

Franchising's Enlightened Compromise: The Implied Covenant of Good Faith and Fair Dealing

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This article assesses the current state of the implied covenant in the common law, efforts by franchisors to abolish it,¹ and attempts by franchisees to impose stricter duties upon franchisors. Anecdotal evidence suggests that attempts to impose waivers of the implied covenant in franchise agreements are increasing and that a wave of litigation over the enforceability of these waiver clauses will follow. Are we entering a new era in which the courts will permit franchisors to untether themselves from any standards of care and thus be licensed, quite literally, to behave “unreasonably” and to act solely in their own self-interest without regard for their franchisees? Would such a development actually be positive, as its proponents contend? Or would far too many franchisors abuse the unbridled discretion that they are seeking, to the detriment (if not the ruination) of franchising as an attractive business model?

To be clear at the outset, we oppose contractual efforts to abolish the implied covenant and urge that courts find such waiver clauses unenforceable. The human tendency to exploit available opportunities counsels strongly against the abandonment of all standards of care. We predict that the implied covenant likely will prove much more

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resilient than its detractors might desire, and that (in the absence of legislative intervention) the implied covenant is probably here to stay in franchising cases.

Indeed, no matter how hard lawyers might try, it remains impossible in drafting a long-term franchise agreement to anticipate every future question that might arise over the life of the relationship.² Therefore, it remains impossible to define the parties' mutual rights and responsibilities so precisely that every future question is decided in advance, when the agreement is signed.³

Moreover, we submit that the courts are unlikely to accept the proposition that franchisors may license themselves to behave unreasonably and place their conduct above meaningful judicial review. The common law has developed the implied covenant as a reasonable standard of care upon contracting parties in performing their express contractual duties. For franchising, this is an unhappy but enlightened compromise. To paraphrase Winston Churchill on the subject of democracy, the much maligned implied covenant may be the worst possible way to measure contract performance in franchising, *except for everything else* that has been, or could be, tried.⁴

Overview of the Implied Covenant

The duty of good faith has been around for centuries, but it did not receive widespread recognition in the United States until the mid-twentieth century, when it was written into the Uniform Commercial Code.⁵ The implied covenant is “now recognized [at common law] in some form in most jurisdictions.”⁶ In franchising, the implied covenant has been applied in a variety of situations relating to contract performance and enforcement,

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including important issues that impact the value of the franchise during the relationship such as destructive competition and bad faith discriminatory treatment or favoritism,⁷ terminations,⁸ transfers,⁹ and renewals.¹⁰ However, the implied covenant remains as controversial as it is prevalent, and thus it is not very surprising to see proposed contract language such as the following provision:

Unless otherwise provided in this Agreement with respect to certain issues, whenever this Agreement requires you to obtain our written consent, or permits us to take any action or refrain from taking any action, we are free to act in our own self-interest without any obligation to act reasonably, to consider the impact on you or to act subject to any other standard of care limiting our right, except as may be provided by statute or regulation.¹¹

Not an Independent Cause of Action

Historically there was much confusion as to whether the duty of good faith gave rise to the tort of bad faith and, secondarily, whether there was an independent cause of action in contract for breach of the implied covenant.¹² This confusion arose in the context of insurance law, where insurance companies were held liable in tort for the bad faith denial of claims, i.e., for exercising bad faith in committing a breach of an insurance contract.¹³ The separate claim of bad faith was then extended, in some jurisdictions, to other parties in special relationships that were deemed comparable to the relationship of a policy holder to an insurance company.¹⁴ Courts soon wrestled with the issue of whether franchising created the type of special relationship that gave rise to an independent claim of bad faith

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(in tort or in contract), and in general, the answer to that question was “no.”¹⁵ The question of whether franchising created special relationships also spawned the issue of whether franchisors owed fiduciary duties to their franchisees, and again, most courts found no such duty.¹⁶

The rejection of an independent cause of action for bad faith breach of contract (and the separate rejection of fiduciary duties) did not eliminate the implied covenant of good faith and fair dealing in franchising. The historical question of special relationships did, however, create confusion that continues to linger in some jurisdictions. In 2000, the Third Circuit in *Northview Motors, Inc. v. Chrysler Motors Corp.*, applying Pennsylvania law, confronted claims by a car dealer who was trying to state an independent cause of action for breach of the implied covenant.¹⁷ The court explained that “courts have utilized the good faith duty as an interpretive duty to determine the parties’ justifiable expectations in the context of a breach of contract action, but that duty is not divorced from the specific clauses of the contract and cannot be used to override express contractual terms.”¹⁸

As discussed below, the Third Circuit’s recognition that Pennsylvania courts would utilize the implied covenant to protect the parties’ justifiable expectations in relation to express contract terms is very much the mainstream view of the implied covenant today. Nonetheless, acknowledging the historical confusion, the court added that Pennsylvania would not recognize an independent action for bad faith in situations where the same set of facts gave rise to other causes of action.¹⁹

More recently, the federal district court in *GNC Franchising LLC v. Khan* likewise declined to decide the “complicated and novel question of whether Pennsylvania would recognize an *independent* cause of action by a franchisee against a franchisor for breach

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of the [implied covenant].”²⁰ The court found that this question was not ripe for review because, at the pleading stage of the case, the franchisee had stated adequate claims for breach of contract based upon the alleged misuse of the advertising fund and wrongful termination of the franchise. As in *Northview Motors*, the district court properly adhered to the prevailing view that, although the implied covenant of good faith and fair dealing cannot be divorced from the specific express terms of the parties’ contract, it serves to animate those express terms and supports a claim for breach of the express contract.²¹ This is the prevailing rule that most courts have reached, and thus is the formulation addressed in the remainder of this article.

Scope of the Implied Covenant

Widespread recognition that the implied covenant does not create an independent cause of action does not settle the question of exactly what good faith and fair dealing require in any given situation. This uncertainty is the root of frustration with the doctrine, giving rise to the attempts by some franchisors to repudiate it.

Early articulation of the doctrine was circular at best. In a 1914 New York decision, the court explained that “there is a contractual obligation of universal force which underlies all written agreements. It is the obligation of good faith in carrying out what is written.”²² By 1933, New York courts held that

in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the

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other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.²³

This formulation remains the bedrock of the implied covenant today, as franchisees typically invoke it seeking to protect the fruits of their franchise agreements.

In another early formulation, the Illinois Supreme Court first applied the implied covenant as a means of resolving ambiguity, stating that “[e]very contract implies good faith and fair dealing between the parties to it, and where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted.”²⁴ This aspect of the implied covenant remains applicable when the language of a contract is ambiguous. Confronted with ambiguous language, prospective franchisees have often faced the difficult choice whether to negotiate now in the hope of favorably resolving the ambiguity or litigate later in the hope that a court will resolve the ambiguity by invoking the implied covenant.²⁵

In the 1960s, the drafters of the Uniform Commercial Code (UCC) took a different approach, prescribing that good faith generally means “honesty in fact in the conduct or transaction concerned,” and in the case of a merchant, a heightened duty of good faith requires both “honesty in fact and the observance of reasonable commercial standards of fair dealing.”²⁶ The UCC’s principal drafter was himself convinced that it was impossible to supply a more precise definition of good faith that would apply to all transactions and that, in the end, good faith is best understood as the absence of bad faith.²⁷

That approach pervades the *Restatement (Second) of Contracts*, which provides in section 205 that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” The *Restatement* further recognizes:

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The phrase “good faith” is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving “bad faith” because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.²⁸

The *Restatement* articulates several examples of bad faith that would constitute a breach, including “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.”²⁹ Courts have generally followed the *Restatement’s* approach of defining good faith on a case-by-case basis. To critics, however, this approach has led to a seeming lack of consistency as to when and how the implied covenant is applied.³⁰ This perceived inconsistency can be defended to the extent that fact differences, no matter how superficially slight, can tip the balance in close cases.

Incomplete Contracts

In franchising, the implied covenant is usually invoked when the franchise agreement is ambiguous or, even more likely, when the agreement vests the franchisor (or sometimes the franchisee) with discretion to act. The discretionary nature of contract performance is

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inherent in franchising, occurring throughout the life of the franchise relationship from initial training to termination.

Most discussion of discretion in franchising focuses upon the broad discretion that franchisors typically enjoy. Gillian Hadfield has aptly observed that franchise agreements are “relational contracts” because they require mutual performance over a number of years; they are necessarily incomplete in defining the parties’ exact duties in every situation; and they necessarily vest discretion in both parties, but especially in the franchisor, as to exactly how the agreement will be performed over a period of years.³¹ Hadfield offers valuable insight as to the way that an imbalance in bargaining power leads almost inevitably to an imbalance of discretionary versus mandatory duties and places the greater risk of injury (from potential exploitation of contractual discretion) squarely upon the franchisee.

As Hadfield explains, a franchisee is typically subject to very specific regulation, by both the franchise agreement and the operations manual, in virtually every facet of the franchise.³² Moreover, franchisees face bleak prospects in the event that the franchisor elects to terminate the relationship.³³ In contrast, few franchisors accept specific mandatory performance duties beyond the licensing of the trademark. Everything else, ranging from the substance and quality of training and ongoing support for franchisees to the ongoing development for the brand, is left to a franchisor’s discretion, as “there are essentially no clauses creating any [specific] obligation for the franchisor to develop the system, to continue in operation, to continue to advertise, or to maintain the trademark.”³⁴

In addition, most franchise agreements leave the franchisor with substantial discretion whether to compete with the franchisee “through the development of another

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system or through the establishment of competing outlets,” or whether to “withdraw its system from a region or the entire market.”³⁵ Likewise, the franchisor has discretion to change the system’s operating procedures and to change the strategic direction of the brand in response to competition.³⁶ The franchisor’s exercises of discretion can impose substantial costs upon franchisees and sometimes lead to franchisee revolt.³⁷ A typical franchise agreement, however, provides little guidance as to how the franchisor should exercise its discretion, or how a court should determine if the franchisor’s performance was adequate. As Hadfield concludes, a court reviewing a franchise agreement, often years after it was drafted, may find that

roles and areas of responsibility are laid out [but the] court has little concrete guidance from the contract in deciding issues such as whether a franchisee’s failure to build a new showroom, or a franchisor’s decision to discontinue marketing its product in a franchisee’s territory, violates the terms of the contract. All that will be clear from the written contract is that the franchisor has discretion over decisions regarding [e.g.] showrooms or marketing; the typical contract will be silent about how this discretion is to be exercised. Moreover, the subject of franchisor discretion will often be undefined.³⁸

The question is how can, or should courts react to the nearly unbridled discretionary powers that a franchisor inevitably has over the franchisee’s business? Hadfield argued in 1990 that the implied covenant is exactly the right judicial response, imposing a duty that is sufficiently elastic, and that it is neither too harsh nor too lenient.³⁹ In Hadfield’s opinion,

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“other ‘doctrinal tools’ such as adhesion, unconscionability, and fiduciary duty” are not suited to franchising as they “operate from the premise that the [central] problem [in franchising] arises from the unequal bargaining power between franchisor and franchisee at the time the contract is ‘negotiated.’”⁴⁰ To Hadfield, the central problem in franchising is the incompleteness of the long-term relational contract that inevitably gives the franchisor the discretion to act in ways that could destroy the franchisee’s investment and future opportunities.⁴¹

Unbridled Discretion?

Courts routinely employ the implied covenant to limit the exercise of discretion that is vested to one party to a contract by holding that discretion must be exercised in good faith and consistent with the parties’ reasonable expectations. Significantly, the commentator who recently suggested that not every contract should contain an implied covenant of good faith also recognized that the implied covenant does play a valuable role where one party to the contract retains discretion to act, or not to act, in a way that could impact the value received by the other party to the contract.⁴²

A typical judicial formulation is that the implied covenant obligates a party who is vested with contractual discretion to “exercise that discretion reasonably” and in a manner consistent “with the reasonable expectations of the parties.”⁴³ More simply, a party vested with contractual discretion must exercise that discretion “fairly.”⁴⁴ Likewise, courts have held that good faith is the duty “to avoid taking advantage of gaps in [the agreement] in order to exploit the vulnerabilities that arise” in performance.⁴⁵ Moreover, the implied

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covenant is intended to ensure “that parties do not try to take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or to do anything that would destroy the other party’s right to receive the benefit of the contract.”⁴⁶ Specifically, the implied covenant prevents a party from manipulating contractual terms in order to take commercial advantage of another party.⁴⁷ These formulations are very close to the early holdings from New York, that the implied covenant serves to protect the “fruits of the contract” for each party.⁴⁸

Freedom of Contract

Critics of the implied covenant often view the doctrine as infringing upon their freedom to contract. The prevailing view is that the implied covenant should only “supplement or interpret the provisions of a contract” and should not be used to “to achieve a result contrary to the express contract terms.”⁴⁹ Employing this principle, franchisors were largely able to turn back the tide of encroachment lawsuits that followed the 1992 decision in *Scheck v. Burger King Corp.*,⁵⁰ in which a district court had held that the grant of a franchise at a specific location implied the right to protection from territorial encroachment. It was relatively simple for franchisors to insert express language in their post-*Scheck* agreements that negated any claim to implied territorial or market area protection.⁵¹ The post-*Scheck* agreements removed the ambiguity that had sprung from the previous silence on the territorial issue. Although many franchisee advocates were heard to complain that the rights that they won in *Scheck* were taken away from them, the better view is that post-*Scheck* franchisees were empowered to make a more informed choice as

to economic attractiveness of the franchise offering.⁵² The degree of express territorial protection offered to franchisees is proportionate to the strength of the franchisor's brand, with stronger brands being more likely to offer less territorial protection. Put another way, the invocation of the implied covenant in *Scheck* led to better contracts going forward, at least on the issue of territorial protection.

Express Contract Terms

As stated earlier, it is now generally recognized that the implied covenant is not an independent source of contract duties, such that claims for breach of the implied covenant are in reality claims that a party breached an express contractual provision by failing to act with the requisite good faith and fair dealing.⁵³

This principle has led to some confusing results, however. In *Yarborough v. DeVilbiss Air Power, Inc.*,⁵⁴ a 2003 nonfranchise case, the Eighth Circuit held that where a contract provided that a party "may or may not" take a specific action, the implied covenant could not be used to limit the party's subsequent exercise of its express right to "not" act where the consequences of "not" acting were foreseeable when the parties signed the contract.

Taken to its logical conclusion, this rationale would defeat invocation of the implied covenant in almost every circumstance, because any language that creates discretion (i.e., the franchisor "may") implies the possibility that the discretion might not be exercised. Indeed, adding "may not" after "may" is redundant. Arguably, the court in *Yarborough* erred by focusing too literally on the possibility that the party vested with discretion might

act unfavorably to the other party (by not acting) while ignoring the “reasonable expectation of the parties” at the time of contracting.

The Role of Motive

One unsettled area is the relevance of “state of mind” evidence with respect to alleged bad faith conduct. Courts sometimes disagree, even within a single jurisdiction, on whether the test for breach of the implied covenant is objective or subjective.⁵⁵ Further, some courts have held that the implied covenant always requires that a party act with “proper motive,”⁵⁶ while other cases have held that subjective motives are irrelevant if a party is acting within its contractual authority.⁵⁷ The converse is also true, as the *Restatement* notes that “a party’s conduct can contravene the good faith obligation even if the party believes the conduct to be justified; it also points out that fair dealing ‘may require more than honesty.’”⁵⁸

From the perspective of a franchisee seeking to establish a breach of the implied covenant, the obvious answer to this confusion is to present evidence of both subjective and objective bad faith. The latter category might include evidence of industry standards, course of performance, and course of dealing, and similar evidence that goes beyond what is learned of the franchisor’s subjective state of mind from depositions and the paper trail. Ultimately, as the common law remains in constant evolution, the role of motive will likely be clarified.

Franchisee Discretion

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Franchisees have substantial discretion in hiring employees, quality control, and overall management of their businesses.⁵⁹ “This discretion is often overlooked because of the presumption that franchisees have every incentive to perform to the best of their ability due to their unique financial risk.”⁶⁰ In *Lockewill, Inc. v. United States Shoe Corp.*,⁶¹ a franchisee that was objecting to the termination of its contract was required to show that it had “in good faith incurred expense and devoted time in building his business” as a condition for challenging the termination.⁶² Both parties to the franchise agreement were held to a good faith performance standard in that case.

Why Aren't Franchisees Happy?

Recent cases illustrate that the implied covenant continues to be applied in myriad franchising situations that benefit franchisees. In April 2006, the Tenth Circuit held in *Pepsi-Cola Bottling Company of Pittsburg, Inc. v. Pepsico, Inc.; Bottling Group, LLC*,⁶³ that under New York law, the implied covenant required Pepsi to take affirmative reasonable steps to prevent competing bottlers from encroaching on the local bottler's exclusive territory. In a 2005 Minnesota federal decision, *Bloomington Chrysler Jeep Eagle, Inc. v. DaimlerChrysler Motor Co., L.L.C.*,⁶⁴ the district court denied summary judgment against a plaintiff-franchisee's claim for breach of the implied covenant where the franchisor allowed a competing franchisee within the plaintiff franchisee's trade area, despite the fact that the franchise agreement allowed the franchisor discretion to establish competing franchises “as appropriate.” In March 2006, an Indiana district court in *Hubbard Auto Center, Inc. v. General Motors Corp.*⁶⁵ refused to dismiss claims that the franchisor had breached the

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implied covenant by, inter alia, “failing to distribute motor vehicles in a fair and equitable manner . . . [and] failing to permit the opportunity to receive a reasonable return on investment.”

These cases lead the unwary to the erroneous conclusion that franchisee advocates have won a tremendous victory by persuading courts to apply the implied covenant to franchise agreements. After all, holdings that the implied covenant obligates a party who is “vested with contractual discretion” to “exercise that discretion *reasonably* and with *proper motive* . . . in a manner [*consistent*] with the reasonable expectations of the parties” provide franchisees with compelling arguments that can lead to victory on the right facts.⁶⁶ Likewise, imposing the implied covenant to protect the franchisee’s expectations of a “reasonable return on investment” would seem to be the penultimate victory for fair franchising advocates.⁶⁷

Such a view, however, would ignore history. Early franchisee advocates pled for the imposition of a broad fiduciary duty upon franchisors and for vigorous application of the unconscionability doctrine.⁶⁸ A pure fiduciary duty would arguably have gone too far, and, thus, many courts simply watered down fiduciary duty to a good faith standard.⁶⁹ Holding a franchisor to the stricter duties demanded of a trustee to its beneficiary, or from an agent to its principal, would preclude the franchisor from considering anything except the well-being of the franchisee, even at the expense of the system or brand.⁷⁰

The heightened standard would ignore the commercial nature of franchising in which both parties expect to negotiate at arm’s length and to derive economic benefits.⁷¹ For these reasons, most courts refuse to hold that franchisors are fiduciaries except in limited circumstances where agency is established.⁷² Likewise, the unconscionability

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doctrine was historically unsuccessful in franchising largely because most courts have viewed franchise agreements as commercial contracts, and not as completely one-sided consumer contracts where there is an absence of meaningful choice.⁷³

Viewed from this perspective, the implied covenant has been a fallback position for franchisees, who remain frustrated by its inconsistent application and by continuing franchisor attempts to draft themselves out of such responsibility. The duty of good faith and fair dealing would arguably be more valuable to franchisees if it were made express, either by statute or by inclusion of an express duty of good faith in every franchise agreement, as it would preclude attempts by franchisors to exclude or limit the covenant's application through careful drafting. Franchisees potentially could be freed from the necessity of identifying an express contract term as the subject of the breach.

Even if the duty of good faith and fair dealing were made express, however, it probably would not go much further than it has been taken by the courts as an implied covenant. For example, it is unlikely that even an express duty of good faith would be permitted to override express contractual terms, unless those terms were deemed unconscionable or otherwise unenforceable. If a putative express duty of good faith were allowed to conflict with express contract terms, the result would be chaotic. The common law, recognizing the importance of freedom of contract, has wisely determined that the implied covenant should not override express contractual terms.

Franchisor Unhappiness

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Franchisors share the complaint that the implied covenant leads to unpredictable results, resulting in calls for the eliminating of implied covenants and standards of care altogether. Surprisingly, however, the notion of franchise agreements as being necessarily incomplete relational contracts has received scant attention.⁷⁴ Instead, some lawyers for franchisors have continued to chisel away at the scope of the implied covenant.⁷⁵ At the same time, the average franchise agreement has become longer and longer in the drafters' elusive quest for completeness. But, as Professor Hadfield opines, the attempt to draft a complete franchise agreement can never fully succeed.⁷⁶

Enlightened franchisors recognize this truth and draft their franchise agreements accordingly, in the hope of creating profitable relationships and limiting their potential future liabilities. There are two major choices. First, franchisors may attempt to negate the duty of good faith and fair dealing, but that approach invites more litigation on the issue of whether the implied covenant may be waived, and for franchisors, the outcome of that litigation is far from assured. Secondly, franchisors may strive to “manage” the implied covenant by more carefully delineating the parties' “realistic expectations” at the time of contracting, i.e., by more carefully crafting the parties' express contractual duties and more carefully defining the contractual standard of care.

Stealth Waivers

Contract drafters seeking to eradicate the implied covenant have employed great ingenuity, often without announcing their specific intention to impose a waiver for fear of making the franchises less marketable. Perhaps most commonly, a contract may provide

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that a particular discretionary decision is committed to the franchisor's sole discretion, or if that is not enough, then to the franchisor's sole and exclusive discretion, or even to the franchisor's "absolute discretion." All of these clauses, however, risk being deemed ineffective because, by its very definition, the implied covenant operates as a limitation on the exercise of a party's discretion.⁷⁷ Therefore, the fact that a particular subject of the contract is committed to that party's sole or exclusive discretion simply heightens the need for application of the implied covenant, and hardly seems to create a waiver.

As the bankruptcy court in *In re Schick* succinctly put it: "[a]bsolute discretion . . . does not necessarily mean what it suggests, or negate the implied covenant of good faith and fair dealing."⁷⁸ Moreover, these clauses arguably create more problems than they solve, especially in situations where the drafter commits some contractual decisions to simple discretion (the franchisor "may"), others to "sole" discretion, and still others to "sole and exclusive" or "absolute" discretion, thus arguably creating multiple standards of care for different discretionary decisions in the same document.⁷⁹

Other attempts to eradicate the implied covenant are to provide, as part of a contractual integration clause, that the written contract is complete and there are "no implied agreements" between the parties. Because the implied covenant is generally viewed as an aid to interpreting the existing agreement, and not as creating a separate agreement, the "no implied agreements" clause likely is of limited effectiveness.⁸⁰

Express Waivers

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The proposed “boilerplate” disclaimer of the implied covenant discussed above has at least one virtue: it is honest and straightforward.⁸¹ It puts prospective franchisees on notice that there will be no “standard of care” and that they are actually licensing the franchisor to misbehave.⁸² Another direct approach is to provide that, to the extent permitted by law, the parties expressly waive the implied covenant of good faith and fair dealing. These two approaches arguably eliminate any reasonable expectations on the part of a franchisee that it will have the right to question the franchisor’s discretion, even if that discretion is exercised unfairly, arguably leaving nothing for the implied covenant to protect. Franchisors seeking to impose waivers of the implied covenant in franchise agreements bear the burden to establish that the waivers should be judicially upheld, and that proposition is far from certain.

Judicial Hostility

Many reported decisions have held that the implied covenant cannot be waived.⁸³ Moreover, section 1–102(3) of the UCC expressly provides that “the obligations of good faith, diligence, reasonableness and care proscribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.” Thus, the UCC envisions that the parties may attempt to define the standards by which a franchisor might exercise good faith, but still imposes an outer boundary that the defined standards may not be “manifestly unreasonable.”

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Likewise, the *Restatement (Second) of Contracts* makes no provision for the possibility of waiver, and, on its face, a waiver would contradict the *Restatement's* assertion that the implied covenant is found in every contract.

To be sure, some cases suggest an opposite result. The Illinois Appellate Court in *Foster Enterprises, Inc. v. Germania Federal Savings and Loan Ass'n*,⁸⁴ stated in dictum, and without offering any reasoning, that the implied covenant only applied “absent express disavowal,” suggesting that it could indeed be waived. This statement has been repeated in a handful of subsequent decisions, but none of those courts offered reasons to support that statement.⁸⁵ More importantly, the cases that have repeated this dictum did not permit a waiver of the implied covenant on the basis of their particular facts, and did not actually hold that one of the contracting parties was free to engage in bad faith conduct that would eviscerate the spirit of the contract.⁸⁶

Illusory Promises

By design, attempts to impose waivers of all standards of care, including but not limited to the implied covenant, seek to remove all yardsticks for adjudicating whether a franchise agreement has been adequately performed or breached. Without the implied covenant, discretionary promises made in franchise agreements can become illusory if there is no meaningful way to require good performance.

In *Chodos v. West Publishing Co., Inc.*,⁸⁷ the Ninth Circuit recognized this problem and recognized that only the implied covenant serves to make a discretionary promise real. In *Chodos*, a nonfranchising case, an author signed a publishing contract obligating

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him to write a book, but leaving the publisher free to walk away from the contract if it decided not to publish. In that circumstance, the Ninth Circuit held that the publisher was subject to the implied covenant in its publishing decision, thereby establishing mutuality of obligation and permitting the court to enforce an otherwise illusory contract.⁸⁸

Franchise agreements, to be sure, are distinct from the publishing contract in *Chodos*, where the publisher's discretionary promise was the only consideration that the author had received. Franchisors supply sufficient consideration for the agreement simply by licensing their trademarks, so there is little danger in franchising, as there was in *Chodos*, that the entire contract would fail for lack of consideration simply by removing the implied covenant.

Unconscionability

Nonetheless, any judicial finding that specific express promises made by a franchisor were illusory could surely lead to findings that attempts to waive the implied covenant are unconscionable. The threat of an unconscionability finding is not an idle one. In a recent series of cases in California and the Ninth Circuit, some courts have found clauses in a franchise agreement to be unconscionable where the franchisee was not given a meaningful opportunity to negotiate the terms of the contract, and where the resulting terms were deemed sufficiently unfair or oppressive that the court refused to enforce them.⁸⁹ The lack of mutuality of obligation factored into one of these decisions, *Ticknor v. Choice Hotels*, where a franchisee was obligated to arbitrate certain claims, but the franchisor was not under a reciprocal obligation.⁹⁰

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Elimination of the implied covenant arguably creates the same lack of mutuality, as franchisors would be free of any duty to perform to franchisee expectations, while the franchisee would remain bound to its highly regulated performance obligations. Proponents of waiving the implied covenant will almost certainly meet arguments that their waiver clauses are unconscionable (in addition to being confronted with the line of cases cited in the preceding section that the implied covenant simply cannot be waived).

More Precise Drafting

Short of seeking to waive the implied covenant and eliminate all standards of care, franchisors often try to expressly delineate as many future possibilities as could be imagined at the time of contract drafting, which is the precise task that Professor Hadfield found to be doomed from the outset. These efforts go far in explaining the unfortunately increasing length of many contemporary franchise agreements. As a common example, franchisors often attempt to avoid a complaint that they acted without good faith in approving a proposed transfer by making express the grounds for disapproval. Similar examples can be posited for most provisions of a typical franchise agreement. One potential effect of better drafting, then, is to shift to the franchisee a greater burden of understanding (if not actually negotiating) the terms of the franchise agreement before signing. This was the situation that followed *Scheck*. On the other hand, a more likely effect resulting from attempts at more specific drafting is to create more points for future disagreement. Thus, intuitively, it is not clear whether longer and more detailed agreements will actually reduce litigation.

“Reasonable Business Judgment”

A better attempt to alter the standard of care that appears to be gaining currency is to define the franchisor’s “business judgment” or “reasonable business judgment” as the contractual standard of care for the franchisor’s exercise of discretion.⁹¹ On the surface, these clauses appear to borrow a page from corporate law, where the “business judgment rule” has long provided a very minimal standard for judicial review of business decisions made by corporate officials.⁹² By including a business judgment clause in franchise agreements, some franchisors may be hoping to create the same type of safe harbor in which their discretionary decisions would presumptively be upheld.

A brief review of the business judgment rule in corporate law, however, compels a rejection of that view. As formulated by the American Law Institute,

“[a] director or officer who makes a business judgment in good faith fulfills the [duty of care] if the director or officer: (1) is not interested in the subject of his business judgment; (2) is informed [of the relevant facts in the circumstance] to the extent the director or officer reasonably believes to be appropriate under the circumstances; and (3) rationally believes that the business judgment is in the best interests of the corporation.”⁹³

This rule does not translate into franchising, at least not in a way that would protect franchisors from scrutiny under the implied covenant. First, business judgment must generally be exercised in good faith in order to stand as a defense, once again leading us back to the implied covenant.⁹⁴ Moreover, franchisors are usually interested in the subject of their discretionary decisions that affect the franchisor/franchisee relationship.⁹⁵

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Nonetheless, consistent with the UCC's invitation that the parties may attempt to define the standards by which discretionary decisions may be made (so long as they are not "manifestly unreasonable"), the inclusion of a business judgment clause might serve to clarify the factors that a franchisor might take into account in the exercise of its discretionary business judgment. In this regard, the franchisor would be stating, at the time the contract is signed, that it will be making future discretionary decisions in light of the competing interests among various system stakeholders. This is arguably what franchisors are supposed to be doing anyway so clauses that clarify the factors that a franchisor must consider in the good faith exercise of its business judgment may be very beneficial to franchising.

Conclusion

The implied covenant has emerged as a reasonable compromise for the problems that are inherent in franchising, which include the necessary incompleteness of relational contracts, the frequent disparity of bargaining power between the parties, and the inherently competing interests that can come into conflict during the term of the contract.

Yet the implied covenant is a meaningful standard that can protect the realistic and legitimate expectations of both parties that result from the inevitable discretion given largely to franchisors. It also protects against the honest ambiguity that is often not foreseeable at the time of contracting. Having rejected earlier cases imposing a fiduciary duty standard, courts have moved to the middle of the road in fashioning the implied covenant as the most appropriate standard of care in franchising cases.

Waivers of the implied covenant raise the larger question of whether they are good

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for franchising. To that end, would any franchisor lawyer actually advise a franchisee to sign an agreement containing such language, if the franchisee was their client? Even if the particular franchisor has a good track record in its past franchisee relations, the risk of bad faith conduct going forward is far too great. Moreover, proponents of the implied covenant in franchise agreements have identified no positive virtues that would result from such waiver beyond the reduction of potential franchisor liabilities.⁹⁶ Any such benefit, however, would soon prove to be illusory. Simply put, unreasonable behavior, left unchecked, is ultimately worse for any franchise system than either threatened or actual litigation, which can serve to deter and correct unreasonable behavior. With all respect, we submit that the “license to be unreasonable” crowd has lost sight of everyone’s best interests including the long-term, enlightened interests of those franchisors who seek “win win” relationships with their franchisees.

We acknowledge that the implied covenant is far from perfect, but those who seek perfect clarity in the law and total predictability of results, in advance of the dispute even arising, are usually disappointed. Trial lawyers and judges know from experience that most often, hard cases are decided by their facts. The implied covenant is the perfectly elastic concept which allows courts to reach just results on the *facts* of particular cases. Courts that have been willing to apply the implied covenant to restrict the unbridled exercise of discretion have struck the most appropriate balance in franchising, even if it is to the chagrin of advocates on both sides of the aisle.

¹ This article does not address the subject of statutorily imposed good faith duties (or other standards of care). Suffice it to say that the field of statutorily imposed duties is far from complete, such that vast areas of franchisor performance in a majority of states are unregulated by statute.

² See Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990).

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³ *Id.*

⁴ According to Churchill: “It has been said that democracy is the worst form of government except all the others that have been tried.” The Quotations Page, <http://www.quotationspage.com/quote/364.html> (last visited January 31, 2007).

⁵ Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR. L. REV. 227, 227 & n.4 (2005). See also E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 669 (1963) (“The inclusion of an obligation of good faith performance in the Code revives an ancient, although largely forgotten, principle.”).

⁶ Dobbins, *supra* note 4, at 228 & n.4 (citations omitted). Texas and Indiana are notable exceptions. In Texas, the duty of good faith remains limited to situations where the parties have a special relationship, e.g., insurer/insured. See *Electro Assocs. v. Harrop Constr. Co.*, 908 S.W.2d 21, 22 (Tex. App. 1995). In *First Fed. Sav. Bank of Indiana v. Key Markets, Inc.*, 559 N.E.2d 600, 604–05 (Ind. 1990), the Indiana Supreme Court declined to accept the *Second Restatement* to the extent it imposes good faith in all contracts. The court reasoned that while courts may have to apply good faith and fair dealing when interpreting a contractual clause that is ambiguous, Indiana courts would not generally impose good faith and fair dealing in performance of a contract. *Id.* (“The proper posture for the court is to find and enforce the contract as it is written and leave the parties where it finds them.”)

⁷ See *Venta, Inc. v. Frontier Oil & Refining*, 827 F. Supp. 1526 (D. Colo. 1993) (the implied covenant prohibited destructive competition); and *Eastern Shore Markets v. J.D. Assoc. Ltd.*, 213 F.2d 175 (4th Cir. 2000) (the implied covenant prohibited favoritism among franchisees).

⁸ See e.g., *Interim Health Care of N. Illinois, Inc. v. Interim Health Care, Inc.*, 225 F.3d 876, 886 (7th Cir. 2000) (holding that a franchisor’s discretionary decision to terminate may be actionable as a bad faith breach of contract, even if good cause for termination existed due to the nonpayment of royalties, if the franchisor’s cumulative bad faith conduct rendered it impossible for the franchisee to remain solvent and pay royalties).

⁹ *Dayan v. McDonald’s Corp.*, 125 Ill. App. 3d 972, 990, 466 N.E.2d 958, 972 (Ill. App. Ct. 1984) (imposing good faith requirement on franchise terminations); and *Cherick Distribs. v. Polar Corp.*, 669 N.E.2d 218 (Mass. Ct. App. 1996) (upholding jury’s determination that manufacturer’s termination of its distributor, for admittedly pretextual reasons and actually to dissuade distributors from joining together to negotiate with manufacturer, upon four days’ notice, was in violation of the covenant of good faith).

See *Town & Country Equip., Inc v. Deere & Co.*, 133 F. Supp. 2d 665 (W.D. Tenn. 2000) (finding that a franchisor could have breached the dealer agreement as well as the implied covenant of good faith and fair dealing by unreasonably denying the dealer’s request to relocate its franchise, imposing unreasonable performance criteria on the dealer, and interfering with the dealer’s efforts to sell the franchise).

¹⁰ See *Randy’s Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 519 (10th Cir. 1976) (finding that Nissan’s threat of nonrenewal to coerce the dealer into a program or retail price fixing was contrary to its duty of good faith as provided in the Automobile Dealer Franchise Act).

¹¹ Joseph Schumacher, *Exercise of Discretion—Laws Affecting a Franchisor’s Exercise of Discretion and Avoiding Claims in the Exercise of Discretion*, IFA Legal Symposium (May 2005) at 23.

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¹² Howard L. Fink, *The Splintering of the Implied Covenant of Good Faith and Fair Dealing in Illinois Courts*, 30 LOY. U. CHI. L.J. 247, 249–50 (1999), citing *Ledingham v. Blue Cross Plan for Hosp. Care of Hosp. Serv. Corp.*, 330 N.E.2d 540 (Ill. App. Ct. 1975), rev'd on other grounds, 356 N.E.2d 75 (Ill. 1976), where an appellate court held that the implied covenant of good faith and fair dealing gives rise to an independent cause of action in both contract and tort for an insurance company's breach of its duty to deal fairly with the insured.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See e.g., *George Hammersmith, Inc. v. Taco Bell Corp.*, 1991 U.S. App. LEXIS 19716 (9th Cir. 1991).

¹⁶ See William L. Killion, *Existence of Fiduciary Duty Between Franchisor and Franchisee*, 52 A.L.R. 5th 613.

¹⁷ 227 F.3d 78, 91 (3d Cir. 2000).

¹⁸ *Id.*

¹⁹ *Id.* at 92. See Fink, *supra* note 11, for a discussion of cases in which independent claims for bad faith have been recognized.

²⁰ 2006 U.S. Dist. LEXIS 91544 (D. Pa. 2006).

²¹ *Id.*

²² *Brassil v. Maryland Cas. Co.*, 104 N.E. 622, 624 (N.Y. 1914).

²³ *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933).

²⁴ *Martindell v. Lake Shore Nat'l Bank*, 15 Ill. 2d 272, 286 (Ill. 1958).

²⁵ Carmen D. Caruso & Jeff Goldstein, *Negotiate Now or Litigate Later*, American Franchisee Association (2001).

²⁶ Uniform Commercial Code §§ 1-201(20), 2-103(1)(j).

²⁷ R. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201 (1968).

²⁸ RESTATEMENT (SECOND) OF CONTRACTS § 205 & cmt. (a).

²⁹ *Id.*, cmt. (d). For a case following the *Restatement* definition of bad faith, see *Dinger v. Allfirst Fin., Inc.*, 82 Fed. Appx. 261 (3d Cir. 2003) (applying Pennsylvania law).

³⁰ *Dobbins*, *supra* note 4, at 228–30 (and cases and articles cited therein).

³¹ *Hadfield*, *supra* note 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 944.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See e.g., *Fiore v. McDonald's Corp.*, 1996 U.S. Dist. LEXIS 12354 (D.N.Y. 1996), where a franchisor attempted to revitalize its stores but met resistance from a long-term franchisee that did not want to reinvest in his business. For purposes of disclosure, the author represented the defendant in that case.

³⁸ *Hadfield*, *supra* note 2.

³⁹ *Id.* at 985, n.262.

⁴⁰ *Id.*

⁴¹ *Id.*

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⁴² Dobbins, *supra* note 4, at 244.

⁴³ Interim Health Care of N. Illinois, Inc. v. Interim Health Care, Inc., 225 F.3d 876 (7th Cir. 2000) (applying the duty of good faith and fair dealing to the franchisor's discretionary management of its national accounts program, but rejecting the contention that good faith and fair dealing created implied territorial protection that would have exceeded an express territory clause). For purposes of disclosure, the author represented the plaintiff in that case.

⁴⁴ Dayan v. McDonald's Corp., 125 Ill. App. 3d 972, 990, 466 N.E.2d 958 (Ill. App. Ct. 1984) (imposing good faith requirement on franchise terminations). For purposes of disclosure, one of the author's partners represented the defendant in that case.

⁴⁵ Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookie, Ltd., 970 F.2d 273, 280 (7th Cir. 1992).

⁴⁶ Voyles v. Sandia Mortgage Co., 196 Ill. 2d 288, 296, 751 N.E.2d 1126, 1131 (2001) (quoting Cramer v. Ins. Exch. Agency, 174 Ill. 2d 513, 675 N.E.2d 897 (Ill. 1996) (citations omitted)).

⁴⁷ Zeidler v. A&W Rests., Inc., 301 F.3d 572, 575 (7th Cir. 2002).

⁴⁸ See *supra* note 18.

⁴⁹ Schumacher, *supra* note 10, citing Burkhardt v. City Nat'l Bank of Detroit, 57 Mich. App. 649, 226 N.W.2d 678, 680 (Mich. Ct. App. 1975).

⁵⁰ 798 F. Supp. 692 (S.D. Fla. 1992) (the court concluded from the agreement's grant of a franchise at a particular location coupled with silence on the subject of territorial protection that the franchisor's implied duty of good faith included a duty not to encroach).

⁵¹ See Burger King Corp. v. Weaver, 169 F.3d 1310 (11th Cir. 1999). By the time of this 1999 case, Burger King had modified its franchise agreement to expressly negate any claim of protection from encroachment.

⁵² There would still be a question as to whether a prospective franchisee had sufficient information to make an informed judgment as to whether its franchise could prosper without territorial protection, but the issue of whether disclosures are sufficient goes beyond the scope of this article.

⁵³ *Id.*, citing Barnes v. Burger King Corp., 932 F. Supp. 1420 (S.D. Fla. 1996). See also, Zeidler v. A&W Rests., Inc., 301 F.3d 572, 575 (7th Cir. 2002).

⁵⁴ 321 F.3d 728 (8th Cir. 2003).

⁵⁵ Fink, *supra* note 11, at 264 (discussing a conflict in Illinois appellate decisions).

⁵⁶ When one party to a contract is vested with contractual discretion, it must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously or in a manner inconsistent with the reasonable expectations of the parties. Interim Health Care of N. Ill., Inc. v. Interim Health Care, Inc., 225 F.3d 876, 884 (7th Cir. 2000); Dayan v. McDonald's Corp., 125 Ill. App. 3d 972, 991, 466 N.E.2d 958 (Ill. App. Ct. 1984) ("Where a party acts with improper motive, be it a desire to extricate himself from a contractual obligation by refusing to bring about a condition precedent or a desire to deprive an employee of reasonably anticipated benefits through termination, that party is exercising contractual discretion in a manner inconsistent with the reasonable expectations of the parties and therefore is acting in bad faith.")

⁵⁷ See Uptown Heights Assocs. Ltd. P'ship v. Seafirst Corp., 320 Ore. 638, 645 (Ore. 1995), where the Supreme Court of Oregon held that only the objective reasonable expectations of both parties were to be considered in determining whether the implied covenant has been breached, and no breach of good duty may occur when the alleged breaching party was acting within the express terms of the contract. Cf. Sons of Thunder, Inc. v. Borden, Inc., 690 A.2d 575, 587-89 (N.J. 1997),

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which held that a party may breach the implied covenant merely by exercising its express and unconditional right to terminate the contract if the termination was motivated by bad faith or dishonesty.

⁵⁸ See Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship*, 6 BARRY L. REV. 61, 65 (2006) (citation omitted).

⁵⁹ See Thomas J. Chinonis, *Implied Covenant of Good Faith: A Two-Way Street in Franchising*, 11 DEPAUL BUS. L.J. 229, 248 (1998).

⁶⁰ *Id.* (citation omitted).

⁶¹ 547 F.2d 1024 (8th Cir. 1976).

⁶² *Id.*

⁶³ 2006 U.S. App. LEXIS 20545, at *38–*39 (10th Cir. 2006).

⁶⁴ No. 05-1222, 2005 U.S. Dist. LEXIS 37172, at *15–*19 (D. Minn. 2005).

⁶⁵ 422 F. Supp. 2d 999, 1003–04 (N.D. Ind. 2006).

⁶⁶ *Interim Health Care of N. Illinois, Inc. v. Interim Health Care, Inc.*, 225 F.3d 876, 884 (7th Cir. 2000) (emphasis added).

⁶⁷ See Chinonis, *supra* note 58.

⁶⁸ See Bethany L. Appleby, C. Griffith Towle & Carmen D. Caruso, *Unconscionability and Franchise Litigation* (ABA Forum on Franchising, October 2006), at 10 [hereinafter *Unconscionability and Franchise Litigation*], citing Harold Brown, *Franchising: A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971); and Ernest Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 490 (1967).

⁶⁹ Hadfield, *supra* note 2, at 985, n.262.

⁷⁰ *Id.*

⁷¹ It might theoretically be possible to conceive an economic model in which numerous franchisees band together to “hire” a franchisor to serve as their fiduciary, but that is not the economic model of franchising as we know it.

⁷² Killion, *supra* note 15. See also 2660 Woodley Road Jt. Venture v. ITT Sheraton Corp., 2002 WL 53913, at *2 (D. Del. Jan. 10, 2002) (holding a franchisor to fiduciary standards on agency theory).

⁷³ *Unconscionability and Franchise Litigation*, *supra* note 67.

⁷⁴ Hadfield, *supra* note 2.

⁷⁵ Schumacher, *supra* note 10.

⁷⁶ Hadfield, *supra* note 2.

⁷⁷ *Interim Health Care of N. Illinois, Inc. v. Interim Health Care, Inc.*, 225 F.3d 876 (7th Cir. 2000); and *Dayan v. McDonald’s Corp.*, 125 Ill. App. 3d 972, 990, 466 N.E.2d 958, 972 (Ill. App. Ct. 1984).

⁷⁸ 235 B.R. 318, 327–28 (S.D.N.Y. 1999); see also *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 923 n.8 (2d Cir. 1977); *Tymshare Inc. v. Covell*, 727 F.2d 1145, 1153–54 (D.C. Cir. 1984); *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575, 587–89 (N.J. 1997).

⁷⁹ Schumacher, *supra* note 10, at 20–21.

⁸⁰ See *supra* note 18.

⁸¹ Schumacher, *supra* note 10, at 20–23.

⁸² *Id.* at 23.

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⁸³ See *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 672 (Cal. 1995) (parties to a commercial contract are not free to disclaim the implied covenant) (quoting *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 686 P.2d 1158, 1167 (Cal. 1984)); *Perling v. Citizens & Southern Nat'l Bank*, 300 S.E.2d 649, 652 (Ga. 1983) (the implied covenant may not be waived in a trust agreement); *AAR Aircraft & Engine Group, Inc. v. Edwards*, 272 F.3d 468, 470–71 (7th Cir. 2001) (holding that Illinois law would prohibit a guarantor from waiving commercial reasonableness); *Cont'l Bank N.A. v. Everett*, 760 F. Supp. 713, 717 (N.D. Ill. 1991) (“In Illinois, a duty of good faith and fair dealing is implied in every contract (including guaranties), and the obligation to perform in good faith may not be waived”) (citations omitted); *BA Mortgage & Int'l Realty Corp. v. Am. Nat'l Bank & Trust Co.*, 706 F. Supp. 1364, 1376–77 (N.D. Ill. 1989) (strong public policy in Illinois would prohibit waiver of the implied covenant in any contract); *Morris v. Columbia Nat'l Bank of Chicago*, 79 B.R. 777, 785 (N.D. Ill. 1989) (“good faith conduct is not waivable”); *New Amsterdam Casualty Co. v. Lundquist*, 198 N.W.2d 543, 549 n.4 (Minn. 1972) (holding the implied covenant may not be waived in an indemnitor-indemnitee agreement); *Stark v. Circle K Corp.*, 751 P.2d 162, 166 (Mont. 1988) (holding that pursuant to public policy of Montana, the implied covenant is not subject to express or implicit waiver); *Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs.*, 889 P.2d 445, 450 n.4 (Utah Ct. App. 1994) and cases cited therein (duty to perform a contract in good faith cannot be waived); see also Thomas A. Diamond, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 HASTINGS L.J. 585, 626 (March 1996). On a related issue, several courts outside of Illinois have held that in the unique case of a guaranty contract, a waiver of defenses clause may waive the requirement of commercial reasonableness. See *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 443 (Mass. 1992) (without explanation, a waiver of defenses clause in a guaranty contract constituted a waiver of commercial reasonableness); *Lincoln Park Fed. Sav. & Loan Ass'n*, 192 Ill. App. 3d 188, 192–93 (1st Dist. 1989) (obligation to act with commercial reasonableness was waived by terms of guaranty agreement). However, even this minor exception to the general rule that the implied covenant may not be waived is not beyond doubt. See *Fed. Deposit Ins. Corp. v. Rayman*, No. 92 C 3688, 1995 U.S. Dist. LEXIS 12180, at *16–*18 (N.D. Ill. Aug. 23, 1995) (questioning the reasoning in *Lincoln Park*).

⁸⁴ 97 Ill. App. 3d 22, 28 (3d Dist. 1981).

⁸⁵ See *Interim Health Care of N. Illinois, Inc. v. Interim Health Care, Inc.*, 225 F.3d 876, 884 (7th Cir. 2000) (“In Illinois, a covenant of good faith and fair dealing is implied in every contract absent express disavowal.”) (citations omitted).

⁸⁶ *Id.*

⁸⁷ 292 F.3d 992, 996–97 (9th Cir. 2002).

⁸⁸ *Id.*

⁸⁹ *Unconscionability and Franchise Litigation*, *supra* note 67.

⁹⁰ *Id.* at 19, citing *Ticknor v. Choice Hotels, Inc.*, 265 F.3d 931 (9th Cir. 2001) (holding that the arbitration clause in a preprinted franchise agreement was unconscionable under Montana law “because it required binding arbitration of the weaker bargaining party’s claims, but allowed the stronger bargaining party the opportunity to seek judicial remedies to enforce contractual obligations”).

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⁹¹ See David Hood & Bill Zucco, *Complying with System-Wide Standards*, International Franchise Association Legal Symposium (2005), at 7.

⁹² Douglas Branson, *The Indiana Supreme Court Lecture: The Rule That Isn't a Rule: The Business Judgment Rule*, 36 VAL. U.L. REV. 631 (Summer 2002).

⁹³ *Id.* at 634 (citing ALI).

⁹⁴ *Id.*

⁹⁵ This second concern would perhaps not arise in the narrow circumstance in which a disinterested franchisor is umpiring a dispute between two or more franchisees. But even there, each of the franchisees would have the right to expect the franchisor's good faith performance as umpire.

⁹⁶ Schumacher, *supra* note 10, at 17.