meeting to discuss the FRB Procedures, understood that they would apply to him, and continued his employment with that in mind. (RAIV/269¶5.) Indeed, HBS created the FRB Procedures in part to “respond to the Ben Edelman situation in

particular.” (RAII/324.) Every aspect of the context—purpose of creation, consultation of faculty, Plaintiff’s participation, and the policy’s creation *for him*—supports a finding that the policy is contractual. Based on this factor alone, a jury could find that a reasonable faculty member would expect the FRB Procedures to bind HBS and apply to Plaintiff’s FRB relating to a tenure review. *Decker*, 369 Mass. at 961.

Other *O’Brien* factors confirm the policy is contractual. Harvard “called special attention to” the FRB Procedures by referencing and providing them to Plaintiff at the outset of both the 2015 and 2017 FRB processes. *O’Brien* at 693 (RAI/339, 490-491.) The FRB Procedures offered no disclaimer disavowing enforceability. (RAI/422-425.) Later cases have superseded the authority that Harvard and the Superior Court relied on about modifiability of personnel manuals. *Compare Jackson*, 403 Mass. at 14-15 (employer retaining right to modify terms suggests promises in manual were illusory) *with O’Brien* at 694 (focusing on employees’ reasonable expectations) and *Ferguson*, 53 Mass. App. Ct. at 101-03 (ability to update manual not dispositive).

That Harvard purported to follow the FRB Procedures is “evidence that the terms of the [policy] were part of the employment contract.” *O’Brien* at 692. The FRB gathered evidence, produced a draft report, solicited a response from Plaintiff, and produced a final report (RAI/480-531), all elements of the FRB Procedures that Harvard followed but now claims were not required. (Red Br. 26-27.) Contrary to Harvard’s assertion that these steps merely represented the FRB’s “commitment to a fair process” (Red Br. 29 n.4), a jury could infer that they did these things because they believed the FRB Procedures so required. (RAI/427.)

Harvard says the FRB Procedures are non-contractual because the Dean supposedly could override them. Harvard’s argument is grounded in an FRB Procedures footnote mentioning the Green Book. But that footnote merely states that the FRB Procedures’ description of how faculty members are expected to contribute to the HBS community and mission is “[c]onsistent with” the Green Book’s discussion of HBS Community Values. (RAI/422.) Other FRB Procedures footnotes similarly reference additional policies governing faculty conduct in specific areas. Read in context, the single footnote reference to the

Green Book does not mean the Green Book supersedes the FRB Procedures' mandatory procedural guarantees. *See Wortis v. Trustees of Tufts College*, 493 Mass. 648, 664-65 ("Wortis") (holding references to other policies allegedly "undermining express contractual rights and expectations" to be "[a]t best... ambiguous."). Notably, the FRB Procedures do not mention procedural aspects of the Green Book. (RAI/422-425.) Harvard's strained interpretation (ungrounded in the language of either policy) is unnecessary for them to fit together. Contrast *Matthews v. Planning Bd. of Brewster*, 72 Mass. App. Ct. 456, 463 (2008) (interlocking documents part of same transaction, containing identical language). Here, the two documents were adopted years apart, for different purposes, and speak for themselves.

Moreover, whatever authority Harvard claims Dean Nohria had to vary the procedures used by the FRB, he did not exercise it. (RAI/261 26:20-27:2) Faculty would reasonably expect both the Green Book's tenure review process and the FRB Procedures to be followed if the Dean did not approve a variance. The Dean cannot retroactively (during litigation) bless the FRB's procedural breaches. *See Charest v. Pres. &*

Fellows of Harv. Coll., No. 13-11556-DPW, 2016 WL 614368, *18 n.10 (D. Mass. Feb. 16, 2016).

Harvard says there is “no express contract” (Red Br. 22), but the FRB Procedures were enacted consistent with standard university practice. The SJC has noted that university rules “are not bargained with the applicant or incumbent at all. These are policies adopted by the institution, customarily in consultation with a faculty governing body”—and are enforceable as contract. *Wortis* at 662 n.11 (quotation omitted).

Harvard has not placed beyond factual dispute whether a reasonable professor would understand the Procedures as binding. *See Ferguson*, 53 Mass. App. Ct. at 101-03. Summary judgment was improper in light of evidence the FRB Procedures were contractual.

B. A JURY COULD FIND BREACH OF THE FRB PROCEDURES

Harvard also failed to demonstrate an absence of disputed material facts as to whether Harvard violated the FRB Procedures. A jury must decide whether Harvard’s 2017 FRB proceeding accorded with a reasonable professor’s expectations about the process. *Wortis* at 668; *see also Sonoiki v. Harvard Univ.*, 37 F.4th 691, 704 (1st Cir. 2022)

(explaining that assessment of breach requires factfinder to determine whether “given the [person’s] reasonable expectations, there was a gap between what the school promised and what the school delivered”).

1. The FRB Procedure Section Applies to all FRBs

Harvard claims that only the Promotions Section of the FRB Procedures is relevant for a faculty member under consideration for tenure, but that section’s own language contradicts that claim. It states that the FRB’s review will “begin[] with drafting an allegation as outlined above.” (RAI/425.)

The phrase “as outlined above” directs the reader to the previous reference to drafting an allegation, which then explains what the FRB must do with that allegation (provide it to the subject faculty member, investigate it, draft a report, etc.). (RAI/423.) The best reading (certainly a reasonable reading) is that even in the context of a tenure review, the FRB must begin with an allegation, proceed with the steps in the Procedure Section, and produce a final report. Harvard’s brief does not even mention this language, let alone explain what else it could mean.

The Superior Court relied on FRB Procedures footnote 5 (Add.61), but that footnote says only that the Promotions Section offers “a fuller description” of the interaction between FRB and tenure review. It nowhere suggests that the Procedure Section (in which the footnote appears) does not apply to tenure cases. Harvard makes no attempt to defend the Superior Court’s reading of footnote 5. (Compare Blue Br. 40-41, Red Br. 30-38.)

Notably, everyone thought at the time that the full FRB Principles applied. The FRB gathered evidence, produced a draft report, solicited a response from Plaintiff, and produced a final report (RAI/480), just as the Procedure Section instructs. Chair Edmondson expressed that she was obliged to follow the Procedure Section. (RAI/427.) In 2018, Plaintiff told Harvard that it had breached the FRB Procedures, color-highlighting provisions not followed. (RAI/93.) No one claimed then that the provisions he cited were inapplicable. (RAII/78-79.) Harvard’s interpretation is newly invented for litigation.

A jury could reject the interpretation that the Procedures are inapplicable to tenure cases because it contradicts HBS’s purpose in creating the FRB, to foster faculty trust for those very cases. (Blue Br.

12.) It would undermine that purpose to have a structured process outside of tenure cases, but no procedural protections when the stakes were highest.

On Harvard's reading, a tenure FRB has no procedures at all. The Promotions Section's bullets, which Harvard claims are the only provisions applicable to a tenure FRB, address only when an FRB may be convened and how its report is used (RAI/0424), but say nothing about how the FRB does its work. A reasonable faculty member could instead read this section as guidance on how an FRB fits with the promotions process, with the Procedures section remaining applicable.

2. Allegation and Scope

Harvard attempts to defend the Superior Court's conclusion that no allegation was required because the 2017 FRB "was a continuation of the tenure case that had begun in 2015." (Red Br. 31-32; contrast Blue Br. 51-54.) But it is disputed whether the two FRB proceedings were distinct. Deans called the 2017 FRB "another review", not a continuation. (RAI/270, 271, 275, RAIV/0314.) HBS contemporaneously called the 2015 and 2017 FRBs "reviews" plural. (RAIV/0310.) The FRB Procedures nowhere discuss an FRB continuing past issuance of its

report, or a single FRB issuing two reports. (RAI/422-425.) Nothing in the FRB Procedures says the FRB was not required to begin in 2017 by “drafting an allegation” and then providing it to Plaintiff. (RAI/422-425.)

Harvard separately argues that if an allegation was required, it was provided. (Red Br. 32.) But FRB Chair Edmondson admitted the letter starting the 2017 FRB process was not an allegation. (RAI/57.) A jury could find no allegation was provided.

The purpose of providing an allegation is to give notice of what issues will be investigated. Edmondson’s letter was so vague that Plaintiff had to guess what the FRB was investigating and what he should address. (RAI/490-491.) By September 2017, the FRB did have a concrete allegation in mind, Plaintiff’s disclosures concerning Google and Microsoft (RAI/549), but it chose not to inform Plaintiff. (RAI/554.) Instead, it inquired generally about “outside activities,” without giving him an indication that he should review and discuss those disclosures. (*Id.*) The information withheld was particularly prejudicial because, when Plaintiff learned of the specific concern in the draft report, he did not have time to investigate the disclosures and identify the numerous

inaccuracies in the FRB’s report. (RAIV/122-127.) Nor could he have obtained more time—deadlines associated with the tenure process made that impossible. (RAI/438, 97.) At a minimum, a reasonable jury could find that the FRB breached its obligations to draft an allegation and then follow the FRB Procedures, including by giving him notice of the allegation significantly earlier.

Harvard makes much of Plaintiff having mentioned the AA lawsuit to the FRB. (Red Br. 32.) But Plaintiff merely included it among his accomplishments from the past two years, and his submission did not address the concerns that the FRB articulated in its report. (RAI/493-494.) A jury could find that he did not have timely notice that the FRB regarded it as a violation. *See Bulwer v. Mt. Auburn Hosp.*, 473 Mass. 672, 691 (2016) (“*Bulwer*”) (reversing summary judgment *inter alia* because rebuttal not equivalent to timely notice).

Harvard also claims Cunningham’s initial objection to expanding the FRB’s inquiry (RAI/549) was “eventually resolved” when she and others concluded it was not an expansion. (Red Br. 33.) Whether the scope expanded is a question of fact for a jury. Cunningham’s contemporaneous view is relevant evidence from which a jury could

infer that there was an expansion. *See Barry v. Trs. of Emmanuel Coll.*, No. 16-cv-12473-IT, 2019 WL 499774 at *8 (D. Mass. Feb. 8, 2019).

3. The Evidence Gathered

The Superior Court misinterpreted the FRB Procedures to hold that the promise that an FRB “will” share “the evidence gathered” (RAI/423) is inapplicable in an FRB case relating to tenure. Harvard’s defense of the Superior Court’s decision (Red Br. 36-37), like the Superior Court’s interpretation, fails to draw reasonable inferences in favor of Plaintiff as the nonmoving party. If there is ambiguity about what Harvard promised or whether it complied, summary judgment is improper. *See Wortis* at 667-68. Based on Harvard’s purpose to foster trust and the plain language of the FRB Procedures, faculty could reasonably expect that the requirement to share “the evidence gathered” applies in an FRB relating to tenure.

Harvard first defends the FRB’s withholding of evidence by claiming its “detailed summary” of the evidence sufficed. (Red Br. 34.) But Harvard’s supposed summary reversed the meaning of numerous quotes and rendered them irrebuttable by removing speakers’ identities and the context for the comments. (Blue Br. 20-21.) In any event, a

summary of evidence is not “the evidence gathered” – or so a jury could find. Comparing the actual interview notes with the “summary” in the draft report shows how much was missing, not to mention mischaracterized and even fabricated. (RAIV/85-93.)

Harvard next defends withholding evidence on the grounds that one sentence in one bullet of the FRB Procedures contemplates “confidential input” to the FRB and Executive Dean. (RAI/422.)

Harvard reads this bullet point to permit the FRB to withhold any and all evidence from the investigation’s subject. But this is not the best reading of the bullet Harvard cites or the document as a whole, and it certainly is not the only reasonable reading. Rather, it is deeply implausible when the bullet is read in context. That bullet and the bullet just above both explain what happens *prior to* an FRB review, when HBS is determining whether to convene an FRB, not when the FRB is investigating. (See Blue Br. 45-46 (quoting the bullet points in full)). The reference to the Executive Dean, not necessarily an FRB member (see RAI/423), reinforces the conclusion that the language about confidentiality refers only to the determination whether to convene an FRB.

Importantly, Harvard’s interpretation of the “confidential input” clause nullifies the explicit commitment that the faculty member “*will* have an opportunity to review . . . the evidence gathered” (RAI/423, emphasis added). This forceful commitment outweighs tentative language calling privacy and confidentiality “important considerations.” (RAI/423-24.) Nor do these provisions conflict: confidentiality limits general access, in part to protect the reputation of the faculty member under review, but does not eliminate the subject’s express right to review the evidence gathered. (RAI/424.) In contrast, Harvard reads “the evidence gathered” out of the document. Faculty are more likely to read the document the way Plaintiff does, but to the extent there are multiple reasonable interpretations, that ambiguity should have foreclosed summary judgment. *See Wortis* at 667-68. The Superior Court was wrong to draw an inference in Harvard’s favor that reasonable faculty could only interpret the FRB Procedures the way Harvard urges.

4. 2015 Non-Objection

Harvard says Plaintiff’s failure to object to withholding evidence in 2015 is evidence of what he thought the FRB Procedures required.

(Red Br. 28-29, 36 & n.7.) But that evidence supports multiple inferences. Harvard relies on *T.F. v. B.L.*, 442 Mass. 522, 525 (2004), where the SJC evaluated whether parties' conduct manifested intent to parent a child together. But that case pertained to conduct and, at most, an oral agreement. The FRB Procedures are written. And even there, the SJC held only that past conduct "*may be* relevant to the parties' contractual intent." *Id.* (emphasis added). Ultimately the SJC in *T.F.* upheld the probate court's finding *after a full evidentiary hearing*, not at summary judgment. *Id.* at 523. The parties' course of conduct does not determine the existence or unambiguous terms of a contract; it is relevant when the contract is ambiguous, in which case the jury must decide. *See Cardone v. Bos. Reg'l Med. Ctr., Inc.*, 60 Mass. App. Ct. 179, 187-88 (2003) (reversing grant of summary judgment where contract was ambiguous and course of performance was only one factor for factfinder to consider).

As Plaintiff explained, he felt the information withheld in 2015 was limited and immaterial. (Blue Br. 50.) The only disputed factual issue in 2015 concerned Plaintiff's interactions with HBS staff. As to those interactions, the FRB did provide evidence: it produced the emails

it relied upon, and Plaintiff rebutted it by producing a fuller email record. (RAI/88, 91.) He was satisfied with the outcome in 2015 and had no reason to complain. (RAI/94.) A jury could reasonably infer that Plaintiff's conduct in 2015 was consistent with his expectation to receive the evidence gathered in 2017. For that reason, his 2015 decision not to object is not dispositive of either his reasonable belief about whether the FRB procedures created contractual obligation, or whether Harvard met that obligation in 2017.

5. Standing Committee

Harvard claims that both Nohria and Edelman knew that the Standing Committee considered the FRB report and Community Values, a departure from the FRB Procedures. (RAI/424; Red Br. 38.) But that is not what Nohria testified. He affirmed more generally that he did not deviate from procedures. (RAI/261.) A jury could reasonably conclude that Nohria did not realize the Standing Committee's consideration of FRB matters, in the first case handled by the FRB, was a violation of FRB Procedures. As to Edelman, his deposition explains: His department head urged him not to object (RAI/91), plus he accepted the 2015 outcome. (RAI/94.)

Whether the deviation was “minor” is a question of fact. If the Standing Committee vote had been based only on teaching and scholarship, it would have been unanimously positive (RAII/203), leading to a more positive start before the Appointments Committee. A jury could conclude that the mixed Standing Committee discussion and vote harmed Plaintiff. (*See* Blue Br. 56.)

6. Deference

Harvard invokes heightened deference to tenure-related decisions. (Red Br. 29-30.) But deference applies to an ultimate academic judgment, not to the interpretation of University procedures. This Court was clear in *Berkowitz v. Pres. & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 269 (2003), that courts would not displace tenure decisions unless they were “arbitrary and capricious,” but that “war[iness]” extends only to “subjective judgments” about an applicant’s merits. *Id.*; *see also* *Schaer v. Brandeis University*, 432 Mass. 474, 482 (2000) (courts defer to university’s academic judgments, but a university must still “follow its own rules”); *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 724-725 (1st Cir. 1983) (courts must “review the procedures followed to ensure that they fall within the range of

reasonable expectations of one reading the relevant rules”). As to process, courts enforce handbooks according to a professor’s reasonable expectations and subject to black-letter contract law. *Wortis* at 663-664. The differences between Green Book academic judgments and FRB investigations are many: different processes adopted years apart, for different purposes, calling for different reports by different bodies.

C. A JURY COULD FIND VIOLATIONS OF GOOD FAITH AND FAIR DEALING

Harvard argues Edelman points to no “persuasive” evidence of lack of good faith. (Red Br. 47.) But persuasiveness is a jury question. Summary judgment is disfavored where state of mind is at issue. *Bulwer* at 689; *Flesner v. Technical Commc’ns Corp.*, 410 Mass. 805, 809 (1991); *see also* 23 Williston on Contracts § 63:22 (4th ed.) (whether conduct violated covenant “ordinarily a question of fact to be determined by the jury or other finder of fact”). Plaintiff presented evidence that FRB members expressed personal animus toward him, prejudged the outcome, bemoaned favorable evidence, knowingly treated him differently than others who engaged in similar conduct, and artfully excerpted and even falsified quotes to his detriment. (Blue Br. 16-22.) A jury could easily find a lack of good faith.

Harvard relies on *Schaer* and *Berkowitz* for the proposition that the FRB could use its common sense and expertise to evaluate evidence. (Red Br. 46.) But that is not what the evidence shows the FRB did. (See Blue Br. 16-24.) *Schaer* holds that a disciplinary board may draw on its own experience in *weighing* evidence. See *Schaer*, 432 Mass. at 480. *Berkowitz* holds that courts do not tell universities which statements to consider in making substantive academic judgments. See *Berkowitz*, 58 Mass. App. Ct. at 274. Neither suggests that a committee may distort witness statements, insert quotes no witness gave, or predetermine its conclusion before gathering evidence.

As to Crispi and Cunningham, Harvard argues they were not required to recuse merely because they knew Plaintiff. (Red Br. 44.) But that is not Plaintiff's contention. He objects that they abused their privileged position as FRB members. Cunningham instructed Plaintiff in 2008 that no approval was needed for lawsuits (RAI/240-41, 516; RAI/343), yet she never told the FRB she had said so, and she personally drafted the criticism that he failed to seek approval (RAI/486-89). Meanwhile, Crispi inserted what she called "quotes" (RAI/313) that were, at best, her recollections from unknown sources,

yet the rest of the FRB and the Dean took these to be actual quotes from interviews (Blue Br. 22). Harvard ignores these significant problems. A jury could reasonably find lack of good faith by the FRB and responsible staff.

D. DEAN NOHRIA'S SELF-SERVING AFFIDAVIT DOES NOT FORECLOSE MATERIAL DISPUTE ON HARM

Harvard says Plaintiff must provide “definite, competent evidence” that the breach “would have changed the outcome.” Red Br. 39, quoting *Sonoiki v. Harvard Univ.*, No. 19-12172-LTS, 2024 WL 760844, at *11 (D. Mass. Feb. 6, 2024). But the District Court in *Sonoiki* was not stating the controlling causation standard for employment cases.

The key case on point is *Bulwer*, an employment case claiming violation of proscribed procedures. There, the hospital employer argued that a resident “was not harmed” by its failure to follow its grievance procedure. The SJC disagreed, holding that causation was “a question of fact for the jury,” and reversed summary judgment on the contract claim. 473 Mass. at 691. The SJC added that a jury “could find that the plaintiff’s lack of notice and diminished participation in the meetings reduced the effectiveness of his participation in those meetings and,

accordingly, affected the outcome of the committee’s deliberations.” *Id.* Neither the Superior Court nor Harvard’s brief acknowledges *Bulwer*, though it is the best authority available on this point. Harvard cites *Hasseltine House, LLC, v. Jewish Family & Children’s Svcs., Inc.*, 106 Mass. App. Ct. 30 (2025), where the court rejected a landlord’s speculation that earlier notice would have filled vacancies faster. *Id.* at 36-37. But here, there is no need to speculate that Plaintiff’s tenure case would have gone differently without the FRB’s report, since Nohria’s contemporaneous comments explain his reasoning.

Nohria’s contemporaneous statements and Harvard’s interrogatory response both emphasize the faculty vote. (Blue Br. 62-63.) Neither mentions the factors Nohria’s affidavit now claims were most important (the AA lawsuit and Microsoft disclosures). At the time, neither Nohria nor the FRB was bothered by HBS Professor Bazerman’s participation in the same AA lawsuit (RAI/276, RAI/39); a factfinder could question whether the expressed concern about Edelman’s participation was even genuine. On this record, the jury could conclude that the key factors were those Nohria identified at the time. Harvard distinguishes Nohria “reviewing” all the evidence versus what he relied on (Harvard Br. 40),

but this makes an impermissible inference that he ignored everything but AA and Microsoft—contrary to his earlier statements.

Because Nohria's earlier statements emphasized the Appointments Committee vote, one might ask what the vote would have been had the FRB provided accurate information. The tally sheets (IRA/8-18) include a written statement of most Appointment Committee members' reasoning. Although Harvard casts Plaintiff's candidacy as hopeless, multiple faculty members who voted against tenure described it as a difficult choice. (IRA/13-18 F043, F044, F046, F048, F052, F064, F067, F068.) Those voting against Plaintiff overwhelmingly did so in reliance on the FRB's report. (IRA/13-18, RAI/98-100.) Just a few changed votes would have put Plaintiff's case in the realm where all prior candidates received tenure. (RAII/345-46, RAI/261.) Indeed, Nohria acknowledged that if different data gave rise to a different vote, he would have considered the situation differently. (RAI/285.)

Nohria's affidavit presupposes that the outside activities section of the FRB report is beyond attack. But the unstated allegation and late expansion (I.B.2 above) affect that section of the report. With timely notification, Plaintiff could have pressed the FRB to correct errors (Blue

Br. 24), and could have convincingly rebutted the claim that his disclosures were inconsistent. (See Blue Br. 23 (describing FRB's significant errors regarding disclosures it critiqued)). These arguments could have convinced Appointments Committee skeptics and derailed the FRB's criticism. Ultimately prejudice is a jury question, not for resolution on summary judgment based on an eleventh-hour affidavit.

Ultimately the Superior Court and Harvard claim too much. Treating a decision-maker's affidavit as dispositive would pretermitt jury consideration in virtually any case where motivation or intent is at issue, regardless of contemporaneous statements or prior testimony. That is not the law. *Bulwer* at 689. What would have happened if the FRB followed the Procedures is a jury question, and Nohria's affidavit is not dispositive. It is a reasonable inference that compliance with FRB Procedures would have yielded different votes and affected Nohria's recommendation.

II. CONCLUSION

For the reasons herein and in the Blue Brief, this Court should reverse the judgment on Counts I and II, and remand for trial.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I, David A. Russcol, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). I further certify that this brief complies with Rule 20's length limit in that it was prepared in 14-point Century Schoolbook font using Microsoft Word and, according to Microsoft's wordcount tool, contains 4,498 words.

/s/ David A. Russcol

David A. Russcol

CERTIFICATE OF SERVICE

I, David A. Russcol, hereby certify that I will cause the foregoing brief to be served through the Massachusetts e-filing system and by email on:

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23 Williston on Contracts § 63:22 (4th ed.)

Williston on Contracts | May 2026 Update

Chapter 63. What Constitutes Breach of Contract

III. Breach of Implied Promises

§ 63:22. Implied covenant or promise of good faith and fair dealing

[References](#) [Correlation Table](#)

West's Key Number Digest

- West's Key Number Digest, [Contracts](#)  [312\(4\)](#)

Legal Encyclopedias

- [Am. Jur. 2d, Contracts § 673](#)
- [C.J.S., Contracts § 758](#)

Forms

- [Williston on Contracts—Forms § 63F:23 \(4th ed.\)](#)

Every contract imposes an obligation of good faith and fair dealing between the parties in its performance and its enforcement,¹ and if the promise of the defendant is not expressed by its terms in the contract, it will be implied.² The duty embraces, among other things, an implied obligation that neither party will do anything to injure or destroy the right of the other party to receive the benefits of the agreement.³ Violation of the duty of good faith and fair dealing constitutes a breach of contract.⁴

In determining whether a party has breached the obligation or covenant of good faith and fair dealing, a court must examine not only the express language of the parties' contract but also any course of performance⁵ or course of dealing⁶ that may exist between the parties.⁷ Thus, whether particular conduct violates or is consistent with the duty of good faith and fair dealing necessarily depends upon the facts of the particular case and is ordinarily a question of fact to be determined by the jury or other finder of fact.⁸ Moreover, since there is a presumption that all parties act in good faith, the burden of proving a breach of the covenant of good faith and fair dealing is on the person asserting the absence of good faith, the plaintiff or, where the breach is alleged in a counterclaim, the person in the position of the plaintiff, the defendant in the original action.⁹

It is axiomatic that before a court will consider a claim that the implied duty of good faith has been violated, there must be some factual basis for, and, in some jurisdictions, an allegation of, bad faith on the part of the defendant.¹⁰ In other jurisdictions it is broadly stated that a party to a contract is considered to have breached the implied covenant of good faith and fair dealing if it acts in bad faith¹¹ or if it engages in inequitable conduct in the performance of its contractual obligations or undertakings.¹² Thus, a party who evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, may be liable for breach of the implied covenant of good faith and fair dealing.¹³ A breach of the implied obligation of good faith and fair dealing is obviously present where a party acts in bad faith, but it may also be found where the defendant acts in a commercially unreasonable manner while exercising some discretionary power under the contract.¹⁴ Also, in one jurisdiction, whose civil code defines bad faith, but not good faith, bad faith by statute requires proof that the defendant's actions are intentionally malicious.¹⁵ In still other jurisdictions, in order to establish a breach of the obligation to act in good faith in the performance of a contract, a plaintiff must demonstrate that the defendant was not honest in fact and acted with a bad motive.¹⁶ Moreover, while it is generally agreed that merely negligent conduct is

not sufficient to constitute a breach of the covenant of good faith and fair dealing,¹⁷ it has been said that conscious awareness of, and deliberate indifference to or disregard for, any potential harm to the plaintiff will suffice to establish bad faith.¹⁸ Also, in one jurisdiction whose legislature has adopted a statute which imposes in all contracts the same standard of good faith as is applicable to merchants under the Uniform Commercial Code, a plaintiff is required to show that the defendant has acted dishonestly or outside the scope or range of accepted commercial practice with the purpose and goal of depriving the plaintiff of the benefits expected under the contract, in order to establish that the implied duty of good faith, and hence the contract, has been breached.¹⁹ Furthermore, bad faith cannot be inferred from the expected course of business, that is, from the parties performing under the contract as the contract requires them to do.²⁰

Some courts have held that it is not necessary for the defendant to have breached a specific provision of a contract in order to establish a breach of the implied covenant of good faith and fair dealing.²¹ In such cases, the party seeking to recover or a breach of the duty of good faith and fair dealing 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.²² Stated somewhat differently, when one party performs the contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, there is a breach of the covenant of good faith and fair dealing, and hence, a breach of contract, for which damages may be recovered;²³ reasonable or justified expectations, in turn, are to be determined by considering the various factors and circumstances that surround the parties' relationship and thereby shape or give contour to the expectations in the first instance.²⁴ While some courts allow a plaintiff to recover for breach of the duty of good faith and fair dealing even though there has been no breach of a specific contractual clause, provision, or duty, perhaps the majority of courts declined to find a breach of the implied covenant of good faith and fair dealing absent breach of an express term of the contract.²⁵ Under this view, there can be no independent cause of action brought for breach of the covenant of good faith and fair dealing; rather, the claim must be tied to an alleged breach of a specific contract term, often one that allows for discretion on the part of the party alleged to have violated the duty.²⁶

As a general principle, there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract.²⁷ This is so even where the contractual provision at issue is one that purports to grant to the defendant absolute discretion to take certain actions or engage in certain conduct under the contract; such a provision, stated simply, permits the defendant substantial latitude, and as long as the discretion is exercised as permitted under the contract, and without evident bad faith motive or malice, its exercise cannot be a breach of the more general implied promise of good faith and fair dealing.²⁸ It should be noted, however, as suggested above, that even where a defendant is given absolute discretion, it must exercise that discretion in good faith,²⁹ and this is all the more the case where the discretion is limited in its scope by the express terms of the contract.³⁰ Although many of the cases discussed in this section take pains to point out that they are applying a common law rule, it is undoubtedly true that the doctrine which implies an obligation of good faith and fair dealing has expanded dramatically during the past half century and that this expansion is due in no small part to the widespread adoption of the under the Uniform Commercial Code. Under the UCC, as at common law, there is implied in every contract a covenant of good faith and fair dealing,³¹ and, as is the case under the common law covenant, under the Code, a party who acts in compliance with the express terms of the agreement cannot be guilty of bad faith and unfair dealing.³²

One of the early cases dealing with the exercise of discretion by one contracting party involved a contract in which a carrier undertook to carry coal on the Great Lakes on all its steamers going westward from Oswego.³³ The coal company sought to enjoin the steamship line from selling its vessels or removing them from the Great Lakes or the St. Lawrence River west of Montreal. The court said, with respect to the interpretation of the contract:

There is no express provision that the steamers, or any of them, shall make any trips whatsoever, eastward or westward; there is no express provision that the trips, if and when made, shall extend as far east as Oswego. And therefore [the steamship line] contends that the obligation to carry coal westward is conditional solely upon the Transportation Company's uncontrollable willingness to run the boats on Lake Ontario. If this be the sound construction of the agreement, the bill must be dismissed, for, under such circumstances, the court would not tie [the steamship line's] hands.

* * *

Looking at the agreement in its entirety, we find the circumstances that will suspend the obligation, in whole or in part, of each party, clearly specified, such as strikes, accidents, or the loss of a vessel, it is not the obligation to continue a west-bound voyage from Oswego once begun, but the obligation to continue in the conduct of its business, that is expressly remitted or suspended, clearly this has reference to the entire future of the three-year period of the contract; it would be unnecessary to abate the obligation to carry in the event that a vessel be destroyed, if the duty to carry from Oswego were subject to the owner's arbitrary right to keep the vessel on Lake Erie. Furthermore, such a construction would place this part of the [the coal company's] business completely at the mercy of the shipowner, inasmuch as [the coal company's] obligation is absolute, except for the specified excuses, to give [the steamship line] its cargo on call at the port. A bilateral contract of the nature here in question will not lightly be construed, so as to give one of the parties a virtual option, instead of imposing upon each of them obligations conditioned solely as they may have expressly agreed.³⁴

The issue of whether there has been a breach of the implied promise of good faith and fair dealing has arisen particularly frequently in the case of franchise or distributorship agreements; in the typical case, it is alleged that the grantor of the franchise or distributorship breached the implied duty of good faith and fair dealing by acting in a manner that undercuts the plaintiff-franchisee's ability to take advantage of the franchise, as for example, by opening, threatening to open, or authorizing the opening of other franchises in competition with the plaintiff's franchise. Often the outcome of the dispute will be determined by the express terms of the franchise or distributorship agreement, as where the agreement expressly provides that the franchisor may take the particular action at issue, in which case the rule discussed previously—that the implied obligation of good faith may not trump an agreement's express terms—applies.³⁵ Where, however, the agreement is silent on the issue of competitive actions by the franchisor, it becomes necessary to determine whether, and to what extent, a court should imply a term permitting or precluding such competition, or, more specifically, whether the implied obligation of good faith and fair dealing will allow such competition or prevent it. In some cases, the courts refuse to imply any negative covenant, and maintain that the otherwise implied covenant of good faith and fair dealing does not preclude the grantor of the distributorship competing with its distributor, as long as there is nothing in the distribution agreement to prohibit the competition and as long as the distributorship agreement makes contractual sense without any such implication.³⁶ In other cases, the courts, in addition to the express terms of the agreement, look to the particular facts surrounding the relationship between the parties to determine whether a breach of the implied duty of good faith and fair dealing has occurred.³⁷ In an illustrative case, of a court finding an implied duty,³⁸ the plaintiff had been a jobber for an oil company for eight years; he signed a renewal contract which provided that he was to sell to service stations or consuming accounts the products consigned to him. This was to be done on a nonexclusive basis without the oil company's written consent. For any other account, he was to obtain written consent. The oil company reserved the right to select customers. The jobber agreed to use his best efforts, to sell a specified minimum amount, to account for the proceeds of all sales, and to provide the oil company with an up-to-date list of his distributors. His sole compensation was to be commissions from the sales he made. When the renewal contract was signed, the oil company authorized the jobber to continue selling to a customer who had been purchasing only from the jobber. However, when the jobber's contract with that customer expired, the oil company contracted directly with that customer. This, the jobber alleged, was a breach of his contract with the oil company. The plaintiff also alleged that the oil company later promised to replace the lost gallonage but failed to do so.

In appealing the circuit court's dismissal of his cause of action, the plaintiff contended that the oil company did not have the right to solicit the jobber's customers although it could seek new ones. The court agreed, and held that the proper construction of the contract depended on the intent of the parties, which should be determined from the whole contract rather than isolated portions. The oil company's approval of the distributor list, plaintiff's commission compensation, and his obligation to use his best efforts must be considered along with its right to select customers and the nonexclusivity clause. The court quoted the text in support and reviewed the course of conduct between the oil company and the plaintiff as being relevant in interpreting or construing the underlying intent:

The foregoing elements of the contract between plaintiff and [the oil company] convince us that a condition must be implied that [the oil company] would not solicit customers which had been obtained through plaintiff's efforts. The interpretation of the contract for which [the oil company] contends would leave plaintiff and others in a position similar to his completely at the mercy of [the oil company] ...

* * *

There is nothing novel about an implied condition that [the oil company] will not negotiate with [the jobber's] customers during the term of any contract between [the jobber] and his customer, even though [the oil company] has reserved the right to compete in the territory. Competition in the territory must be presumed to mean competition for uncommitted accounts.³⁹

CUMULATIVE SUPPLEMENT

Cases:

"[W]hen one party performs the *131 contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, there is a breach of the covenant of good faith and fair dealing." [United States v. Acevedo-Osorio](#), 118 F.4th 117 (1st Cir. 2024) (citing text).

"[T]here can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract." [JN Contemporary Art LLC v. Phillips Auctioneers LLC](#), 29 F.4th 118 (2d Cir. 2022) (citing text).

There can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract. [Richards v. Direct Energy Services, LLC](#), 915 F.3d 88 (2d Cir. 2019) (quoting text).

Under Louisiana law, the term bad faith generally implies actual or constructive fraud or a refusal to fulfill contractual obligations, not an honest mistake as to actual rights or duties. La. Civ. Code Ann. arts. [Whitney Bank v. SMI Companies Global, Incorporated](#), 949 F.3d 196 (5th Cir. 2020).

This argument fails immediately because, as a leading treatise succinctly explains, "[v]iolation of the duty of good faith and fair dealing constitutes a breach of contract." [Alabama Space Science Exhibit Commission v. Markel American Insurance Company](#), 2022 WL 1667904 (11th Cir. 2022) (citing text).

Parties to a contract are presumed to act in good faith, so before a party can be said to have acted in bad faith, there must be evidence that it possessed all the facts, knew its obligations, and still refused to perform. [Broadway v. State Farm Mutual Automobile Insurance Company](#), 364 F. Supp. 3d 1329 (M.D. Ala. 2019) (citing text).

Thus, a party who evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, may be liable for breach of the implied covenant of good faith and fair dealing. [Marisco, Ltd. v. GL Engineering & Construction Pte., Ltd.](#), 2020 WL 3492572 (D. Haw. 2020) (citing text).

"[T]here is a presumption that all parties act in good faith." [National Experiential, LLC v. City of Chicago](#), 2024 WL 3757066 (N.D. Ill. 2024) (quoting text).

To determine whether there has been a breach of the covenant of good faith, courts must examine not only the terms of the contract, but also "any course of performance or course of dealing that may exist between the parties. Thus, whether particular conduct violates or is consistent with the duty of good faith and fair dealing necessarily depends upon the facts of the particular case and is ordinarily a question of fact to be determined by the jury or other finder of fact." [North Shore Window & Door, Inc. v. Andersen Corporation](#), 2021 WL 4205196 (E.D. N.Y. 2021) (citing text).

As one noted commentator found, "there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract," [Jordet v. Just Energy Solutions, Inc.](#), 2020 WL 7167514 (W.D. N.Y. 2020) (citing text).

Implied contractual obligations of good faith and fair dealing are traditional referred to as single covenant: the implied covenant of good faith and fair dealing. [Korwin v. State Farm Fire & Casualty Company](#), 2024 WL 1514537 (N.D. Ohio 2024) (citing text).

A "party who evades the spirit of the contract ... may be liable for breach of the implied covenant of good faith and fair dealing" [Whelan v. Brestelli](#), 230 Conn. App. 683, 331 A.3d 1220 (2025) (citing text).

a party who evades the spirit of the contract ... may be liable for breach of the implied covenant of good faith and fair dealing. [Pekar v. Clog Master LLC](#), 2024 WL 4274694 (Conn. Super. Ct. 2024) (citing text).

That covenant "embraces, among other things, an implied obligation that neither party will do anything to injure or destroy the right of the other party to receive the benefits of the agreementOf course, the implied covenant of good faith and fair dealing "does not prevent a party from exercising its contractual rights. [T]here is a presumption that all parties act in good faith. Thus, "bad faith cannot be inferred from the expected course of business, that is, from the parties performing under the contract as the contract requires them to do." Consequently, "there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract." [Old Henry Healthcare Real Estate, LLC v. Jewish Hospital & St. Mary's Healthcare, Inc.](#), 2021 WL 4343468 (Ky. Ct. App. 2021) (citing text).

The party claiming a breach of the covenant of good faith and fair dealing "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." [Altomare Auto Group, LLC v. Volkswagen Group of America, Inc.](#), 2023 WL 6930316 (N.J. Super. Ct. App. Div. 2023) (quoting text).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [Restatement Second, Contracts § 205](#).
U.S.—[John M. Floyd and Associates, Inc. v. TAPCO Credit Union](#), 2012 WL 405405 (W.D. Wash. 2012), *aff'd*, 550 Fed. Appx. 359 (9th Cir. 2013) (citing text) (implied in every contract, the duty of good faith and fair dealing requires parties to cooperate with each other so that each may obtain the full benefit of performance); [Pearce v. Manhattan Ensemble Theater, Inc.](#), 528 F. Supp. 2d 175 (S.D. N.Y. 2007) (quoting text) (under New York law, all contracts contain an implied covenant of good faith and fair dealing in the course of contract performance; the covenant encompasses any promises which a reasonable person in the position of the promisee would be justified in understanding were included).
Alaska—[Laybourn v. City of Wasilla](#), 362 P.3d 447 (Alaska 2015) (where a duty of one party to a contract is subject to the occurrence of a condition, the additional duty of good faith and fair dealing may require refraining from conduct that will prevent or hinder the occurrence of that condition or taking affirmative steps to cause its occurrence).
- ² [§ 38:15](#).
- ³ **U.S.**—[Logan v. Bennington College Corp.](#), 72 F.3d 1017, 106 Ed. Law Rep. 51 (2d Cir. 1995).
- ⁴ **D.C.**—[Rosenthal v. Sonnenschein Nath & Rosenthal, LLP](#), 985 A.2d 443 (D.C. 2009) (applying Delaware law).
Idaho—[Drug Testing Compliance Group, LLC v. DOT Compliance Service](#), 161 Idaho 93, 383 P.3d 1263 (2016); [Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP](#), 157 Idaho 106, 334 P.3d 780 (2014).
Mont.—[Hardy v. Vision Service Plan](#), 2005 MT 232, 328 Mont. 385, 120 P.3d 402 (2005).

- Utah—*Eggett v. Wasatch Energy Corp.*, 2004 UT 28, 94 P.3d 193 (Utah 2004).
- 5 U.S.—*Dorset Industries, Inc. v. Unified Grocers, Inc.*, 893 F. Supp. 2d 395 (E.D. N.Y. 2012) (quoting text).
- 6 See, e.g., U.C.C. § 1-205(1), defining course of dealing insofar as a contract for the sale of goods is concerned as a sequence of previous conduct between these parties under other contracts that they have had, so as to justify in them a belief that similar conduct may be expected under this contract and provide a basis between them for interpreting their words and conduct.
U.S.—*Dorset Industries, Inc. v. Unified Grocers, Inc.*, 893 F. Supp. 2d 395 (E.D. N.Y. 2012) (quoting text).
- 7 U.S.—*Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist.*, 226 F.3d 1170 (10th Cir. 2000) (applying Utah law).
Mass.—*Robert and Ardis James Foundation v. Meyers*, 474 Mass. 181, 48 N.E.3d 442 (2016) (manner of performance).
N.Y.—*Daitch Crystal Dairies, Inc. v. Neisloss*, 8 A.D.2d 965, 190 N.Y.S.2d 737 (2d Dep't 1959), judgment aff'd, 8 N.Y.2d 723, 201 N.Y.S.2d 101, 167 N.E.2d 643 (1960) (where a landlord rented a store with a "percentage lease" and covenanted not to rent another space in same building for a similar use, and a plot plan annexed to the lease showed adjoining vacant land not owned by the landlord, it was held that there is implied a mutual covenant of good faith and that by express and implied terms the restriction extended to the vacant land which was subsequently acquired by the landlord or its nominee).
Utah—*Brown v. Moore*, 973 P.2d 950 (Utah 1998).
- 8 U.S.—*Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 72 F.3d 190, 28 U.C.C. Rep. Serv. 2d 430 (1st Cir. 1995); *Travellers Intern., A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570 (2d Cir. 1994); *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 33 Fed. R. Serv. 3d 765 (8th Cir. 1995); *International Technologies Marketing, Inc. v. Verint Systems, Ltd.*, 157 F. Supp. 3d 352 (S.D. N.Y. 2016) (quoting text).
Alaska—*Willard v. Khotol Services Corp.*, 171 P.3d 108 (Alaska 2007) (breach of the implied covenant of good faith and fair dealing may be either subjective or objective).
Colo.—*Amoco Oil Co. v. Ervin*, 908 P.2d 493, 28 U.C.C. Rep. Serv. 2d 452 (Colo. 1995), as modified on denial of reh'g, (Jan. 16, 1996).
Nev.—*Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335 (1995).
S.D.—*High Plains Genetics Research, Inc. v. J K Mill-Iron Ranch*, 535 N.W.2d 839 (S.D. 1995).
- 9 U.S.—*Logan v. Bennington College Corp.*, 72 F.3d 1017, 106 Ed. Law Rep. 51 (2d Cir. 1995); *HLT Existing Franchise Holding LLC v. Worcester Hospitality Group LLC*, 994 F. Supp. 2d 520 (S.D. N.Y. 2014) (quoting text); *In re Magna Cum Latte, Inc.*, 2007 WL 4412143 (Bankr. S.D. Tex. 2007) (citing text) (the party asserting breach of the implied covenant bears the burden of proving the claim by a preponderance of the evidence).
N.J.—*Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 922 A.2d 710 (2007) (a plaintiff claiming a breach of the covenant of good faith and fair dealing must prove the defendant's bad motive or intention).
- 10 U.S.—*Mullowney v. Data General Corp.*, 143 F.3d 1081 (7th Cir. 1998) (applying Massachusetts law).
- 11 U.S.—*Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F.3d 275, 47 Fed. R. Serv. 3d 842 (3d Cir. 2000) (applying New Jersey law); *JRT, Inc. v. TCBY Systems, Inc.*, 52 F.3d 734 (8th Cir. 1995) (applying Arkansas law); *Link v. Department of Treasury*, 51 F.3d 1577 (Fed. Cir. 1995).
Conn.—*Geysen v. Securitas Sec. Services USA, Inc.*, 322 Conn. 385, 142 A.3d 227 (2016) (bad faith, for purposes of an alleged breach of the implied covenant of good faith and fair dealing, in general implies actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive; bad faith means more than mere negligence but rather it involves a dishonest purpose).
- 12 Restatement Second, Contracts § 205, comment.
U.S.—*Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F.3d 275, 47 Fed. R. Serv. 3d 842 (3d Cir. 2000) (applying New Jersey law); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999) (a distributor over-ordered and stockpiled a manufacturer's products while actively misleading the manufacturer about its need for an additional product, thereby breaching the implied duty of good faith and fair dealing).
N.M.—*Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, 124 N.M. 613, 954 P.2d 45 (1997) (requiring a showing of bad faith or that one party wrongfully and intentionally used the contract to the detriment of the other party).
- 13 U.S.—*Barranco v. 3D Systems Corp.*, 2015 WL 419687 (D. Haw. 2015) (quoting text); *Long Rockwood VII, LLC v.*

Rockwood Lodge, LLC, 2016 WL 335853 (D. Idaho 2016) (quoting text).

Conn.—Geysen v. Securitas Sec. Services USA, Inc., 322 Conn. 385, 142 A.3d 227 (2016) (quoting text).

D.C.—Sundberg v. TTR Realty, LLC, 109 A.3d 1123 (D.C. 2015); Paul v. Howard University, 754 A.2d 297, 145 Ed. Law Rep. 702 (D.C. 2000) (citing Hais v. Smith, 547 A.2d 986 (D.C. 1988) which, in turn, cited Restatement Second, Contracts § 205; technically, the statement of the court in both cases is dicta, since in neither case did the court find the implied duty of good faith and fair dealing violated by the conduct of the respective defendants; the instant case involved the affirmance of a summary judgment in favor of defendant university in an action brought by a faculty member who was denied tenure, allegedly in violation of a contractual obligation to grant it; in the earlier decision, the court declined to establish or recognize any duty on the part of a lender to police the mores of codebtors, by reporting to one—the ex-husband of the other—that the ex-wife had refused to negotiate a cashier's check intended by the ex-husband to pay off a joint debt; instead, when the lender would not accept only two-thirds of the check amount, the ex-wife forged the lender's name, paid him the two-thirds, and absconded with the rest; naturally, the ex-husband discovered this when the lender declared the loan in default, and the ex-husband sought to have the court hold—which the lower court did—that the implied duty of good faith required the lender to report the ex-wife's antics; the appellate court, finding no such duty, and refusing to create such a duty, reversed this determination).

14 U.S.—In re Kaplan, 143 F.3d 807 (3d Cir. 1998) (applying Illinois law, remanding for a determination of whether discretion was exercised in good faith or unreasonably, with an improper motive or arbitrarily).

Mont.—Mann Farms, Inc. v. Traders State Bank of Poplar, Montana, 245 Mont. 234, 801 P.2d 73 (1990) (the implied covenant of good faith and fair dealing is breached when one party uses discretion conferred by the contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the bargain).

N.H.—Centronics Corp. v. Genicom Corp., 132 N.H. 133, 562 A.2d 187 (1989) (the question raised whether the defendant's exercise of discretion exceeded the limits of reasonableness).

15 U.S.—America's Favorite Chicken Co. v. Cajun Enterprises, Inc., 130 F.3d 180 (5th Cir. 1997) (citing the *American Bank & Trust* case, below, and applying Louisiana's civil law, which defines bad faith but not good faith, unlike its commercial law (the UCC) which defines good faith; finding no breach of an implied promise absent evidence that failure to comply with the contract provision was intentionally malicious); *American Bank & Trust of Coushatta v. F.D.I.C.*, 49 F.3d 1064 (5th Cir. 1995) (containing an exceptional discussion of good faith and bad faith under the Louisiana statutes, pointing out, among other things, that the Louisiana Civil Code, unlike its commercial law, defines "bad faith" but not "good faith"; the court, tracing the history of the Louisiana Civil Code's "bad faith" rule, rejected the plaintiffs' argument that bad faith might be shown by establishing either that the defendant did not treat the plaintiffs as it would have liked to be treated or that the defendant acted negligently, stating in part: "[T]he court [below] ruled that the FDIC owed the banks only a duty to perform in 'good faith,' and the court looked to the Louisiana Civil Code for the definition of that critical term. The Louisiana Civil Code does not define 'good faith,' but it does define 'bad faith' as 'an intentional and malicious failure to perform.' [citation] Following Louisiana law, the district court then equated 'good faith' with the lack of 'bad faith.' [citations] The court held that the FDIC's actions may have been negligent, imprudent, or bumbling, but because they were not intentionally malicious, the banks could not state a claim).

"On appeal, the banks challenge the court's definition of good faith. They argue that the duty to act in good faith is breached not only by acting in bad faith but by any of three other standards of care. They are, in descending order of stringency, (1) violations of the Golden Rule, (2) negligence, or (3) gross fault. Alternatively, the banks argue that even under the district court's bad faith standard—a standard more lenient to the FDIC than any of their three candidates—the court should have denied the FDIC's summary judgment motion in light of the banks' evidence of the FDIC's self-dealing.

"We reject the banks' three definitions of breaches of good faith: the Golden Rule, negligence, and gross fault. We also agree with the district court that a trier of fact could not reasonably conclude on the facts of this record that the FDIC acted with malice ...

"Louisiana no longer measures good faith by the Golden Rule. Apparently, it once did. In 1979, the Supreme Court of Louisiana observed that implied into every Louisiana contract was the equitable "christian principle not to do unto others that which we would not wish others should do unto us." [citation; the court also explained in a footnote that "Curiously, the word 'christian' entered this statute by a mistake in translation from the French text. According to the Note to Article 1965, the word should have read 'religious.'] ...

"Five years later, the legislature revised the Civil Code and reenacted the statute ...—Article 1965—as Article 2055. Although the legislature stated in a comment that it intended new Article 2055 simply to reproduce the 'substance' of old Article 1965, the legislative revisions dropped the Golden Rule. Old Article 1965 provided that.

"The equity intended by this rule is founded in the christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense

of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity.'" [citation]

"The Golden Rule is absent from revised Article 2055: 'Equity, as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another. Usage, as intended in the preceding articles, is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation. [citation] Nevertheless, old Article 1965 resists its death. Years after Article 1965 was revised, federal and state courts still cite the 'christian principle' of old Article 1965 ... without mentioning that Article 1965, as recodified as new Article 2055, failed to retain it. [citations] We are hesitant then to reject the Golden Rule definition of good faith despite its loss of its statutory source.

"We are persuaded finally to do so because we have been unable to find a single case since ... 1979 that actually applies it. Most courts that have cited old Article 1965 since 1979 have relied not upon the statute's 'christian principle' but upon its rule that 'no one ought to enrich himself at the expense of another.' [citations] Indeed, one Louisiana court has suggested that the 'christian principle' is nothing more than a ban on unjust enrichment. [citation] Even those courts that have used old Article 1965 to inform the meaning of the term 'good faith' have not held that the duty of good faith demands refraining from doing unto others that which we would not wish them to do to us. [citations] In short, the Louisiana Supreme Court's application of the Golden Rule in [1979] appears to have been an anomaly. We predict that the Louisiana Supreme Court would not choose to apply it again, and, in our best effort to replicate the Louisiana Supreme Court, we refuse to do so here.

"The banks' attempt to define negligent acts as a breach of good faith is similarly ill-founded. Under Louisiana law a party can act in good faith and be negligent. In fact, the Louisiana Supreme Court recently rejected the negligence standard.

"Although it is clear that "bad faith" or "lack of good faith" in this context means something more reprehensible than ordinary negligence, imprudence or want of skill, it is apparent that our courts have perceived the terms to include some forms of gross fault as well as intentional and malicious failures to perform.

"[citations] At oral argument, counsel for the banks properly conceded that he knew of no case in Louisiana or anywhere else that stated that negligence is a breach of good faith.

"The banks' second line of argument is that the participation agreements adopt a negligence standard, both implicitly and explicitly. By forcing the participant banks to depend on the FDIC to get the best price for the property, the participation agreements implicitly created what the banks call an 'agency coupled with an interest,' which imposed upon the FDIC the duty to act 'in a manner that a reasonably prudent banker would have acted for his own interest in a nonparticipated loan.' The participation agreements explicitly imposed a negligence standard, the banks argue, by demanding that the FDIC 'exercise the same care with respect to the loan, and the collateral, if any, as it gives to loans and collateral in which it alone is interested.'

"We are not persuaded that the standard the banks find in the text and subtext of the participation agreements imposes a negligence standard

"Further, we agree with the district court that gross fault cannot be a breach of good faith under Louisiana law. The strongest support for the banks' gross fault standard is the Louisiana Supreme Court's statement that 'our courts have perceived [the term "lack of good faith"] to include some forms of gross fault.' [citation] Following the civil law tradition of Louisiana, the district court elevated statutory law over decisional law and gave [the case] little weight. Because Comment c to Article 1997 of the Civil Code defined bad faith as an intentionally malicious failure to perform, and because the Louisiana Supreme Court had made no 'definitive statement' about the meaning of bad faith, the district court stated that it was 'not free to abrogate the Louisiana legislature's unambiguous declarations.' [citation]

"We agree with the district court's careful adherence to Louisiana's civil law tradition. As an *Erie* court, our task is to anticipate the Louisiana Supreme Court's interpretation of the meaning of bad faith, ... even when we construe Louisiana's civil law The Louisiana Supreme Court's statement [above] was dicta, sharply contradicted by the plain text of the comment to Article 1997. We believe that if the Louisiana Supreme Court were hearing this case, it would brush aside the stray statement [above] and follow the clear dictates of the Louisiana Code... . The choice between gross negligence and malice was not before the court. Of course, these are common law, not civil law, observations. Nonetheless, they inform our prediction of the Louisiana Supreme Court's future course.").

¹⁶ U.S.—*Southern Implement Co., Inc. v. Deere & Co.*, 122 F.3d 503 (8th Cir. 1997) (applying Arkansas version of UCC); *JRT, Inc. v. TCBY Systems, Inc.*, 52 F.3d 734 (8th Cir. 1995).

¹⁷ U.S.—*American Bank & Trust of Coughatta v. F.D.I.C.*, 49 F.3d 1064 (5th Cir. 1995).
Conn.—*De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 269 Conn. 424, 849 A.2d 382 (2004).
D.C.—*Wright v. Howard University*, 60 A.3d 749, 289 Ed. Law Rep. 811 (D.C. 2013).

Del.—*SIGA Technologies, Inc. v. PharmAthene, Inc.*, 67 A.3d 330 (Del. 2013) (bad faith is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will).

Miss.—*University of Southern Mississippi v. Williams*, 891 So. 2d 160, 195 Ed. Law Rep. 396 (Miss. 2004).

N.M.—*Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, 124 N.M. 613, 954 P.2d 45 (1997).

18 **Conn.**—*Capstone Bldg. Corp. v. American Motorists Ins. Co.*, 308 Conn. 760, 67 A.3d 961 (2013) ("bad faith" for purposes of a claim of breach of the implied covenant of good faith and fair dealing means more than mere negligence; it involves a dishonest purpose); *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 269 Conn. 424, 849 A.2d 382 (2004) (bad faith, for purposes of an alleged breach of the implied covenant of good faith and fair dealing, in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive).

D.C.—*Sundberg v. TTR Realty, LLC*, 109 A.3d 1123 (D.C. 2015) (to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege either bad faith or conduct that is arbitrary and capricious); *Wright v. Howard University*, 60 A.3d 749, 289 Ed. Law Rep. 811 (D.C. 2013) (lack of diligence, purposeful failure to perform, or interference with the other party's ability to perform).

Del.—*SIGA Technologies, Inc. v. PharmAthene, Inc.*, 67 A.3d 330 (Del. 2013) (bad faith with regard to contract negotiation is not simply bad judgment or negligence, but rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will).

Miss.—*University of Southern Mississippi v. Williams*, 891 So. 2d 160, 195 Ed. Law Rep. 396 (Miss. 2004) ("bad faith" by a party to a contract implies some conscious wrongdoing because of a dishonest purpose or moral obliquity).

N.M.—*Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, 124 N.M. 613, 954 P.2d 45 (1997) (stating this in the context of a contract for funeral or burial services, though affirming summary judgment in favor of the defendant funeral home where the plaintiff could establish no damages from breach of a contract to bury a relative, where the funeral home at the same time negligently disinterred another relative since the funeral home reinterred the latter relative and buried the former at no cost to the plaintiffs).

19 **Mont.**—*Mann Farms, Inc. v. Traders State Bank of Poplar, Montana*, 245 Mont. 234, 801 P.2d 73 (1990) (citing the *Story* case, below, and Montana's statutory good faith provision, *Mont. Code Ann. § 28-1-211*).

Story v. City of Bozeman, 242 Mont. 436, 791 P.2d 767, 12 U.C.C. Rep. Serv. 2d 359 (1990) (the court outlined its prior decisions expanding the duty of good faith and fair dealing, and the damages available under it, then stated: "The legislature has also reacted to the prevalence of bad faith torts. In 1987, it restricted wrongful discharge actions, [citation] and punitive damages, [citation]. In actions arising out of contract, the legislature also banned punitive damages, [citation] and damages for emotional distress [citation]. While the latter provisions may not apply to the separate tort of bad faith, they do indicate that such damages are not always appropriate in contract actions. Most importantly, in *Mont. Code Ann. § 28-1-211*, the 1987 Legislature defined the standard of conduct under the implied covenant as honesty in fact and the observance of reasonable commercial standards—the same standard applied to merchants under the Uniform Commercial Code. [citation] We are persuaded that it is time to reassess the covenant of good faith and fair dealing and to provide more workable guidelines for the future).

...“ The Uniform Commercial Code provides a more workable model for most contracts not covered by specific statutory provisions. The Code states, 'Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement.' [U.C.C. § 1-203]. “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.’ [U.C.C. § 2-103(1)(b)]. A party who breaches the covenant may be denied the benefit of a relevant Code provision or the breach may be deemed a breach of the contract. [citation] This Court believes that the Uniform Commercial Code model should be extended to cover all contracts and that the bad faith tort should be used only when the parties have a special relationship.

“We hold that every contract, regardless of type, contains an implied covenant of good faith and fair dealing. A breach of the covenant is a breach of the contract. Thus, breach of an express contractual term is not a prerequisite to breach of the implied covenant. For every contract not covered by a more specific statutory provision, the standard of compliance is that contained in *Mont. Code Ann. § 28-1-211*.

“The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. This is the same standard as applied to merchants under the Uniform Commercial Code. Each party to a contract has a justified expectation that the other will act in a reasonable manner in its performance or efficient breach. When one party uses discretion conferred by the contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached.

"In the great majority of ordinary contracts, a breach of the covenant is only a breach of the contract and only contract damages are due. For breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom. Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract. [citation] In common contract actions, tort-type damages are not available for breach of the implied covenant of good faith and fair dealing. They are, however, available for traditional contract-related torts such as fraud, fraudulent inducement, and tortious interference with a contract.

"The tort of bad faith may still apply in exceptional circumstances. It serves to discourage oppression in contracts which necessarily give one party a superior position. The legislature has codified the tort's most common applications. [citations] The tort remedy may also be available in contracts involving special relationships which are not otherwise controlled by specific statutory provisions.").

- 20 **Del.**—[Nemec v. Shrader](#), 991 A.2d 1120 (Del. 2010) (one generally cannot base a claim for breach of the implied covenant of good faith and fair dealing on conduct authorized by the agreement).
Mo.—[Bishop & Associates, LLC v. Ameren Corporation](#), 520 S.W.3d 463 (Mo. 2017) (there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract).
Vt.—[Southface Condominium Owners Ass'n, Inc. v. Southface Condominium Ass'n, Inc.](#), 169 Vt. 243, 733 A.2d 55 (1999).
- 21 **U.S.**—[Zenith Ins. Co. v. Employers Ins. of Wausau](#), 141 F.3d 300 (7th Cir. 1998) (quoting [Foseid v. State Bank of Cross Plains](#), 197 Wis. 2d 772, 541 N.W.2d 203 (Ct. App. 1995), which had interpreted other Wisconsin case law, as indicating that party may be liable for breach of implied covenant of good faith, even though all the terms of the written agreement may have been fulfilled); [Marsu, B.V. v. Walt Disney Co.](#), 185 F.3d 932 (9th Cir. 1999) (applying California law).
N.J.—[Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates](#), 182 N.J. 210, 864 A.2d 387 (2005).
Mont.—[Story v. City of Bozeman](#), 242 Mont. 436, 791 P.2d 767, 12 U.C.C. Rep. Serv. 2d 359 (1990).
Wash.—[Rekhter v. State, Dept. of Social and Health Services](#), 180 Wash. 2d 102, 323 P.3d 1036 (2014) (it is possible to breach the implied duty of good faith even while fulfilling all of the terms of the written contract).
Wis.—[Runzheimer Intern., Ltd. v. Friedlen](#), 2015 WI 45, 362 Wis. 2d 100, 862 N.W.2d 879 (2015) (following the letter but not the spirit of an agreement is disfavored, and it is deemed a violation of the covenant of good faith and fair dealing to do so).
Wyo.—[Bear Peak Resources, LLC v. Peak Powder River Resources, LLC](#), 2017 WY 124, 403 P.3d 1033 (Wyo. 2017).
- 22 **U.S.**—[Zenith Ins. Co. v. Employers Ins. of Wausau](#), 141 F.3d 300 (7th Cir. 1998) (applying Wisconsin law); [Business Payment Systems, LLC v. National Processing Co.](#), 2012 WL 6020400 (W.D. Ky. 2012), order clarified, 2014 WL 4215590 (W.D. Ky. 2014) (quoting text); [Hill v. Commerce Bancorp, Inc.](#), 2012 WL 694639 (D.N.J. 2012), *aff'd*, 586 Fed. Appx. 874 (3d Cir. 2014) (quoting text); [Titan Stone, Tile & Masonry, Inc. v. Hunt Const. Group, Inc.](#), 2007 WL 869556 (D.N.J. 2007) (quoting text).
Conn.—[De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.](#), 269 Conn. 424, 849 A.2d 382 (2004) (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 the plaintiff is reasonably expected to receive under the contract must have been taken in bad faith).
Del.—[Dieckman v. Regency GP LP](#), 155 A.3d 358 (Del. 2017) (the implied covenant of good faith and fair dealing applies when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected).
Mont.—[Story v. City of Bozeman](#), 242 Mont. 436, 791 P.2d 767, 12 U.C.C. Rep. Serv. 2d 359 (1990) (under a statute providing in part that "When one party uses discretion conferred by the contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached."); [Phelps v. Frampton](#), 2007 MT 263, 339 Mont. 330, 170 P.3d 474 (2007) (citing text) (to maintain a claim for breach of the implied covenant of good faith and fair dealing, it is insufficient to present evidence that the other party acted in bad faith; the claimant must also come forward with evidence sufficient to support the conclusion that as a result of the other party's action, the claimant was deprived of a benefit or a justified expectation under the contract. Whether the claimant's expectation was justified depends on the various circumstances that surround the parties' relationship and thereby shape or give contour to the expectation in the first instance).
N.J.—[Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates](#), 182 N.J. 210, 864 A.2d 387

(2005); *Morrison v. American Intern. Ins. Co. of America*, 381 N.J. Super. 532, 887 A.2d 166 (App. Div. 2005) (quoting text).

23 U.S.—*Occusafe, Inc. v. EG&G Rocky Flats, Inc.*, 54 F.3d 618 (10th Cir. 1995) (applying Colorado law; citing *Restatement Second, Contracts* § 205 comment).

Nev.—*Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335 (1995) (involving a confidential relationship between the buyer and seller of a retail store where the seller apparently took unconscionable advantage of the buyer).

24 Nev.—*Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335 (1995) (quoting *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 808 P.2d 919 (1991), a case involving a contract between "Dynamic Duo," fight promoters Butch Lewis and Don King, and the Las Vegas Hilton Hotel, for certain "unification" boxing matches which were eventually supposed to unify the various boxing federations' heavyweight champions, including Michael Spinks and Mike Tyson; the court, in addition to the statements set forth in the text, also said: "Even though it has been properly judicially determined that Dynamic Duo did not breach its contract with Hilton, Hilton may still be able to recover damages for breach of the implied covenant of good faith and fair dealing that is part of every contract. Where the terms of a contract are literally complied with but one party to the contract deliberately countervenes [sic] the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing. This court recognized such an action in [an earlier decision], in which contract damages were held to be recoverable for breach of the implied covenant of good faith and fair dealing ... [That] opinion notes the difference between a tort action and contract action in good faith covenant cases, pointing out that the tort action requires a special element of reliance or fiduciary duty ... The tort action for breach of the covenant of good faith and fair dealing (sometimes called a 'contort' because of its hybrid contract-tort nature) must not be confused with the essentially contract form of claim

"Even though Dynamic Duo did not have a contractual duty to furnish Spinks as a contestant in the Hilton events, it did have a legal duty not to interfere with Spinks' capacity to be a contestant and effectively prevent Spinks from participating in the Hilton events. Dynamic Duo, Lewis and King, under the implied covenant of good faith and fair dealing, had a duty to promote the Hilton events in a fair manner and not to manipulate who would be or who would not be the IBF [International Boxing Federation] champion and so advance their own interests in a manner that would compromise Hilton's benefits under the contract. Lewis did not have the right to defeat Hilton's contract interests by deliberately causing Spinks to be stripped of the IBF title in order to benefit himself and Dynamic Duo. Dynamic Duo and Lewis had the duty to perform the obligations of the Hilton contract in good faith. If, as charged by Hilton, Lewis purposefully and intentionally had Spinks stripped of the IBF title in order to undermine the Unification Series and permit Lewis and Dynamic Duo to make more money outside the series, this conduct could be seen as a breach of the covenant of good faith and fair dealing implied in the parties' contract. Lewis's good faith relative to the Hilton-Dynamic Duo contract is a question of fact to be determined by the jury after presentation of all relevant evidence. "Hilton's action for breach of the implied covenant of good faith and fair dealing is problematical. Hilton did not specifically plead a breach of the good faith covenant. Nevertheless, a claim under this theory was apparently litigated by consent of the parties. The following instruction was given, without objection and, presumably, was considered by the jury in rendering its verdicts.

"In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party impliedly agrees not to do anything to destroy or injure the right of the other to receive the benefits of the contract. Thus, each party has the duty not to prevent or hinder performance by the other party."

"When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith. Whether the controlling party's actions fall outside the reasonable expectations of the dependent party is determined by the various factors and special circumstances that shape these expectations. [citations].

"The jury was correctly instructed that Dynamic Duo impliedly agreed (in addition to what it might have been obligated to do under the contract) 'not to do anything to destroy or injure the right of [Hilton] to receive the benefits of the contract.' The question is whether Hilton has made a prima facie case under which it can recover for failure on the part of Dynamic Duo to act in good faith with respect to the contract of the parties. It appears that it has ...

"It cannot be denied that Spinks' not fighting in the Hilton events was injurious to Hilton and destructive of its right 'to receive the benefits of the contract.' Even though Dynamic Duo was not contractually bound to have Spinks fight at the Hilton, it had the duty not to 'injure' Hilton by purposely causing Spinks to forfeit his IBF championship and thus keep him out of the Hilton events; and Hilton had the right to recover benefits which, although not spelled out in the contract, would have been enjoyed by Hilton had it not been for the claimed perfidious actions by Lewis as an agent of Dynamic Duo. Bad faith on the part of Lewis and others could have deprived Hilton of benefits it would have received had it not been for Lewis' pulling Spinks out of the Unification Series so as to make 'big money' elsewhere. Proof of what Lewis said and did in this regard is critical to the prosecution of this aspect of Hilton's

case.").

- 25 U.S.—*Griffith v. Levi Strauss & Co.*, 85 F.3d 185 (5th Cir. 1996) (applying Texas law; any breach of the duty of good faith must occur within the framework of the distribution agreement between the manufacturer and the retailer); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 43 Fed. R. Serv. 3d 448 (11th Cir. 1999) (applying Florida law; finding that the franchisee had no claim against the franchisor for breach of the implied covenant of good faith and fair dealing, based upon the franchisor's decision to license the opening of a competing restaurant near two of the franchisee's existing restaurants).
- 26 U.S.—*Occusafe, Inc. v. EG&G Rocky Flats, Inc.*, 54 F.3d 618 (10th Cir. 1995) (applying Colorado law; citing *Restatement Second, Contracts* § 205 comment); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 43 Fed. R. Serv. 3d 448 (11th Cir. 1999).
Colo.—*Amoco Oil Co. v. Ervin*, 908 P.2d 493, 28 U.C.C. Rep. Serv. 2d 452 (Colo. 1995), as modified on denial of reh'g, (Jan. 16, 1996).
- 27 U.S.—*Century Exploration New Orleans, LLC v. United States*, 110 Fed. Cl. 148 (2013), *aff'd*, 745 F.3d 1168 (Fed. Cir. 2014) (quoting text); *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295 (5th Cir. 1997) (applying Louisiana law); *Big Yank Corp. v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 39 Fed. R. Serv. 3d 339, 1997 FED App. 0267P (6th Cir. 1997); *Hughes v. TD Bank, N.A.*, 856 F. Supp. 2d 673 (D.N.J. 2012) (quoting text); *Clalit Health Services v. Israel Humanitarian Foundation*, 395 F. Supp. 2d 21 (S.D. N.Y. 2005) (quoting text).
Del.—*Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839 (Del. Ch. 2012), judgment entered, 2012 WL 598121 (Del. Ch. 2012), judgment *aff'd*, 59 A.3d 1206 (Del. 2012) (quoting text); *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) (a party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party).
Or.—*Uptown Heights Associates Ltd. Partnership v. Seafirst Corp.*, 320 Or. 638, 891 P.2d 639 (1995) (the party invoking its express, written contractual right does not, merely by so doing, violate its duty of good faith under the contract).
S.C.—*Adams v. G.J. Creel and Sons, Inc.*, 320 S.C. 274, 465 S.E.2d 84 (1995).
Vt.—*Southface Condominium Owners Ass'n, Inc. v. Southface Condominium Ass'n, Inc.*, 169 Vt. 243, 733 A.2d 55 (1999).
Va.—*Mahoney v. NationsBank of Virginia, N.A.*, 249 Va. 216, 455 S.E.2d 5, 26 U.C.C. Rep. Serv. 2d 64 (1995).
- 28 U.S.—*Clark v. America's Favorite Chicken Co.*, 110 F.3d 295 (5th Cir. 1997) (applying Louisiana law; containing an excellent discussion of why the implied obligation of good faith and fair dealing could not trump the express right of the franchisor, *inter alia*, to advertise competing franchises under common ownership, and to utilize advertising fund, made up of contributions by franchisees, in its sole discretion, for the benefit of system as a whole, to the exclusion of any particular franchisee).
- 29 U.S.—*Travellers Intern., A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570 (2d Cir. 1994) (applying New York law, the court noted "[Defendant] characterizes its obligation to produce and distribute brochures as a discretionary promotion. It is well-settled that, in construing discretionary promotional contracts, courts will not read into them a 'best efforts' or a 'promote fully' clause unless the parties have explicitly bargained for such an obligation. [citation] However, even in a discretionary promotional contract, the obligation of good faith remains, and the particular duties of each party are 'derived both from the common expectations of [the] parties ... and from the relationship of those parties as structured by the contract.' "); *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295 (5th Cir. 1997) (commenting on the absence of any evidence of "bad faith or ill motive" under Louisiana law).
Utah—*Oman v. Davis School Dist.*, 2008 UT 70, 194 P.3d 956, 237 Ed. Law Rep. 891 (Utah 2008) (a contract is breached by a failure to perform in good faith if a party uses its discretion for a reason outside the contemplated range, a reason beyond the risks assumed by the party claiming the breach).
- 30 U.S.—*Travellers Intern., A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570 (2d Cir. 1994) (the court, after noting that generally, even where the defendant is given discretion, it must exercise that discretion in good faith, continued: "Moreover, [defendant's] promotional duties under the ... joint venture agreement cannot fairly be characterized as purely discretionary.
"The ... contract confers discretion upon [defendant] to determine the appropriate level of advertising and marketing, but defines and limits that discretion by mandating a cooperative and collaborative process:
"[Defendant] agrees that it will at its own expense ... (i) produce and distribute brochures ... in such numbers as are deemed appropriate to produce the number of ... passengers desired by [the parties], such desired number ... to be mutually agreed upon for each year ...; (ii) advertise ... in various media as deemed necessary by [defendant]; ... In determining the number of ... brochures and the type and extent of advertising ..., [defendant] will give full

consideration to the recommendations of [the other party]."

"This language and the prior course of dealings between the parties (as [the trial judge] found required [defendant] to consult with [the other party to the contract] in determining the number of brochures to be produced and distributed for each tour season, to give 'full consideration' to [its] recommendations, and to produce and distribute a volume of brochures 'deemed appropriate' to generate the minimum targeted number of ... passengers. [Defendant] argues that the required number of brochures 'deemed appropriate' is the number that [defendant] alone 'deemed appropriate.' That reading is not obvious from the language, which specifies no point of view in this phrase, and in any event requires the exercise of good faith in determining an 'appropriate' number.")

- 31 U.C.C. § 1-203, which provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."
- 32 U.S.—*McDonald's Corp. v. Watson*, 69 F.3d 36, 28 U.C.C. Rep. Serv. 2d 174 (5th Cir. 1995).
- 33 U.S.—*Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co.*, 239 F. 603 (C.C.A. 7th Cir. 1917).
- 34 U.S.—*Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co.*, 239 F. 603 (C.C.A. 7th Cir. 1917).
- 35 U.S.—*Clark v. America's Favorite Chicken Co.*, 110 F.3d 295 (5th Cir. 1997) (applying Louisiana law; holding that the franchisor did not breach the implied covenant of good faith and fair dealing by adopting a nationwide marketing and advertising plan, which the franchisees alleged made them less competitive in their market area, where the franchise agreements gave the administrator of the nationwide advertising fund sole discretion in the selection of media and locale for media placement).
- 36 U.S.—*Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 27 U.C.C. Rep. Serv. 2d 1185 (7th Cir. 1995) (applying Illinois law).
- 37 U.S.—*Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 33 Fed. R. Serv. 3d 765 (8th Cir. 1995) (applying Missouri law; a manufacturer did not breach the implied duty of good faith in a distribution agreement by conditionally terminating a distributor, allegedly to award the distributorship to its former vice-president, as the manufacturer had no legal obligation to accept the distributor's choice of a successor president, where the manufacturer unilaterally extended the termination date at least twice to allow the distributor to consummate the sale of its business and there was no showing that the manufacturer interfered with either the operation of the distributor's business or its efforts to sell its assets).
Or.—*Perkins v. Standard Oil Co.*, 235 Or. 7, 383 P.2d 107 (1963).
- 38 Or.—*Perkins v. Standard Oil Co.*, 235 Or. 7, 383 P.2d 107 (1963).
- 39 Or.—*Perkins v. Standard Oil Co.*, 235 Or. 7, 383 P.2d 107 (1963).