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CONTRACT LAW—NO FAITH IN ARKANSAS’S APPROACH TO THE IMPLIED DUTY OF GOOD FAITH. *ARK. RESEARCH MED. TESTING, LLC v. OSBORNE*, 2011 ARK. 158, 2011 WL 1423993.

I. INTRODUCTION

Imagine you have the opportunity to earn an extra \$3 million this year. Your contract hinges upon your employer reaching certain minimum profits. But the company failed to reach the threshold this year due to gross mismanagement and unwillingness to heed your warnings as an advisor, although you owned and operated the company profitably until last year. To your dismay, you learn that a court will not provide a remedy because there was no breach of any written terms of the contract. Because you did not explicitly contract regarding the company’s performance in reaching the profits, you are at the company’s mercy with no redress.

Just such a case occurred in Arkansas, *Ark. Research Med. Testing, LLC v. Osborne*,¹ in which the Arkansas Supreme Court declined to recognize an independent cause of action in contract for the breach of the implied covenant of good faith.² This holding is not particularly provocative given that many courts have minimized the role of the doctrine of good faith in contract law.³ But these restrictions implicate some of “the most controversial [questions] relating to the duty of good faith.”⁴ Most notable is whether a breach of good faith can exist without a breach of an express contract term.⁵ Arkansas has now joined many jurisdictions that answer “no.”⁶

The court confined the duty of good faith to a factor used in determining whether a breach of contract occurred, rather than giving it any meaning

1. *Ark. Research Med. Testing LLC v. Osborne*, 2011 Ark. 158, at 1, 2011 WL 1423993, at *1.

2. This note is confined to the discussion of a cause of action based in contract law. The Arkansas Supreme Court has already ruled that there is no cause of action for the breach of good faith in tort. *See id.*; *see also* discussion *infra* Part IV.A.

3. *See* discussion *infra* Part III.A.1.

4. Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR. L. REV. 227, 265 (2005). The duty of good faith remains controversial despite extensive academic coverage. Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN’S L. REV. 559, 615–16 (2006). As one scholar noted, good faith is “the subject of a small avalanche of law review articles seeking to define its meaning, role, and scope.” *Id.*

5. Dobbins, *supra* note 4, at 265.

6. *Ark. Research Med. Testing, LLC v. Osborne*, 2011 Ark. 158, at 3, 2011 WL 1423993, at *6.

outside the express agreement.⁷ In ruling that no cause of action exists, the court reversed the jury's finding that the company breached its duty of good faith because the jury did not also find breach of the written contract.⁸ This interpretation leaves without remedy situations in which there is no breach of an express term but there is breach of the "spirit" of contract.⁹ In light of these insufficiencies, Arkansas should recognize a cause of action in contract for the breach of the implied covenant of good faith in order to both effectuate the equitable purpose of the doctrine of good faith and to provide a remedy when the duty of good faith is violated without a breach of an express term of the contract.

This note begins with an overview of the origins of the implied duty of good faith.¹⁰ Specifically, this includes an exploration into its roots as an equitable doctrine, created to supplement existing rules and promote fairness and justice in contract interpretation. Next, it discusses the current frameworks for the application of good faith.¹¹ There are two—formalism, which emphasizes the strict construction of express terms of a contract over implied terms, and contextualism, which emphasizes the importance of the context of the agreement to determine the parties' intentions. Then, the note shows how *Ark. Research Med. Testing, LLC v. Osborne* illustrates Arkansas's formalist approach to the duty of good faith.¹² With that, this note contends that the formalist approach, due to its emphasis on express terms, fails on two fronts. First, it fails to effectuate the intended equitable purpose of the covenant of good faith.¹³ Second, it fails to provide a remedy for parties such as the Osbornes, who suffered a breach of the "spirit" of their deal with the company without any violation of the written agreement.¹⁴ Finally, this note argues that Arkansas should adopt a more contextualist approach to the duty of good faith and fair dealing in order to give it more substantive meaning.¹⁵

7. *Id.* at 6, 2011 WL 1423993, at *3 (The breach of the covenant of good faith is "nothing more than evidence of a possible breach of a contract between parties.").

8. *Id.* at 3, 2011 WL 1423993, at *2.

9. *See, e.g., Chamison v. HealthTrust, Inc. Hosp. Co.*, 735 A.2d 912, 920 (Del. Ch. 1999) ("This implied covenant is a judicial convention designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain.").

10. *See* discussion *infra* Part II.A.

11. *See* discussion *infra* Part III.A.

12. *See* discussion *infra* Part III.C.

13. *See* discussion *infra* Part IV.A.

14. *See* discussion *infra* Part IV.B.

15. *See* discussion *infra* Part IV.C.

II. BACKGROUND

The implied duty of good faith and fair dealing is an equitable doctrine that allows courts to promote fairness by considering the circumstances surrounding a contract. As such, the duty's early champions envisioned good faith as a means to protect the intentions of the parties, even when those intentions are not included in the written agreement.¹⁶ As an implied duty, it is designed to fill gaps in and help interpret the parties' contract more holistically.¹⁷

A. Origins of the Implied Duty of Good Faith in Common Law Contract

The modern concept of good faith emerged from a need to do equity in the face of the formalist approach to contract interpretation.¹⁸ The heart of this approach is embodied by an emphasis on the written text of an agreement, which in turn values individual autonomy of the parties.¹⁹ It also incorporates the belief that language is uniform and determinate, thus requiring no interpretation beyond its plain meaning.²⁰ But strict construction of express contract terms often allowed parties to take advantage of oversights in the contract language, which in turn resulted in harsh outcomes that parties did not contemplate at formation.²¹ Use of the plain-meaning rule allowed courts to ignore the intent of the parties in favor of an objective meaning of the language.²² A more comprehensive understanding of the circumstances surrounding the parties' agreement, intentions, and dealings would be required to fully and fairly effectuate the intent of the parties.²³ And because the law should not suppose that one party intends to put himself at the mercy of the other,²⁴ it began to imply promises inherent in the process of contracting that, while not express, imposed obligations upon the

16. See Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel*, 2005 UTAH L. REV. 1, 3.

17. Dobbins, *supra* note 4, at 243–44.

18. Judge Cardozo noted this need in the seminal case *Wood v. Duff-Gordon*: “[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today.” 118 N.E. 214, 214 (N.Y. 1917).

19. Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1234 (1999).

20. *Id.* (“‘interpretation’ involved merely a ‘mechanical’ process of deducing the answers already contained in the written text [and required no] judicial discretion”).

21. Dubroff, *supra* note 4, at 561–62.

22. *Id.* at 567–68.

23. This change was ushered in by adoption of the U.C.C. Van Alstine, *supra* note 19, at 1237–39.

24. As Judge Cardozo opined in *Wood*. 118 N.E. at 214.

parties.²⁵ These obligations were what one scholar called “a family of general legal doctrines . . . [that] supplement, limit[,] and qualify specific legal rules and contract terms.”²⁶

The implied covenant of good faith was one such obligation.²⁷ Based on equitable principles, courts sought to impose ideas of fairness into contracts and the surrounding relationship of the parties.²⁸ And the “family” of legal doctrines provided courts with a means to promote these ideas by applying legal principles rather than creating legal fictions, and thus uncertainty in the law.²⁹ Taking hold, these ideas resulted in the creation and adoption of the common law implied covenant of good faith. It was memorialized in the Restatement Second of Contracts section 205, which provides that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”³⁰

The Restatement adopted the “excluder analysis” of preeminent contracts and Uniform Commercial Code scholar Professor Robert Summers.³¹ It is so named because it defines good faith within the context of the bad faith conduct that judges decide to prohibit.³² This requires a more open definition of good faith, which in turn allows courts discretion to ensure the doctrine may be applied to forms of bad faith that come to light within the circumstances of individual cases.³³ The concept of good faith is intentionally broad, with the Restatement noting that “its meaning varies somewhat with the context.”³⁴

Summers and the Restatement represent the duty of good faith as a means to promote justice, fairness, and morality into contract law.³⁵ The

25. See, e.g., *id.*

26. Robert S. Summers, “Good Faith” In *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 198 (1968). This “family” includes implied promise, custom and usage, fraud, and negligence and estoppel, as well as good faith. *Id.*

27. Dobbins, *supra* note 4, at 227 (“But even when the parties’ intentions and agreements are clearly and unambiguously stated, enforcement may be undesirable or inequitable because one party has taken unfair advantage of the other by acting dishonestly during contract formation, performance, or enforcement; by including onerous or unduly burdensome terms; or by abusing discretion granted to that party under the contract. In response, courts have relied upon equitable principles to develop doctrines that promote fairness in contractual relationships. The implied covenant of good faith is one such doctrine.”).

28. *Id.*

29. Summers, *supra* note 26, at 198.

30. RESTATEMENT (SECOND) OF CONTRACTS §205 (1981).

31. RESTATEMENT (SECOND) OF CONTRACTS §205 (1981) (Rep.’s note).

32. Summers, *supra* note 26, at 202.

33. *Id.* at 215.

34. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

35. Summers, *supra* note 26, at 198. See also Summers’s follow-up article, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 812–13 (1982) [hereinafter Summers, *General Duty*].

comments to section 205 use the excluder analysis and define good faith as “exclud[ing] a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness[,] or reasonableness.”³⁶ Under this analysis, the duty of good faith goes beyond the actual agreement of the parties to broader notions of what is fair and reasonable conduct.³⁷ The duty presumes that parties would not intentionally consent to behavior that is outside the bounds of what they expect is such fair and reasonable conduct.³⁸

B. The Equitable Intentions of the Doctrine of Good Faith

Good faith is intended to consider less tangible aspects of the contractual relationship, such as the “spirit of the deal” and the expectations surrounding the agreement.³⁹ In regard to the performance of a contract, Summers identified categories of bad faith to include “evasion of the spirit of the deal, lack of diligence and slacking off, willful rendering of only substantial performance, abuse of power to specify terms, abuse of power to determine compliance, and interference with or failure to cooperate in the other party’s performance.”⁴⁰ In these instances, courts may use the tool of good faith to find a breach although the express agreement may not itself be breached.⁴¹ The Restatement adopted these categories, recognizing that a “complete catalogue of types of bad faith is impossible.”⁴²

More generally, the duty of good faith protects the parties’ justified expectations of the agreement that are not included in the language of the agreement.⁴³ Such expectations may be omitted for lack of foresight or because they are obvious and fundamental terms that do not necessarily war-

36. RESTATEMENT (SECOND) OF CONTRACTS §205 cmt. a (1981).

37. Van Alstine, *supra* note 19, at 1253.

38. *Id.* at 1295.

39. *Id.* at 1250, n.107; 1274–75, n.213 (arguing that the duty of good faith directs an interpreter to be sensitive to the “spirit of the bargain” over “the technicalities of the language”); *see also* Summers, *General Duty*, *supra* note 35, at 827 (“[I]t is one function of the good-faith performance doctrine to enforce the spirit of deals, including their unspecified inner logic.”).

40. Summers, *supra* note 26, at 232–33.

41. *See* Houh, *supra* note 16, at 3.

42. RESTATEMENT (SECOND) OF CONTRACTS §205 cmt. d (1981) (“Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.”).

43. *See* Van Alstine, *supra* note 19, at 1228; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (“Good faith . . . emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party”); Summers, *supra* note 26, at 263 (“In most cases the party acting in bad faith frustrates the justified expectations of another.”).

rant written acknowledgement.⁴⁴ Because the intentions of the parties are so complex, implied promises supplement the express ones in order to determine and give effect to these intentions.⁴⁵ Inevitably, this requires courts to consider both the language and the circumstances under which the parties formed the contract.⁴⁶ The covenant's purpose is to prevent one party from impairing the other's right to receive the "fruits of the contract," and as such, courts impose the duty of good faith as justice requires.⁴⁷

III. APPLICATION

Although the development of good faith contemplated a move toward contextualism as a response to rigid formalism, both theories are applied to different extents in the various jurisdictions. Formalist courts emphasize the express terms of the contract when discerning the parties' perceived rights and duties under the agreement.⁴⁸ Contextualism courts value the whole of the parties' contractual relationship.⁴⁹ The theory applied determines whether a given jurisdiction will recognize that the covenant of good faith exists outside of a breach of contract. Most courts decline to find a separate cause of action, but those that do give more meaning to the obligation of good faith.⁵⁰ Formalist courts, like Arkansas, relegate the duty to mere evidence of a breach of contract claim.⁵¹

A. Formalism vs. Contextualism: The Competing Interests in How Courts Apply the Doctrine of Good Faith

There are competing interests in how to apply the covenant of good faith, which are grounded in the fundamentally different approaches to the law of contract interpretation. The crux of courts' struggles to interpret and apply the doctrine lies in the same dichotomy between formalism and contextualism that surrounded its implementation in the twentieth century.⁵² These broad principles dictate the frameworks for how courts apply the doc-

44. 6 PETER LINZER, CORBIN ON CONTRACTS § 26.2 (Joseph M. Perillo ed., 2010).

45. See Summers, *supra* note 26, at 198.

46. 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 63:21 (4th ed. Supp. 2012) ("[I]mplied provisions as are indispensable effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made.").

47. *Id.*

48. See Dubroff, *supra* note 4, at 567–69.

49. HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 8:8 (West 2012 ed.).

50. Edward J. Imwinkelried, *The Implied Obligation of Good Faith in Contract Law: Is It Time to Write Its Obituary?*, 42 TEX. TECH L. REV. 1, 12 (2009).

51. See discussion *infra* Part III.C.

52. See discussion *supra* Part II.A.

trine of good faith.⁵³ These frameworks play out on a spectrum in which the covenant of good faith is, at one end, centered on the contractual language.⁵⁴ At the other end, the duty is an implied term that exists alongside the contract.⁵⁵

It appears near-universal that the contract is the basis for any application of the duty of good faith.⁵⁶ But where formalism applies the language of the contract stringently, contextualism considers the circumstances surrounding the formation and existence of the contract and the parties.⁵⁷ Practically, these jurisprudential theories determine whether jurisdictions recognize an independent cause of action for the breach of good faith.

1. *Formalist Approach*

The formalist approach is predicated on a foundational principle of contract law—freedom of contract.⁵⁸ Formalism regards a contract as the full expression of the parties' intentions.⁵⁹ Contracting is an exercise in which the parties negotiate and allocate risks.⁶⁰ Courts are generally reluctant to make a contract for the parties by adding or changing terms.⁶¹ As an implied term, and thus not bargained for, courts cannot use good faith to create obligations outside of the contract or those reasonably suggested by it.⁶²

Generally, implied terms cannot override or contradict an express term of the contract.⁶³ Because of this, there is less need for implied duties to

53. See discussion *infra* Part III.A.

54. See HUNTER, *supra* note 49, § 8:8.

55. *Id.*

56. *Id.* In fact, there can be no obligation of good faith implied where no contract exists. *E.g.*, Banco do Brasil, S.A. v. 275 Wash. St. Corp., 750 F. Supp. 2d 279, 295 (D. Mass. 2010) (good faith is created by the obligations under the contract); Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund, 38 P.3d 12, 28 (Ariz. 2002) (the duty exists by virtue of a contractual relationship).

57. HUNTER, *supra* note 49, § 8:8.

58. Dubroff, *supra* note 4, at 577.

59. Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 688 (2009).

60. *Id.*

61. HUNTER, *supra* note 49, § 8:8.

62. *E.g.*, Dubroff, *supra* note 4, at 616. See also Smith v. Jenkins, 626 F. Supp. 2d 155 (D. Mass. 2009), rev'd, 732 F.3d 51 (1st Cir. 2013); Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872 (Del. Ch. 2009); Avatar Dev. Corp. v. De Pani Constr. Inc., 834 So. 2d 873, 876 (Fl. Dist. Ct. App. 2002).

63. LORD, *supra* note 46, § 63:21; Van Alstine, *supra* note 19, at 1264 n.168 (citing Thomas A. Diamond & Howard Foss, *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, 587 & n.5 (arguing that the covenant of good faith is merely a residual “gap-filling default rule” that “cannot be used to override or contradict the express

supplement the agreement.⁶⁴ By the same token, a breach of good faith cannot exist when a party acts within the rights and obligations of the contract.⁶⁵ The concept of good faith is designed to protect the expectations of the parties, and the formalist approach qualifies this as the expectations the parties expressed in the agreement itself.⁶⁶

Limited this way, the duty of good faith is used by courts as a tool of contract interpretation.⁶⁷ The language is used to determine what those expectations reasonably entail.⁶⁸ Good faith prevents a party from hampering the other's ability to obtain the "fruits of the contract," provided that the allegation of bad faith does not contradict any of the express provisions of the agreement.⁶⁹ But when the contract terms are ambiguous or silent, courts use the covenant as a gap-filler to fulfill the written contract where absolutely necessary to give effect to the intentions of the parties that were reasonably expected at the time they formed the contract.⁷⁰ In this way, it serves as a tool of construction when a term may be susceptible to different, reasonable interpretations.⁷¹

2. Contextual Approach

The contextual approach looks beyond the four-corners of contract and into the context of the agreement.⁷² With this, the implied covenant of good

terms of the contract"). *See also* *Fields v. Thompson Printing Co., Inc.*, 363 F.3d 259, 271–72 (3d Cir. 2004).

64. *City of Gillette v. Hladky Constr., Inc.*, 196 P.3d 184, 196 (Wyo. 2008) ("The implied covenant of good faith and fair dealing [does not] create new, independent rights or duties beyond those agreed to by the parties."). *See also* *Noonan v. Wonderland Greyhound Park Realty LLC*, 723 F. Supp. 2d 298, 350 (D. Mass. 2010) (good faith "does not supply terms to the [contract] that the parties were free to negotiate, but did not"); *Blondell v. Littlepage*, 991 A.2d 80, 91 (Md. 2010) (good faith does not "interpose new obligations about which the contract is silent, even if inclusion of the obligation is thought to be logical and wise.").

65. *E.g.*, *Auriga Capital Corp. v. Gatz Props., LLC*, 40 A.3d 839 (Del. Ch. 2012).

66. *HUNTER*, *supra* note 49, § 8:8.

67. *Imwinkelried*, *supra* note 50, at 12 ("The implied obligation's limited role is to serve as an interpretive canon; it is merely a guide or tool to assist in interpreting the express provisions of the contract.").

68. *APS Sports Collectibles, Inc. v. Sports Time, Inc.*, 299 F.3d 624, 628 (7th Cir. 2002); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 617 (3d Cir. 1995).

69. *Kaseberg v. Davis Wright Tremaine, LLP*, 265 P.3d 777, 784 (Or. 2011).

70. *LORD*, *supra* note 46, § 63:21; *Van Alstine*, *supra* note 19, at 1262; *Diamond & Foss*, *supra* note 63, at 587 & n.5 (arguing that the covenant of good faith is merely a residual gap-filling default rule that cannot be used to override or contradict the express terms of the contract).

71. *Seip v. Rogers Raw Materials Fund, L.P.*, 948 N.E.2d 628 (Ill. App. Ct. 2011). *See also* *Imwinkelried*, *supra* note 50, at 12.

72. *Dubroff*, *supra* note 4, at 575.

faith is more of a substantive term, with weight independent from the express terms of the contract.⁷³ “[T]here is a blurry distinction between use of good faith precepts to ‘round out’ an express covenant and such use to create a new obligation.”⁷⁴ The contextualist approach does not contemplate that the duty of good faith creates new obligations under the contract, but nor is it only a gap-filler.⁷⁵ Unlike formalism, the contextual approach does not require that the duty of good faith be linked to a specific, express term, and a party may breach the implied covenant of good faith without breaching the underlying contract.⁷⁶ Likewise, the duty of good faith is implicated even for conduct not explicitly required by the contract.⁷⁷

The contextual approach provides a means for courts to construe ambiguous or missing terms of an agreement by considering the parties’ dealings and understandings, in order to determine the expectations of the parties.⁷⁸ The construction, nevertheless, must be consistent with the general objectives of the contract, and of course cannot expressly contradict any explicit terms.⁷⁹ As such, the contextual approach does not necessarily represent the overreaching into parties’ freedom to contract that formalism fears.⁸⁰ The definition of good faith limits its scope to “performance and enforcement” of a contract, and not conduct that is outside the scope of the contractual relationships.⁸¹ Thus, express terms still carry considerable weight because the covenant itself is derived from the contractual agreement between the parties.⁸²

73. *Wells Fargo Bank*, 38 P.3d at 30 (stating Arizona courts view the implied terms of a contract “as much a part of the contract as are the express terms”).

74. Nicholas R. Weiskopf, *Wood v. Lucy: The Overlap Between Interpretation and Gap-Filling to Achieve Minimum Decencies*, 28 PACE L. REV. 219, 223 (2008).

75. *E.g.*, *Foseid v. State Bank of Cross Plains*, 541 N.W.2d 203, 212 (Wis. Ct. App. 1995).

76. *Fields v. Thompson Printing Co., Inc.*, 363 F.3d 259, 271 (3d Cir. 2004). Applying New Jersey law, the court held that implied covenants are as much part of an agreement as express ones, and a party may breach an implied covenant even if that party does not violate an express term. *Id.* See also *Chase Manhattan Bank, N.A. v. Keystone Distribs. Inc.*, 873 F.Supp. 808, 815 (S.D.N.Y. 1994); *Wells Fargo Bank*, 38 P.3d at 29; *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 727 (Cal. 1992); *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 539 (Del. 2011).

77. *Wells Fargo Bank*, 38 P.3d at 29.

78. HUNTER, *supra* note 49, § 8:8.

79. *Id.*

80. See Edwards, *supra* note 59, at 688.

81. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

82. Van Alstine, *supra* note 19, at 1240. Under the U.C.C. and the Restatement, express terms remain the primary guide to interpretation of a contract, and such express terms will prevail when contextual evidence provides an unreasonable interpretation. *Id.* See also U.C.C. § 1-205(4) (providing that express terms control usage of trade and course of dealing if a consistent construction is “unreasonable”); see also *id.* § 2-208(2) (defining the same result but also including a course of performance); RESTATEMENT (SECOND) OF CONTRACTS §

This does not mean, however, that a breach of the duty is limited to a breach of the contract itself.⁸³ In fact, the duty of good faith is implied in every contract and is capable of being violated despite a party's compliance with the "form" of the contract.⁸⁴ This can be done even by objectively reasonable conduct, without malice.⁸⁵ One court has aptly categorized this as when the bad faith conduct in question "accomplish[es] exactly what the agreement [of the parties] sought to prevent."⁸⁶ It is these types of situations that an action for the breach of the duty of good faith addresses.

B. The Duty of Good Faith, Independent From a Breach of Contract

The question of a breach of the covenant of good faith is closely related to whether a breach of contract occurred. Many courts favor formalism when applying the duty of good faith, and thus decline to support a separate cause of action for its breach.⁸⁷ Because the majority of courts decline to consider it an independent term of the contract,⁸⁸ good faith must be related to the express obligations of the contract, and a breach of good faith must be based on imperfect performance of an express term.⁸⁹ Under this view, good faith is used as a tool of contract interpretation of the explicit terms and is considered in an inquiry of whether a breach of contract took place.⁹⁰

Whether the duty is given independent weight does not necessarily coincide with whether a breach of the duty constitutes an independent cause of action. Theoretically, the covenant still obligates the parties to act in accord-

203(b) (stating that express terms are given "greater weight" than usage of trade and courses of dealing and performance).

83. *Foseid v. State Bank of Cross Plains*, 541 N.W.2d 203, 212 (Wis. Ct. App. 1995).

84. *Id.*; see also HUNTER, *supra* note 49, § 8:8.

85. *Carma Developers Inc.*, 826 P.2d at 727 (citing Summers, *supra* note 26, at 204–06).

86. *Foseid*, 541 N.W.2d at 213 (quoting *In re Estate of Chayka*, 176 N.W.2d 561, 564 (Wis. 1970)). In *In re Estate of Chayka*, a surviving wife violated the duty of good faith implied in the couple's joint and reciprocal wills, although she complied with the letter of the instrument. 176 N.W.2d 561 (Wis. 1970). The wills provided that upon death of one spouse, all of the property would be left to the survivor, who would in turn leave the property to another relative upon her death. *Id.* at 563. Upon her death, the will was executed as written, and the property was left to the relative. *Id.* at 564. However, by transferring almost all of the estate's property to her second husband before her death, she violated the intent of the original agreement, and thereby also the duty of good faith. *Id.*

87. Imwinkelried, *supra* note 50, at 12.

88. See, e.g., *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 617 (3d Cir. 1995); *Silver v. Countrywide Home Loans, Inc.*, 760 F. Supp. 2d 1330, 1344 (S.D. Fla. 2011); *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089 (Cal. 2000).

89. E.g., *Silver*, 760 F. Supp. 2d at 1344; *Flagship Resort Dev. Corp. v. Interval Intern., Inc.*, 28 So. 3d 915 (Fla. Dist. Ct. App. 3d Dist. 2010); see also LORD, *supra* note 46, § 63:22.

90. See *City of Golden v. Parker*, 138 P.3d 285, 292 (Colo. 2006).

ance with their overall purpose and their reasonable expectations.⁹¹ For example, a breach of this obligation can consist of interference with or failure to cooperate with the other party's performance of the contract.⁹² Some courts recognize an independent cause of action while not recognizing that the duty has independent force as part of the contract.⁹³ At least one state's courts imply good faith when it is "indispensable to effectuate the intention of the parties," but still require that it "arise from" the contract language.⁹⁴ As is generally true, courts in these instances will not imply duties not intended by the parties to be part of the contract.⁹⁵ But by tying recovery to the express terms of the contract, a breach of good faith is not actionable unless these intentions are set forth in the writing.⁹⁶ Practically, this approach gives little meaning to the covenant.⁹⁷

Similarly, other courts recognize a separate cause of action only when the counts for breach of contract and breach of good faith are based on different conduct.⁹⁸ This view operates under the assumption that the two are intrinsically connected and therefore redundant of one another.⁹⁹ This leaves open the possibility that a breach of the covenant may stand only if it differs from a breach of contract claim.¹⁰⁰ But if a court construes the obligation as inseparable from the express terms of the contract, it is hard to imagine a scenario in which this would stand. Courts tend to reject the argument that because a party breached the contract it also breached the duty of good faith.¹⁰¹ Generalized assertions of "withholding the benefit of the bargain" or "preventing performance" tend to fall short as well.¹⁰² Although appearing to leave room for claims of good faith based on a violation of the spirit of the

91. *Scherer Constr., LLC v. Hedquist Constr., Inc.*, 18 P.3d 645, 655 (Wyo. 2001) (adopting Restatement (Second) of Contracts section 205, and finding that there is a cause of action in contract for breach of the duty of good faith).

92. *Id.*

93. *See, e.g., id.*

94. *Id.* at 653–54.

95. *Id.* at 653.

96. *Ultra Resources, Inc. v. Hartman*, 226 P.3d 889, 920 (Wyo. 2010).

97. *Carma Developers, Inc.*, 826 P.2d at 727 n.12.

98. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 539 (Del. 2011); *Ferrisburgh Realty Investors v. Schumacher*, 992 A.2d 1042, 1052 (Vt. 2010).

99. *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 623 n.4 (7th Cir. 2012); *Cent. Mortg. Co.*, 27 A.3d at 539 (applying N.Y. law); *Lakota Local Sch. Dist. Bd. of Educ. v. Brickner*, 671 N.E.2d 578, 584 (Ohio App.1996); *see also* Seth William Goren, *Looking for Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith Performance*, 37 U.S.F. L. REV. 257, 311 n.193 (2003).

100. *Cent. Mortg. Co.*, 27 A.3d at 539.

101. *Silver*, 760 F. Supp. 2d at 1344–45.

102. *Id.* [The above quotations do not appear in the text of this case].

contract, it seems unlikely that this view will allow for the recovery based on a violation of the duty apart from what is included by the parties.¹⁰³

A finding that the two causes of action cannot be based on the same conduct has a different result when applied in the contextual approach.¹⁰⁴ When the doctrine is applied without requiring an express term to be implicated, a party can recover based on duties stemming from the contract, both express and implied, to effectuate the parties' intent.¹⁰⁵

Defendants have provided us with no other reason why Plaintiffs cannot state a claim for both breach of contract and breach of an implied covenant. Moreover, to assert that Plaintiffs cannot bring a claim for breach of the implied covenant because they have already stated a claim for breach of contract is ludicrous. There is nothing preventing Plaintiffs from stating two separate claims for breach of contract in the complaint; likewise, Plaintiffs are not prevented from stating a claim for breach of contract along with a claim for breach of the implied covenant of good faith and fair dealing.¹⁰⁶

By freeing the duty from strict adherence to the contract language, courts may give more significant meaning to the obligation of good faith.

C. *Osborne* and Arkansas's Formalist Approach

In *Ark. Research Med. Testing, LLC v. Osborne*,¹⁰⁷ the Arkansas Supreme Court declined to recognize an independent cause of action for the breach of the implied covenant of good faith because it had never done so in the past.¹⁰⁸ The Osbornes entered into a contract to sell Arkansas Research Medical Testing Center, Inc. to the defendants (reorganized as ARMT). The agreement stipulated that Mr. Osborne would remain on the board as a consultant and also receive up to three million dollars per year for the first three years after the sale, provided ARMT reached minimum profits.¹⁰⁹ For the remaining portion of the year of the sale, ARMT met its goal and paid the Osbornes.¹¹⁰ In the following years, ARMT did not meet the profits and thus

103. See, e.g., *id.* at 1345.

104. See, e.g., *Killian v. McCulloch*, 850 F. Supp. 1239, 1251 (E.D. Pa. 1994).

105. *Id.*

106. *Id.*

107. 2011 Ark. 158, at 6, 2011 WL 1423993, at *3.

108. Although not explicitly stated as a contract claim, the court cited *W. Memphis Adolescent Residential, LLC v. Compton*, which ruled Arkansas law does not recognize a separate tort for breach of the contractual duties of good faith and fair dealing. 2010 Ark. App. 450, 9, 374 S.W.3d 922, 927.

109. *Osborne*, 2011 Ark. 158 at 2, 2011 WL 1423993, at *1.

110. *Id.*, 2011 WL 1423993, at *1.

did not pay.¹¹¹ The Osbornes filed suit and alleged breach of contract and breach of the covenant of good faith and fair dealing, among other claims.¹¹²

The jury found that ARMT had breached the duty of good faith and awarded the Osbornes three million dollars in damages, but it did not find a breach of the written contract.¹¹³ In their complaint, the Osbornes alleged that “[d]efendants’ gross mismanagement of ARMT, LLC, the failure to heed the continuous and systematic advice, counsel[,] and warnings of the Plaintiffs . . . breach[ed] the implied covenant of good faith and fair dealing.”¹¹⁴ Essentially, ARMT did not allow Plaintiffs to perform their consulting role as agreed by the contract, which resulted in the Osbornes not receiving what they bargained for.

Because the court determined there is no cause of action for breach of good faith, it reversed the verdict.¹¹⁵ While recognizing that Arkansas implies the duty of good faith in every contract,¹¹⁶ the court noted that a violation of that duty does not create an actionable claim in its own right.¹¹⁷ Arkansas already declared that there is no tort for the breach of good faith.¹¹⁸ In *Osborne*, it definitively ruled that there could be no independent cause of action based in contract law either.¹¹⁹

By holding that the breach of the covenant of good faith is “nothing more than evidence of a possible breach of a contract between parties,”¹²⁰ the Arkansas Supreme Court solidified the state’s view that a breach of the

111. *Id.* at 2–3, 2011 WL 1423993, at *1.

112. *Id.* at 3, 2011 WL 1423993, at *1. The other claims were breach of fiduciary duty, breach of third-party-beneficiary agreement, interference with contract, constructive fraud, and promissory estoppel. *Id.*, 2011 WL 1423993, at *1.

113. *Id.*, 2011 WL 1423993, at *1.

114. Complaint at ¶ 58, *Ark. Research Med. Testing LLC v. Osborne*, 2011 Ark. 158158, 2011 WL 1423993, (No. 10-750), available at https://docsdms.pulaskiclerk.com/DocsDMS/Default.aspx?A=3/CK_IMAGE.PresentRange?token:7b48e48fa39a6a849785bd90ce45a84f009b5c5be0b442980efff33164159b34dcd186916d1f5ab4091d99866c07cbceb50662dc074db0acd940a3251e2dc1b40eb6dd79e9f255926879038dbe693a6fcef25a83e0cdc03f0dc73c8200c15388428dcc35f18f03c4f45ec68a0699d591.

115. *Osborne*, 2011 Ark. 158, at 6, 2011 WL 1423993, at *3.

116. *Id.* at 4, 2011 WL 1423993, at *2 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205).

117. *Id.*, 2011 WL 1423993, at *2.

118. *Preston v. Stoops*, 373 Ark. 591, 595, 285 S.W.3d 606, 610 (2008); *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 655–56, 966 S.W.2d 894, 899 (1998).

119. *Osborne*, 2011 Ark. 158, at 6, 2011 WL 1423993, at *3. Before *Osborne*, federal courts used the same precedents to hold that Arkansas does not recognize a claim in tort or contract. *Price v. Am.’s Servicing Co.*, 403 B.R. 775, 794 (Bankr. E.D. Ark. 2009); *Smith v. Lincoln Benefit Life Co.*, Civil Action No. 08–01324, 2009 WL 789900, at *13 (W.D. Pa. Mar. 23, 2009).

120. *Osborne*, 2011 Ark. 158, at 6, 2011 WL 1423993, at *3.

covenant has little significance outside a breach of contract.¹²¹ Arkansas has aligned with the majority, more formalist approach that applies the covenant as an interpretative device in determining breach of contract cases.¹²² The court left unanswered how Arkansas will address scenarios such as that in *Osborne*, where the jury found a breach of the duty of good faith, but no breach of the agreement as written.

IV. PROBLEMS AND SOLUTIONS

The implied covenant of good faith was conceived by courts to protect the spirit of a contract between parties, encompassing their reasonable intentions and expectations, whether express or implied.¹²³ Yet the formalist application of the duty of good faith fails to give effect to its intended equitable purpose.¹²⁴ A generalized and open definition of the duty of good faith, designed to promote case-by-case application, is stifled by courts for fear of good faith becoming too vague and unpredictably applied.¹²⁵ A desire to restrict the covenant comes from a fear of its perceived potential to impose obligations upon the parties that they did not bargain for.¹²⁶ This focus on the express terms of the contract has left little room for implication of any obligations considering the context in which the agreement was made. The covenant is still, however, an implied term that is derived from the contractual language and relationship.¹²⁷ Although perhaps elusive, a balance exists between emphasis on express terms and the imposition of implied terms.

A. The Formalist Application Fails to Give Effect to the Equitable Intent of the Doctrine

The doctrine of good faith was envisioned to be flexible and “circumstance-bound” so that judges would use it as a tool to “do justice *and* do it according to law”¹²⁸ in the face of formalism.¹²⁹ Formalism is very much alive in the law of contract interpretation, so this purpose is not yet fully achieved.¹³⁰ The generalized definition of good faith envisioned by Profes-

121. See *id.*, 2011 WL 1423993, at *3.

122. See, e.g., *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 91 (3d Cir. 2000).

123. See discussion *supra* Part II.A–B.

124. See discussion *infra* Part IV.A.

125. See discussion *infra* Part IV.A.

126. Dobbins, *supra* note 4, at 268–69.

127. See discussion *supra* Part II.B.

128. Summers, *supra* note 26, at 198, 215.

129. *Id.* at 198–99.

130. See Van Alstine, *supra* note 19, at 1265. Some scholars have argued that the covenants origins in tempering formalism are no longer applicable. See *id.*

sor Summers furthered the policy goal of promoting fairness and justice in contract interpretation.¹³¹ Some have criticized the lack of a definition as vague and unpredictable.¹³² Yet as an implied term, the duty of good faith is not limitless, but rather contemplated by and within the scope of contractual relationships.¹³³ The vague conceptualization of good faith is intentional, so as to maximize the covenant's ability to do equity.¹³⁴

The modern formalist approach often excludes the context of the surrounding agreement in favor of the express terms of the contract, which does not allow courts much latitude in using good faith to promote fairness in the agreement.¹³⁵ Formalist courts prefer express terms over implied terms because they are more definite and do not require the court to discern the parties' more subjective intentions.¹³⁶ This is for fear of implying terms that the parties did not actually expect or intend.¹³⁷ But again, this fear is perhaps overstated because the implied terms can only exist within the context of the written agreement itself.¹³⁸ And if good faith is to fulfill its duty as a mechanism to ensure parties' reasonable expectations are not frustrated by the other's conduct, courts must consider the context in which the agreement was made.

Formalist construction of contracts does not allow consideration of implied good faith to override an express term, which makes implied duties inapplicable whenever a party's conduct extends from a right explicitly granted by the contract.¹³⁹ This is problematic, in that it fails to address the

131. See *supra* Part II.A.2; see also Dobbins, *supra* note 4, at 269 (arguing that contract law does not require general fairness).

132. See Dobbins, *supra* note 4, at 228–30.

133. Van Alstine, *supra* note 19, at 1276. “The duty of good faith performance applies, of course, against the background of the parties’ formal agreement.” *Id.*

134. See Dobbins, *supra* note 4, at 233–38. This lack of a concrete definition is advantageous. LINZER, *supra* note 44, § 26.8 (“Professor Summers’s rejection of a single definition has much to be said for it. There is surely more to good faith than not trying to regain what a party bargained away. . . . Good faith is a vague and shifting concept, but so is justice. That a concept cannot be formalized into a tight matrix does not make it wrong. It makes it consistent with the way humans behave, and good faith has a great deal to do with the way humans behave—and should behave.”).

135. Van Alstine, *supra* note 19, at 1265–72.

136. See *id.* at 1257–66.

137. See HUNTER, *supra* note 49, § 8:2.

138. *E.g.*, Scherer Constr., LLC v. Hedquist Constr., Inc., 18 P.3d 645, 653–54. (Wyo. 2001).

139. Van Alstine, *supra* note 19, at 1267. (“This is a tidy logical circle: The duty of good faith performance cannot override an express term in a contract, and is irrelevant in absence of a breach of an express term. If a breach of an express term already exists, however, it is difficult to see where the duty of good faith would fit in the law of contracts at all.”(footnote omitted)). *But see* Sons of Thunder, Inc. v. Borden, Inc., 690 A.2d 575, 588 (N.J. 1997) (holding that the defendant’s pre-termination conduct in frustration of the plaintiff’s reasonable expectations breached the duty of good faith performance even though the conduct at

problem that good faith was designed to address—that parties cannot foresee the future and therefore do not put all terms in the written instrument.¹⁴⁰ To require parties to expressly address all possible bad faith in the contract itself would make the duty of good faith meaningless.¹⁴¹ It is for this purpose that the duty of good faith is an implied term, designed to have a general meaning that is applicable as the circumstances require.¹⁴² Parties should not be punished for an inability to foresee all the implications of the terms they do contract for.

Parties also rely on good faith as a “safety valve” that courts use to fill gaps in a written instrument.¹⁴³ The majority approach’s strict connection to the express terms of the contract fails to give the implied covenant of good faith any independent meaning.¹⁴⁴ In the formalist approach, a breach of the implied duty of good faith cannot exist without a finding of a breach of an express term.¹⁴⁵ Without substantive weight, this application is duplicative of the breach of contract analysis and therefore superfluous.¹⁴⁶

Along with its intended purpose as an instrument of equity and fairness, early scholars envisioned the duty of good faith as a full, albeit implied, term of the contract, supplying independent obligations to the parties not to act in bad faith, a breach of which would be independently actionable.¹⁴⁷ But the development of the doctrine since that time and the influence of formalism have led the duty of good faith away from its original foundation in fairness.¹⁴⁸

issue did not violate any express contractual term); *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) (allowing a claim for breach of the duty of good faith performance although the conduct did not violate any express terms of the contract).

140. Some practical limitations on the parties’ abilities to negotiate and draft a comprehensive contract include a lack of or inability to obtain information, the impossibility of unambiguous language and meaning for all terms, and the cost of extensive negotiations. *See Van Alstine, supra* note 19, at 1282–83.

141. If every term was included and addressed in the written agreement, no implied terms would be necessary. *Id.* at 1264–68.

142. *See* discussion *supra* Part II.A.

143. *Summers, supra* note 26, at 215.

144. *See Houh, supra* note 16, at 14.

145. *Id.*

146. *Id.*

147. *Imwinkelried, supra* note 50, at 4 (“The general provision referred to an ‘obligation.’ That term strongly suggested that the provision imposed a duty or covenant on contracting parties to exercise good faith during the performance phase. If the contracting parties were now under a full-fledged duty, the failure to exercise good faith could amount to an actionable breach. It then seemed to follow logically that the aggrieved party could obtain an independent recovery for that breach. That line of argument seemed particularly plausible since the drafters decreed that the parties could not disclaim the obligation.”(footnotes omitted)).

148. *Houh, supra* note 16, at 52. *Houh* also notes that while this application has helped in the interpretation of breach of contract, it is unnecessary to consider good faith an independent duty. *Id.* at 54.

B. The Formalist Approach Fails to Provide a Remedy for Bad Faith Conduct Not Also Constituting a Breach of Contract.

When courts limit a finding of breach of good faith to a finding of a breach of contract, parties such as the Osbornes cannot recover. Without independent force, there is no independent cause of action for breach of good faith.¹⁴⁹ This is problematic when parties commit bad faith, violating the “spirit” of the contract, but not any express terms.¹⁵⁰ Value placed on party autonomy and emphasis on express terms lead the formalist view to deny the possibility of recovery for a breach of good faith.¹⁵¹ In the *Osborne* contract, there was no express term addressing the performance of ARMT in reaching its profits, thus its conduct did not breach the contract.¹⁵² Perhaps this should be viewed only as a cautionary tale of parties who had an insufficiently specific contract. However, implied terms developed in part to ease the burden of parties having to contract for every detail, and courts should not abandon this policy for the sake of formalism.¹⁵³

Some scholars conclude that the covenant of good faith is not needed as a source of recovery in contract because the traditional contract remedies are sufficient.¹⁵⁴ But at the conceptualization of good faith, Professor Summers justified the independent status of good faith in part on the basis that it could supplement the traditional rules of contract law.¹⁵⁵ He envisioned that judges would use good faith to do equity when conduct does not rise to the level of negligence or fraud, or to prevent abuse of power when estoppel cannot necessarily be proved.¹⁵⁶ The seemingly endless types of bad faith

149. *E.g.*, *Ark. Research Med. Testing, LLC v. Osborne*, 2011 Ark. 158, at 1, 2011 WL 1423993, at *1.

150. *See, e.g.*, *Chamison v. HealthTrust, Inc. Hosp. Co.*, 735 A.2d 912, 920 (Del. Ch. 1999).

151. *See* discussion *supra* Part III.B.

152. *Osborne*, 2011 Ark. 158, at 6, 2011 WL 1423993, at *3.

153. *See id.*

154. *Dobbins, supra* note 4, at 233–37. *See also* *Dubroff supra* note 4, at 619 (“If the contract is a fair one, the principle of individual autonomy should require that it be enforced without the uncertainties that would be created by enabling a party disadvantaged by enforcement of the deal to claim bad faith as a defense. If the contract is unfair, the unconscionability doctrine is the existing and appropriate tool for relieving the disadvantaged party.”). The law of contracts already provides a suitable range of remedies for breach, including the right to receive the benefit of the bargain, known as reliance recovery. *Id.* [I can’t locate anything in this article to support this or the following “*id.*”]. It should also provide the right to receive satisfaction of contractual expectation—the loss of a party’s bargain plus consequential damages within the contemplation of the parties. *Id.*

155. *Summers, supra* note 26, at 199.

156. *Id.*

justify the doctrine's existence.¹⁵⁷ Rules such as the one adopted in Arkansas do not allow for such an application.

A separate cause of action for a violation of the duty of good faith does not necessarily address this problem either. In formalist jurisdictions that recognize an independent claim for breach of good faith do so only semantically.¹⁵⁸ When proof of a breach of good faith must be linked to an express term of the agreement or based on separate conduct, the duty of good faith has no meaning outside of a breach of contract, and is thus rarely likely to be applicable.¹⁵⁹ Although it is too late for the *Osbornes*, circumstances do arise that require use of the implied term of good faith beyond the express language of the contract.

C. Arkansas Should Adopt the Contextualist Approach: The Approach That Gives Good Faith an Independent Meaning

The Arkansas court's adoption of the formalist approach to good faith fails to effectuate the intended purpose of the doctrine, which lies in equity.¹⁶⁰ Adoption of a more contextually based approach will better meet the intended purpose of good faith. As well, it will provide for a remedy in situations like *Osborne*, where there is a breach of good faith without a breach of a contract provision.¹⁶¹ This view would strike an appropriate balance between formalism and contextualism because it effectuates the equitable purposes of the duty of good faith without expanding its application too broadly.¹⁶² The duty will still exist within the contract itself, but will allow the court to more openly consider the relationship of the parties and their intentions.

Specifically, Arkansas should find that the breach of the duty of good faith can constitute a cause of action based in contract without requiring a breach of an express contract provision.¹⁶³ This will ensure that the recovery still lies within the rights and obligations of the contract without unduly restricting the purpose of good faith.¹⁶⁴ This difference can be subtle, “[w]hile

157. *Id.* at 232–33.

158. *See* discussion *supra* Part III.B.

159. *See* discussion *supra* Part III.B.

160. *See* Summers, *supra* note 26, at 199–200.

161. *See* Ark. Research Med. Testing, LLC v. Osborne, 2011 Ark. 158, at 3–4, 2011 WL 1423993, at *3.

162. *See, e.g.,* Comprehensive Care Corp. v. RehabCare Corp., 98 F.3d 1063, 1066 (8th Cir. 1996) (citation omitted) (quoting Morton v. Hearst Corp., 779 S.W.2d 268, 273 (Mo. Ct. App. W.D. 1989) (“The law does not allow the implied covenant of good faith and fair dealing to be an ever flowing cornucopia of wished-for legal duties; indeed, the covenant cannot give rise to new obligations not otherwise contained in a contract’s express terms.”)).

163. *See* Houh, *supra* note 16, at 52.

164. *See id.*

a claim for breach of contract addresses the breaking of express promises and obligations, a claim for breach of the covenant of good faith and fair dealing addresses the breaking of the implicit promises that make the contract possible in the first place.”¹⁶⁵

A breach of the covenant of good faith is not duplicative of a breach of contract claim because a breach of good faith can occur while the form of the contract is fulfilled.¹⁶⁶ A party should have recourse against another who fails to live up to the spirit of the deal and thereby causes harm. Parties cannot reasonably be expected to negotiate a comprehensive and exhaustive contract, so implied terms are necessary to discern and honor the intentions of the parties.

V. CONCLUSION

The implied covenant of good faith was conceived to counter the harsh effects of formalism that did not account for the contextual relationship surrounding a contract.¹⁶⁷ As such, it was designed as a tool of equity to promote fairness and justice.¹⁶⁸ Although most jurisdictions have adopted the Restatement section 205 that implies the duty of good faith into the performance and enforcement of every contract, how courts construe the duty differs widely.¹⁶⁹ Some courts, such as Arkansas, give it no meaning by restricting it to a breach of contract claim.¹⁷⁰ Others go so far as to make the duty of good faith an independently actionable term of the contract, but still link it to the express terms.¹⁷¹ A balance exists, however, where the duty provides a remedy for imprudent or overreaching conduct while remaining within the scope of the contractual relationship between the parties.

The duty is intended to have a flexible definition in order to apply the duty as circumstances require.¹⁷² Yet fear of an overly broad interpretation of the duty is unwarranted because as an implied term it is confined to the contract and the surrounding relationship.¹⁷³ Because of the nature of the duty of good faith as part of the contract as an implied term, courts will not

165. W. Scott Fewell, *Vermont's Implied Covenant of Good Faith and Fair Dealing in Commercial Contracts*, 36 VT. B.J. 20, 24, (2010-2011). [I can't find this article anywhere in our databases, and the VT Bar website does not have this one listed. I do however know that it isn't a consecutively paginated journal.]

166. See *Osborne*, 2011 Ark. at 2-3, 2011 WL 1423993, at *1-2.

167. See discussion *supra* Part II.A.

168. Dobbins, *supra* note 4, at 228.

169. See discussion *supra* Part III.B.

170. See, e.g., *Osborne*, 2011 Ark. at 3-4, 2011 WL 1423993, at *2.

171. E.g., *Carma Developers, Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 727 (Cal. 1992); *Ultra Resources, Inc. v. Hartman*, 226 P.3d 889, 920 (Wyo. 2010).

172. Dobbins, *supra* note 4, at 266.

173. See discussion *supra* Part III.A.

effectuate its intended purpose until it has been untethered from the express terms of the contract. If formalist jurisdictions such as Arkansas adopt a more contextualist view, a more balanced application of the duty of good faith will result, whereby the equitable foundations of the doctrine will be given effect and the covenant will be given meaning. It will also allow for parties to recover based on a breach of good faith, and thus implement its intended role as a tool to do justice.

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