

# Indiana Law Review

Volume 56

2023

Number 3

## NOTES

### THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING: INDIANA VS. DELAWARE

SAMUEL HUFF\*

#### INTRODUCTION

Since its origin, the implied duty of good faith has developed to be a crucial doctrine in modern contract law. Despite the doctrine's widespread use and acceptance, there is no uniform consensus of the doctrine's exact definition.<sup>1</sup> Due to the concept of good faith in the performance of contracts lacking any uniform meaning, states have used the doctrine for many different purposes.<sup>2</sup> Unlike other contract doctrines like unconscionability or undue influence, where a contract is unenforceable due to the context of the parties' unequal relationship at the time of contract formation, the implied duty of good faith and fair dealing applies to the performance and enforcement of contracts that are freely entered into and bargained for by both sides.<sup>3</sup> Generally, the implied covenant serves the purpose of ensuring that the contract meets the reasonable expectations of the parties by preventing any actions done in bad faith that, while allowed under the express terms of the agreement, would harm the other party.<sup>4</sup>

In 2002, the Supreme Court of Indiana reaffirmed that the implied duty of good faith and fair dealing does not apply in every contract.<sup>5</sup> Under Indiana law, all contracts for the sale of goods subject to the Uniform Commercial Code ("UCC") include an implied obligation of good faith in performance or enforcement of the agreement.<sup>6</sup> Beyond contracts governed by the UCC, Indiana exercises the implied duty of good faith in limited circumstances such as

---

\* J.D. Candidate, 2023, Indiana University Robert H. McKinney School of Law; B.A. DePauw University – Greencastle, Indiana. I would like to thank Judge Heather Welch for her guidance in selecting the subject of this Note. Thank you to my fellow members of the *Indiana Law Review* for all their help through this process. Most of all, thank you to my friends and family, especially my parents, Michael and Gretchen Huff, for their constant love and support.

1. Northwest, Inc. v. Ginsberg, 572 U.S. 273, 285 (2014).

2. See *id.* at 286.

3. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981).

4. Daniel Markovits, *Good Faith as Contract's Core Value*, 2021 MICH. ST. L. REV. 1, 4 (2021).

5. Allen v. Great Am. Rsrv. Ins. Co., 766 N.E.2d 1157, 1162 (Ind. 2002).

6. IND. CODE § 26-1-1-203 (2022).

insurance contracts,<sup>7</sup> contracts that involve a fiduciary relationship,<sup>8</sup> and instances where the intention of the parties is unclear due to the contract language being ambiguous.<sup>9</sup> Unlike Indiana, a majority of states, including Delaware, apply the implied duty of good faith to every contract.<sup>10</sup> The Indiana Supreme Court's decision also added another layer to the complex topic of good faith by claiming that the implied covenant is recognized in contracts where parties share an agency relationship.<sup>11</sup> This additional example emphasizes how the implied duty of good faith in Indiana can be very unclear and gives rise to the question of whether Indiana would benefit from adopting the majority approach to the implied duty of good faith, as represented by states like Delaware.

This Note first provides an overview of the general approaches to the implied duty of good faith and fair dealing in Delaware and Indiana, followed by a comparison of similarities and differences between the two jurisdictions when applied to specific cases. Following an analysis of these cases, this Note discusses the policy considerations behind both States' approaches to the implied covenant. Next, this Note analyzes how the courts choose to apply the doctrine in each jurisdiction regarding implied terms and express terms, using the implied covenant as an independent cause of action, and its relationship to other contract principles. Finally, after analyzing the advantages and disadvantages to both approaches, this Note argues that Indiana should adopt Delaware's approach to the implied duty of good faith by applying the doctrine to all contracts.

## I. OVERVIEW OF THE IMPLIED DUTY OF GOOD FAITH IN DELAWARE LAW

### A. General Approach to the Implied Covenant

The implied duty of good faith gained widespread acceptance across the States following the promulgation of the UCC in 1951. The Restatement (Second) of Contracts, followed by a majority of jurisdictions, asserts that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."<sup>12</sup> Adhering to the language of the Restatement, under Delaware law, every contract has an implied obligation of good faith and fair dealing in its performance and enforcement.<sup>13</sup> Instead of limiting the application of this doctrine to specific types of contracts, Delaware courts view the obligation to perform a contract in good faith "as a general principle of contract law."<sup>14</sup>

---

7. *Allen*, 766 N.E.2d at 1162 (citing *Erie Ins. Co. v. Hickman ex rel Smith*, 622 N.E.2d 515, 518 (Ind. 1993)).

8. *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 123 (Ind. Ct. App. 2008).

9. *First Fed. Sav. Bank of Ind. v. Key Mkts., Inc.*, 559 N.E.2d 600, 604 (Ind. 1990).

10. See 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, 266, 289-99 (2003).

11. *Allen*, 766 N.E.2d at 1162-63.

12. RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981).

13. Goren, *supra* note 10, at 266-67.

14. Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 BUS. LAW. 1469,

However, although the duty of good faith and fair dealing is implied in all contracts, Delaware courts are still reluctant to infer implied obligations arising from a duty of good faith.<sup>15</sup> Delaware recognizes the implied covenant only in narrow circumstances, describing such cases as those which “should be rare and fact-intensive, turning on issues of compelling fairness.”<sup>16</sup> Further, Delaware courts have described “that implying obligations based on the covenant of good faith and fair dealing is a cautious enterprise.”<sup>17</sup> Implied obligations are only read into a contract by the court if it is a necessary implication based on the provisions of the contract.<sup>18</sup> Implied terms are “necessary to give the contract the effect which the parties as fair and reasonable men presumably would have agreed on, if, having in mind the possibilities of the situation which has arisen, they had contracted expressly in reference thereto.”<sup>19</sup> Courts have established a limit on the implied covenant by highlighting that the duty may not be used to enforce new obligations on parties that go beyond the scope of the agreement.<sup>20</sup>

*B. Tests for Determining Application of the Implied Covenant*

There is no precise standard for determining what type of conduct constitutes a violation of the duty of good faith; thus, Delaware courts have chosen to make this determination on a case-by-case basis depending on the contract being disputed.<sup>21</sup> The test used by Delaware courts to determine when the implied duty of good faith should be imposed on an agreement was laid out very clearly by the court in *Katz v. Oak Industries Inc.*, where the court explained:

Because it is an implied *contractual* obligation that is asserted as the basis for the relief sought, the appropriate legal test is not difficult to deduce. It is this: is it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter. If the answer to this question is yes, then, in my opinion, a court is justified in concluding that such act constitutes a breach of the implied covenant of good faith.<sup>22</sup>

This exemplifies the general approach that Delaware courts take regarding the implied duty of good faith and fair dealing, but the courts have also provided

---

1475 (2005).

15. *Id.* at 1479.

16. *Cincinnati SMSA Ltd. P’ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998).

17. *Id.*

18. *Danby v. Osteopathic Hosp. Ass’n of Del.*, 101 A.2d 308, 314 (Del. Ch. 1953).

19. *Id.*

20. *Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 921 (Del. Ch. 1999).

21. *Altman & Raju*, *supra* note 14, at 1478.

22. 508 A.2d 873, 880 (Del. Ch. 1986).

more guidance on what conduct violates the implied covenant in specific types of contracts.

When dealing with insurance contracts, “the implied covenant has historically included a duty to settle [claims] within policy limits where recovery in excess of those limits is substantially likely.”<sup>23</sup> A bad-faith failure to settle by an insurer violates an implied duty of good faith on that basis of the insurer’s exclusive control over settlement negotiations and the resulting conflict of interests that may arise.<sup>24</sup>

## II. OVERVIEW OF THE IMPLIED DUTY OF GOOD FAITH IN INDIANA

### *A. Indiana Code Section 26-1-1-203 & Indiana Case Law*

As a general rule, Indiana adopted the UCC’s language regarding the implied covenant which states, “[e]very contract or duty within IC 26-1 imposes an obligation of good faith in its performance or enforcement.”<sup>25</sup> Under this rule, all transactions subject to the UCC must include the implied duty of good faith. According to Indiana’s Uniform Commercial Code, the implied covenant is only available beyond contracts for the sale of goods in a few instances.<sup>26</sup> While Indiana courts have chosen to follow the Restatement in most cases, courts have specifically noted that this provision of the Restatement was not adopted by Indiana.<sup>27</sup>

Despite Indiana’s refusal to include the implied covenant in all contracts outside the UCC, courts have decided to impose the implied duty of good faith in various circumstances. In *First Federal Savings Bank of Indiana v. Key Markets, Inc.*, the Supreme Court of Indiana established that, while courts are to enforce the intentions of the parties when clearly stated in the contract, they must use other means to discern the parties’ intentions when the contract language is ambiguous or uncertain in its terms.<sup>28</sup> If an ambiguity arises in a contract due to unclear or uncertain terms, courts will impose an implied duty of good faith by presuming that the parties intended to act reasonably in order to determine the intent of the parties.<sup>29</sup> In addition to ambiguous contract language, the implied covenant will be enforced in any contract where the terms of the agreement expressly apply the duty of good faith on the parties involved.<sup>30</sup>

The question of whether the implied covenant should apply to all contracts

---

23. *Connelly v. State Farm Mutual Auto. Ins. Co.*, 135 A.3d 1271, 1274 (Del. 2016) (internal quotations omitted).

24. *Id.* at 1275.

25. IND. CODE § 26-1-1-203 (2022).

26. *See* 6 IND. LAW ENCYC. *Contracts* § 81 (2022).

27. *See First Fed. Sav. Bank of Ind. v. Key Mkts., Inc.*, 559 N.E.2d 600, 604-05 (Ind. 1990).

28. *Id.* at 604.

29. *Id.*

30. *Lake Cnty. Tr. Co. v. Wine*, 704 N.E.2d 1035, 1039 (Ind. Ct. App. 1998) (citing *First Fed. Sav. Bank of Ind.*, 559 N.E.2d at 604); *see also* *CW Farms, LLC v. Egg Innovations, LLC*, 169 N.E.3d 874, 880-81 (Ind. Ct. App.), *trans. denied*, 175 N.E.3d 275 (Ind. 2021).

or only a limited group is a question many jurisdictions have struggled to answer. Indiana courts serve as a great example of the difficulty in establishing a clear standard due to many conflicting decisions on this issue. Despite this, Indiana courts have uniformly held that Indiana law recognizes an implied duty of good faith in all insurance contracts.<sup>31</sup> The implied covenant ensures that an insurer will act in good faith with its insured.<sup>32</sup> The Supreme Court of Indiana reaffirmed this enforcement of the implied covenant in *Allen v. Great American Reserve Insurance Co.* where it explained that “[t]his duty results from the unique nature of the insured/insurer relationship, which may be at varying times arm’s-length, fiduciary, and/or adversarial.”<sup>33</sup> In insurance contracts, while there is no precise measure of duty, several obligations resulting from an insurer’s duty of good faith have been recognized, including:

the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.<sup>34</sup>

Beyond insurance contracts, Indiana courts have recognized that the implied duty of good faith is also included in other circumstances where a special relationship exists between contracting parties. The courts have varied in determining what exactly constitutes a special relationship in the context of the implied covenant. In most cases, courts have identified this as contracts between parties who share a fiduciary relationship.<sup>35</sup> The Indiana Supreme Court has used slightly different terminology in different cases, evidenced by the court establishing that agreements between those with an agency relationship are to include an implied duty of good faith.<sup>36</sup> Regardless of the exact terminology, Indiana courts have routinely found that employment contracts constitute an agreement where the implied duty of good faith is to be enforced.<sup>37</sup>

There are other limited circumstances where the implied duty of good faith is imposed. While Indiana most often limits the implied duty of good faith in employment and insurance contracts, “there is no absolute restriction to employment and insurance contracts.”<sup>38</sup> One example of this comes in cases of agreements between a bank and a checking account holder. While not always a

---

31. *Allen v. Great Am. Rsrv. Ins. Co.*, 766 N.E.2d 1157, 1162 (Ind. 2002) (citing *Erie Ins. Co. v. Hickman ex rel. Smith*, 622 N.E.2d 515, 518 (Ind. 1993)).

32. *Erie Ins. Co.*, 622 N.E.2d at 518.

33. *Allen*, 766 N.E.2d at 1162 (citing *Erie Ins. Co.*, 622 N.E.2d at 518).

34. *Erie Ins. Co.*, 622 N.E.2d at 519.

35. See, e.g., *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 123 (Ind. Ct. App. 2008).

36. *Allen*, 766 N.E.2d at 1162-63.

37. See *Allison*, 883 N.E.2d at 123; *Old Nat’l Bank v. Kelly*, 31 N.E.3d 522, 531 (Ind. Ct. App. 2015).

38. *Old Nat’l Bank*, 31 N.E.3d at 531; see also *Wells v. Stone City Bank*, 691 N.E.2d 1246, 1251 (Ind. Ct. App. 1998).

fiduciary relationship, the relationship between a bank and checking account holder may invoke a duty of good faith and fair dealing, as the relationship is often similar to other agency or fiduciary relationships where the implied covenant is imposed.<sup>39</sup> The court in *Old National Bank v. Kelly* explained its reasoning for extending the implied covenant in this situation when it stated, “[w]e discern no crucial difference between insurance companies and banks, as each—from a superior vantage point—offer customers contracts of adhesion, often with terms not readily discernable to a layperson.”<sup>40</sup> *Old National Bank* provides just one example of Indiana courts’ application of the implied covenant in contracts outside the UCC, beyond just employment and insurance contracts. To fully identify the scope of this doctrine in Indiana, it is beneficial to highlight cases involving contracts where the implied duty of good faith was not imposed.

*B. Contracts Where the Implied Duty of Good Faith Has Not Been Recognized*

As previously discussed, the implied duty of good faith in Indiana is only recognized in limited circumstances within contracts for services. This distinction has been confirmed by Indiana courts on several occasions. *Perfect Flower, Inc. v. Teleflora LLC* included a contract between Teleflora, which operated a network of florists, and Perfect Flowers, which ran a retail flower shop.<sup>41</sup> Perfect Flowers entered into the written contract with Teleflora and agreed to become a member florist in Teleflora’s network of florists.<sup>42</sup> In addition to this agreement, Teleflora offered separate contracts with its member florists where it would set up websites for individual member florists.<sup>43</sup> Perfect Flowers declined this contract with Teleflora for this creation of a website because it already had its own functioning website.<sup>44</sup> Perfect Flowers alleged that Teleflora created a website despite never being authorized to do so and, as a result, Perfect Flowers alleged it lost money due to the internet traffic being directed to the unauthorized website.<sup>45</sup> Perfect Flowers could not point to a specific contract provision that was breached but instead argued that Teleflora breached its duty of good faith and fair dealing by extending its actions beyond the intended scope of the contract.<sup>46</sup> Applying Indiana law, the district court held that no such duty existed in the contract because there was no fiduciary relationship between the parties and the agreement constituted a contract for ongoing services, which is not a transaction covered by Indiana’s Uniform Commercial Code.<sup>47</sup>

Similarly, Indiana courts refused to extend the implied duty of good faith and

---

39. *Wells*, 691 N.E.2d at 1251.

40. *Old Nat’l Bank*, 31 N.E.3d at 531.

41. *Perfect Flowers, Inc. v. Teleflora LLC*, No. 1:10-cv-1031, 2012 WL 2994636, at \*1 (S.D. Ind. July 20, 2012).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at \*2.

47. *Id.* at \*3.

fair dealing to an alleged breach of the implied covenant stemming from the contractual relationship between a medical student and university.<sup>48</sup> In *Amaya v. Brater*, a third-year medical student was accused of cheating during an examination.<sup>49</sup> The student alleged that the medical school did not follow the proper procedure for expelling a student as it was detailed in the student handbook.<sup>50</sup> Thus, the student raised two claims against the school, one for breach of contract and another for breach of the duty of good faith and fair dealing.<sup>51</sup> In addressing the question of whether the duty of good faith could be applied in this context, the court did acknowledge that the legal relationship between a student and university is an implied contract.<sup>52</sup> Despite the existence of a contract, the court held that the student failed to present any authority supporting a finding that a separate cause of action for breach of good faith existed in the case.<sup>53</sup> The court relied on the general rule that the concept of the duty of good faith and fair dealing is restricted to contracts for the sale of goods and is only expanded as a tort cause of action in insurance contracts.<sup>54</sup> This case serves as an example of Indiana courts' unwillingness to expand the implied covenant beyond very limited circumstances.

Another type of contract where Indiana courts have directly addressed the issue of the implied duty of good faith are guaranty contracts.<sup>55</sup> In *Ford Motor Credit Co. v. Garner*, Garner and his wife agreed to become guarantors of a loan from Ford Motor Credit Co. ("FMCC"). In 1978, he and his wife executed a "continuing guaranty" in favor of FMCC, to which they were the guarantors.<sup>56</sup> Garner's car dealership shut down and began to liquidate by early 1980.<sup>57</sup> During this process, Garner was advised that they could become personally responsible under the guaranty for any losses sustained by FMCC.<sup>58</sup> Because Garner was considering filing for bankruptcy to be released from the personal guaranty, Garner was told that FMCC likely would not pursue the personal guaranty because of Garner's net worth.<sup>59</sup> Garner did not hear from FMCC again until 1987, when he received a letter demanding payment.<sup>60</sup> Among various other defenses, Garner asserted the contract imposed an implied duty of good faith and that FMCC breached this obligation in the performance and enforcement of the

---

48. *Amaya v. Brater*, 981 N.E.2d 1235, 1239 (Ind. Ct. App. 2013).

49. *Id.* at 1237.

50. *Id.* at 1240.

51. *Id.* at 1239.

52. *Id.* at 1240.

53. *Id.* at 1241-42.

54. *Id.* at 1239.

55. *Ford Motor Credit Co. v. Garner*, 688 F. Supp. 435, 442 (N.D. Ind. 1988).

56. *Id.* at 437.

57. *Id.* at 438.

58. *Id.*

59. *Id.* at 438-39.

60. *Id.* at 440.

contract.<sup>61</sup> The court found that the UCC was inapplicable because this guaranty contract was not a contract for the sale of goods governed by the UCC.<sup>62</sup> Further, the court resolved some lingering questions from prior case law by confirming that the Restatement did not create a general duty of good faith that applied to all contracts in Indiana.<sup>63</sup>

Marital agreements are another example of contracts that are not governed by the UCC, causing courts to determine whether a duty of good faith and fair dealing is to be implied. This issue was directly considered in a dispute about the enforcement of an antenuptial agreement where, after eleven years of marriage, a husband used such agreement to shield assets from his wife that would normally be treated as marital assets.<sup>64</sup> The trial court determined that the antenuptial agreement was valid and not unconscionable but still chose not to enforce the agreement by creating an exception based on the court's finding that the husband did not act in good faith during the marriage.<sup>65</sup> However, the appellate court reversed this decision, determining that this holding went against Indiana law.<sup>66</sup> The appellate court explained that, even while accepting the trial court's determination that the husband acted in bad faith, creating a new exception to a valid marital contract is inappropriate because there is no implied duty of good faith in every contract under Indiana law.<sup>67</sup> The court reasoned that the agreement's terms were "clear and unambiguous" and thus the court's duty was to enforce the parties' obligation to perform in accordance with the terms they bargained for.<sup>68</sup>

One final illustration of the limited application of the implied covenant under Indiana law is found in a contract between a not-for-profit corporation and its members. This issue was analyzed in a dispute between the NCAA and one of its affiliated members, HCF, a private non-profit organization aimed at developing young Hispanic leaders.<sup>69</sup> At the same time that HCF was accepted as a member and authorized to sponsor preseason football games, the NCAA adopted a proposal to eliminate certified preseason games in favor of another regular season game.<sup>70</sup> As a result, if a team played in the preseason game it would count towards their maximum playable games and cause them to lose a regular season game.<sup>71</sup> In effect, this harmed members like HCF who could only sponsor preseason games. The NCAA exempted the preseason game from the new rule

---

61. *Id.* at 442.

62. *Id.*

63. *Id.* at 442-3.

64. *Pardieck v. Pardieck*, 676 N.E.2d 359, 361-63 (Ind. Ct. App. 1997).

65. *Id.* at 363.

66. *Id.* at 364-65.

67. *Id.* at 364.

68. *Id.* at 365.

69. *Hispanic Coll. Fund, Inc. v. Nat'l Collegiate Athletic Ass'n*, 826 N.E.2d 652, 653-54 (Ind. Ct. App. 2005).

70. *Id.* at 654.

71. *Id.*

for HCF for the first two years.<sup>72</sup> However, the NCAA denied HCF's waiver to have their sponsored preseason game exempted from the rule the following year, and as a result, HCF sued the NCAA alleging that the standard used for its decision was "arbitrary and unreasonable."<sup>73</sup> HCF brought a common law contract claim asserting that "the articles of incorporation and bylaws of a not-for-profit corporation are generally considered to be a contract between the corporation and its members."<sup>74</sup> Based on the existence of a contractual relationship, HCF argued that a duty of good faith and fair dealing applies and the NCAA violated that obligation.<sup>75</sup> The court refused to accept HCF's argument, noting that Indiana law does not impose a duty of good faith and fair dealing in all contracts.<sup>76</sup>

These cases display the narrow scope of the implied duty of good faith in contracts outside the UCC under Indiana law. Additionally, these examples just begin to highlight the surface of how Indiana's approach to the implied covenant can harm individuals who have suffered from the bad faith actions of parties in their contractual agreements. The significant number of contracts that are not covered by the breadth of the implied covenant in Indiana becomes even more apparent when compared to the majority approach displayed in Delaware law.

### *C. Similarities and Differences in Application*

On the surface, the approaches to the implied duty of good faith and fair dealing taken by Indiana and Delaware may appear to starkly contrast with each other. In reality, they are much more similar in their application in everyday practice. The similarities and differences between Indiana and Delaware law regarding the implied covenant are best observed through some of the cases previously discussed (where the implied duty of good faith was not applicable under Indiana law), as if Delaware's approach to the doctrine was applied instead.

First, in the context of contracts for services, the court in *Perfect Flowers* found the duty of good faith and fair dealing was not implied in a contract between a retail flower shop and Teleflora, a company operating a network of florist.<sup>77</sup> Under Delaware law, applying the test of whether operating the website was something that the parties would have included had it come up during contract negotiations, a court would have likely found this to be a breach of the duty of good faith. First, there is no express language dealing with the issue in the contract. Further, there would have been a clear understanding between the parties that the agreement did not give Teleflora the right to make and operate a website on behalf of Perfect Flowers because Teleflora offered that service in a

---

72. *Id.* at 654-55.

73. *Id.* at 655.

74. *Id.* at 658.

75. *Id.*

76. *Id.*

77. *Perfect Flowers, Inc. v. Teleflora LLC*, No. 1:10-cv-1031, 2012 WL 2994636, at \*3 (S.D. Ind. July 20, 2012).

separate contract with all of its clients and Perfect Flowers declined the offer in the second contract.<sup>78</sup> Based off these circumstances, both parties reasonably expected that Teleflora was not to operate a new website.

However, in *Amaya*, a Delaware court would likely agree with the Indiana court's decision because the determination made by the dean of the medical school upholding the student's expulsion was not made in bad faith.<sup>79</sup> Further, the school's procedure for handling her appeal was made after much deliberation that was sufficient according to the express language of the student handbook.<sup>80</sup>

In *Ford Motor Credit Co.*, the Indiana court determined that the implied duty of good faith did not apply to a guaranty contract. A Delaware court would likely reach the same conclusion. Although the implied duty of good faith did not apply in the case, the Indiana court noted that, even if the implied covenant did exist in the contract, there was no evidence of a duty of good faith being breached.<sup>81</sup> While it took longer than usual to do so, FMCC followed the express language of the agreement and did nothing to interfere with Garner's reasonable expectations in the agreement.<sup>82</sup>

Finally, when looking at the marital agreement dispute in *Pardieck*, a Delaware court's decision could come out differently when the implied duty of good faith is recognized in the contract. The trial court made a finding that the husband did not act in good faith according to the agreement.<sup>83</sup> Applying the test under Delaware law, it is likely that it was the reasonable expectation of the parties that any new assets would be going to the couple's marital assets instead of being accumulated under the husband's personal assets.

### III. CLASHING POLICY CONSIDERATIONS

The differences in the application of the implied duty of good faith between Indiana and other jurisdictions like Delaware represent a direct clash of two fundamental ideas at the core of modern contract law. These fundamental ideas have been the center of debate around contract theory for decades.<sup>84</sup> The balance between fairness for individual parties and social duty versus the freedom to contract lays at the center of this discussion as well.<sup>85</sup> Indiana's approach represents a more traditional view supported by those who value the freedom to contract. Conversely, Delaware's approach maintains more emphasis on the ensuring each party receives their reasonable expectation from an agreement as opposed to strict adherence to the terms of a contract alone.

---

78. *Id.* at \*1.

79. *Amaya v. Brater*, 981 N.E.2d 1235, 1241-42 (Ind. Ct. App. 2013).

80. *Id.*

81. *See Ford Motor Credit Co. v. Garner*, 688 F. Supp. 435 (N.D. Ind. 1988).

82. *See id.*

83. *Pardieck v. Pardieck*, 676 N.E.2d 359, 361 (Ind. Ct. App. 1997).

84. *See Carolyn Edwards, Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 695-96 (2009).

85. *Id.*

*A. Indiana Policy Considerations*

The main policy considerations for Indiana's approach to the implied covenant are clearly explained by the Supreme Court of Indiana in *First Federal Savings Bank of Indiana v. Key Markets, Inc.*<sup>86</sup> The dispute was over the cancellation of a lease for space in a shopping center where the lease agreement required the lessor's consent to any assignment of the lease but did not indicate whether refusal of such consent was required to be reasonable. In its opinion, the court stated:

It is not the province of courts to require a party acting pursuant to such a contract to be "reasonable," "fair," or show "good faith" cooperation. Such an assessment would go beyond the bounds of judicial duty and responsibility. It would be impossible for parties to rely on the written expressions of their duties and responsibilities. Further, it would place the court at the negotiation table with the parties. . . . 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.<sup>87</sup>

This opinion highlights Indiana's desire to protect the freedom to contract and the court's desire to not overstep its judicial duties. These policy concerns are at least in part rooted from fear that application of the implied covenant could lead courts to impose obligations that are inconsistent with or go beyond the actual terms of the contract, altering the rights of a party in their own agreement.<sup>88</sup> A misapplication of the doctrine in this way could lead to results that courts rely on, creating "an erroneous body of law."<sup>89</sup> Due to these concerns, the implied duty of good faith is generally not favored in Indiana, particularly when it "restrict[s] the freedom to enter into contracts."<sup>90</sup>

Indiana courts have supported this approach in their decisions by claiming that it is in the public's best interest that courts do not unnecessarily limit persons' freedom to contract.<sup>91</sup> In *Fresh Cut, Inc. v. Fazli*, the Indiana Supreme Court handled a dispute between a warehouse owner and tenant over the responsibility to maintain a fire protection sprinkler system.<sup>92</sup> The court tackled the question of to what extent "an owner's statutory duty to maintain a fire protection sprinkler system in good operating condition" restricted the parties' freedom to contract.<sup>93</sup> Despite a municipal ordinance that required an owner of commercial property to maintain a fire protection sprinkler system, the court

---

86. 559 N.E.2d 600 (Ind. 1990).

87. *Id.* at 604.

88. See Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith From (Some) Contracts*, 84 OR. L. REV. 227, 251-53 (2005).

89. Goren, *supra* note 10, at 313.

90. *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992).

91. *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995).

92. *Id.*

93. *Id.*

upheld the parties' contract, which shifted this liability to the tenant.<sup>94</sup> The court reasoned that the parties knowingly and willingly bargained for the shift in the contract and that the agreement did not go against public policy.<sup>95</sup> In the opinion, the court even went so far as to state that "this ability of parties to allocate risk by contract extends so far as to permit indemnification for one's own negligence."<sup>96</sup> Generally, Indiana law "allows competent adults the utmost liberty in entering into contracts which, when entered into freely and voluntarily, will be enforced by the courts."<sup>97</sup> Further, in cases where private agreements seemingly conflict with statutes or public policy, courts implement a "very strong presumption of enforceability."<sup>98</sup>

### *B. Delaware Policy Considerations*

The approach taken to the implied duty of good faith and fair dealing under Delaware law arises from another central goal at the heart of modern contract law, enforcing the parties' reasonable expectations for performance of a contract.<sup>99</sup> To support the decision to impose the implied covenant in all contracts, Delaware courts have relied on the contractual theory behind this obligation.<sup>100</sup> The court in *Katz v. Oak Industries Inc.* turned directly to a leading treatise on this contractual theory, which reads:

If the purpose of contract law is to enforce the reasonable expectations of parties induced by promises, then at some point it becomes necessary for courts to look to the substance rather than to the form of the agreement, and to hold that substance controls over form. What courts are doing here, whether calling the process "implication" of promises, or interpreting the requirements of "good faith", as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court "implies a promise" or holds that "good faith" requires a party not to violate those expectations, it is recognizing that sometimes silence says more than words, and it is understanding its duty to spirit of the bargain is higher than its duty to the technicalities of the language.<sup>101</sup>

This fundamental idea of modern contract law, that the spirit of the bargain is more important than the exact terminology included in a contract, lies at the heart of Delaware's position regarding the implied covenant.

---

94. *Id.* at 1130.

95. *Id.*

96. *Id.*

97. *Peoples Bank & Tr. Co. v. Price*, 714 N.E.2d 712, 716 (Ind. Ct. App. 1999) (citing *Fed. Kemper Ins. Co. v. Brown*, 674 N.E.2d 1030, 1033 (Ind. Ct. App. 1997)).

98. *Id.*

99. *Altman & Raju*, *supra* note 14, at 1476.

100. *See Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).

101. *Id.* (quoting CORBIN ON CONTRACTS § 570 (Kaufman Supp. 1984)).

Beyond just the theoretical argument behind imposing a duty of good faith and fair dealing in all contracts, Delaware law is supported by various practical public policy considerations. First, Delaware courts have recognized the inherent difficulty in contract formation. When drafting a contract, it is very difficult if not impossible to contemplate and negotiate all of the possible obligations for performance that may arise, especially when dealing with long-term or on-going contractual relationships.<sup>102</sup> There is no written contractual agreement that can account for every single possible scenario and provide express terms to direct the parties' performance in such scenarios. Additionally, there are sometimes expectations that are so obvious and fundamental to an agreement that the parties fail to see the need to include them expressly in a written contract.<sup>103</sup> Thus, Delaware courts impose the implied covenant in every type of contract as a gap-filler to account for the limitations of the express agreement in enforcing the parties' reasonable expectations.<sup>104</sup>

By recognizing the inability of a contract's provisions to explicitly establish all of the parties' expectations, Delaware's approach to the implied covenant is more beneficial to the public because it protects all contracting parties, regardless of what type of agreement, from being unfairly taken advantage of by the other party. Every contract has gaps in its terms, which is why the implied duty of good faith is necessary in all contracts. This is not to say that contracting parties cannot still act in their own interests. Delaware courts have explained that parties can still act selfishly to maximize the benefits they receive from a contract.<sup>105</sup> The courts have simply identified that "there are outer limits to the self-seeking actions they may take under a contract."<sup>106</sup>

#### IV. EXPRESS TERMS & INDEPENDENT CAUSE OF ACTION

##### *A. Implied Duty of Good Faith vs. Express Terms*

One of the central issues surrounding the implied duty of good faith that courts are tasked with handling is whether the implied covenant has the ability to alter or affect the express terms of a contract and, if so, to what extent. It is this aspect of the implied covenant that those who oppose its general application cite to as a serious cause for concern.<sup>107</sup> In Indiana, courts have consistently been very clear that it is the duty of the court to enforce the direct terminology of an agreement if it is unambiguous and the intent of the parties can be readily determined.<sup>108</sup> "The existence of express terms in a valid contract precludes the

---

102. Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., Civ. A. No. 12150, 1991 WL 277613, at \*23 (Del.Ch. Dec. 30, 1991).

103. Katz, 508 A.2d at 880 (quoting CORBIN ON CONTRACTS § 570 (Kaufman Supp. 1984)).

104. Altman & Raju, *supra* note 14, at 1476-77.

105. Credit Lyonnais, 1991 WL 277613, at \*23.

106. *Id.*

107. Dobbins, *supra* note 88, at 282.

108. First Fed. Sav. Bank of Ind. v. Key Mkts., Inc., 559 N.E.2d 600, 604 (Ind. 1990).

substitution of and the implication in law of terms regarding the subject matter covered by the express terms of the contract.”<sup>109</sup> If express terms are clear and unambiguous, there cannot be recovery from a theory implied in law.<sup>110</sup> Despite their opposing views regarding the implied covenant, Indiana and Delaware law are actually consistent on this issue.

Under Delaware law, although a duty of good faith is implied in every contract, any implied terms cannot override the express terms of an agreement.<sup>111</sup> This is mainly why Delaware courts are reluctant to impose the implied covenant and only apply it in narrow circumstances. The implied covenant is used as a judicial tool to protect the spirit of the contract but only when it does not violate the express terms of the agreement.<sup>112</sup> Thus, courts will only enforce the implied covenant in order to protect a party who is harmed 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.”<sup>113</sup> When discussing the scope of the implied duty of good faith, Delaware courts have also established that implied terms cannot create a new obligation that is beyond the scope of the express terms of the parties’ written contract.<sup>114</sup>

Finally, it is also important to note that in Delaware, the implied duty of good faith and fair dealing cannot be waived or contracted away by the parties expressly in an agreement.<sup>115</sup> However, the implied covenant will not apply regarding matters expressly covered in the agreement.<sup>116</sup> In other words, while parties may not remove the entire net of the implied covenant, they can still avoid it using the express provisions of their agreement. “Therefore, drafters of agreements desiring to limit the applicability of the Implied Covenant have a significant incentive to provide in express and clear language the rights and obligations of the parties in a detailed fashion.”<sup>117</sup>

### *B. Tort Action & Independent Cause of Action*

The implied duty of good faith and fair dealing is a complex doctrine, and thus, courts and scholars have long struggled to define it or develop an easily applicable standard for its use in all contexts. Another development that made it a difficult doctrine was its evolution from a contract action to a bad faith tort claim and independent cause of action in certain circumstances.

In Indiana, the breach of an implied duty of good faith in a contract governed

---

109. *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992) (citing *Kincaid v. Lazar*, 405 N.E.2d 615 (Ind. Ct. App. 1980)).

110. *Id.*

111. *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1143 (Del. 1990).

112. *Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 920-21 (Del. Ch. 1999).

113. *Id.* at 920.

114. *Id.* at 921.

115. *Altman & Raju*, *supra* note 14, at 1480.

116. *Id.*

117. *Id.*

by the UCC does not create an independent cause of action.<sup>118</sup> Indiana courts chose to follow the guidance of the official comment of UCC section 1-203, which states: “the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.”<sup>119</sup> The implied duty of good faith is only treated as an independent cause of action in one circumstance: insurance contracts. Courts justify this distinction based on how it is very easy to see the harm that an insured party, who holds a valid claim and is in need of insurance proceeds after a loss, feels as a result of an insurer not exercising good faith in denying to honor the claim.<sup>120</sup> Therefore, there is an independent cause of action for breach of contract as well as an independent tort cause of action.<sup>121</sup> In making this determination, the Supreme Court of Indiana reasoned:

Given the *sui generis* nature of insurance contracts, then, we conclude that it is in society’s interest that there be fair play between insurer and insured. These factors, coupled with our return to the rule of no punitive damages in contract cases, leads us to conclude that recognition of a cause of action for the tortious breach of an insurer’s duty to deal with its insured in good faith is appropriate.<sup>122</sup>

However, an independent cause of action is not available from every instance that ‘an insurance claim is erroneously denied.’<sup>123</sup> “[A] good faith dispute about the amount of a valid claim or about whether the insured has a valid claim at all will not supply the grounds for a recovery in tort for the breach of the obligation to exercise good faith.”<sup>124</sup>

Delaware law follows the official comments of the UCC, similarly adopted by a majority of jurisdictions, that the implied duty of good faith does not give rise to an independent cause of action and simply serves as a form of contract interpretation helping courts determine whether a breach of contract exists.<sup>125</sup> Similar to Indiana, Delaware courts will allow punitive damages as a remedy for breach of contract and the implied covenant of good faith in the breach of insurance contracts when the bad faith denial of insurance coverage is especially malicious or egregious.<sup>126</sup>

---

118. See IUE-CWA Loc. 901 v. Spark Energy, LLC, 440 F. Supp. 3d 969 (N.D. Ind. 2020).

119. U.C.C. § 1-203 cmt. (AM. L. INST. & UNIF. L. COMM’N 1977).

120. See, e.g., Erie Ins. Co. v. Hickman *ex rel.* Smith, 622 N.E.2d 515, 518-19 (Ind. 1993).

121. *Id.* at 518.

122. *Id.* at 519.

123. *Id.* at 520.

124. *Id.*

125. U.C.C. § 1-203 cmt. (AM. L. INST. & UNIF. L. COMM’N 1977).

126. E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 446 (Del. 1996).

## V. OVERALL COMPARISON OF INDIANA AND DELAWARE LAW

*A. Policy Comparison*

Despite there being evidence of a policy clash between the courts of Indiana and Delaware when it comes to the implied duty of good faith,<sup>127</sup> Delaware courts are still reluctant to imply the duty of good faith because they recognize it is not the court's job to rewrite or replace a written contract's terms and the implied covenant is only to be imposed with great caution.<sup>128</sup> Also, in both jurisdictions, the courts will only look to imply terms of the contract when the express terms fail to sufficiently represent the intentions of the parties to the agreement in the context of the dispute.<sup>129</sup> Moreover, Indiana and Delaware courts follow the same approach in determining that a breach of the implied duty of good faith does not give rise to an independent cause of action except in the case of insurance contracts.<sup>130</sup>

While there are similarities, there is still a noticeable difference in the main policy focus supporting each jurisdiction's law governing the implied covenant. Indiana courts have given great attention and consideration to avoiding restrictions to the freedom to contract, thus setting limits on their judicial responsibility.<sup>131</sup> Meanwhile, Delaware courts have displayed more consideration to the difficulties in contract drafting, especially in the context of long-term agreements.<sup>132</sup>

*B. Advantages & Disadvantages*

When comparing Indiana's approach to the implied duty of good faith and fair dealing to the majority approach implemented under Delaware law, the majority approach has more advantages than disadvantages, which is something that cannot be said about Indiana's minority approach. Additionally, nearly all of the policy concerns leading Indiana courts to limit the implied duty of good faith to specific types of contracts are still sufficiently satisfied under Delaware law.

The main reason why Indiana should imply the duty of good faith in all contracts is because of the many economic benefits associated with the doctrine of good faith. Limiting the implied duty of good faith harms economic efficiency

---

127. See *First Fed. Sav. Bank of Ind. v. Key Mkts., Inc.*, 559 N.E.2d 600, 605 (Ind. 1990); *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, Civ. A. No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991); *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).

128. *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998).

129. See *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992); *Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999).

130. *E.I. DuPont de Nemours & Co.*, 679 A.2d at 446; *Allen v. Great Am. Rsr. Ins. Co.*, 766 N.E.2d 1157, 1162 (Ind. 2002); *Erie Ins. Co. v. Hickman ex rel. Smith*, 622 N.E.2d 515, 520 (Ind. 1993).

131. *First Fed. Sav. Bank of Ind.*, 559 N.E.2d at 604.

132. *Credit Lyonnais Bank Nederland, N.V.*, 1991 WL 277613, at \*23.

because the implied covenant reduces the cost of contracting.<sup>133</sup> Under the law of a jurisdiction like Delaware, a broad application of the implied covenant makes it easier for contracting parties to find other contract partners because they can more peacefully enter into agreements with unfamiliar parties, knowing they are protected by the law.<sup>134</sup> Thus, individuals are not forced to waste time and money attempting to find business partners, causing more contracts to be created in the aggregate. Under Indiana law, parties are forced to spend more time drafting very specific express terms to explicitly cover as many future circumstances as possible. The good faith doctrine enhances efficiency by allowing more contracting parties to rely on shorter and more general written contracts.<sup>135</sup> At the same time, the implied covenant still allows for any party to reduce the amount of uncertainty in a contract by being more detailed and specific through express terms if they choose to do so.<sup>136</sup> Decreased spending on contract formation leads to more agreements being made and more economic benefits felt by the public as a whole. Further, positive economic relationships create more trust in the marketplace.<sup>137</sup> The implied covenant's creation of a standard of economic behavior fosters the growth of this trust in the public. The increased level of trust leads to lower transaction costs due to less time spent considering various contingencies during negotiations.<sup>138</sup> Therefore, because the implied duty of good faith generally functions to support the market,<sup>139</sup> imposing the implied covenant in all contracts in Indiana would be in its people's best interest.

Despite these benefits, there are arguments that the implied covenant could harm economic efficiency because of a party's lack of certainty and ability to predict the party's legal rights in a contract.<sup>140</sup> However, adhering to inflexible contract terms and legal rules could be counterproductive as well.<sup>141</sup> The absence of an implied duty of good faith may encourage a buyer to avoid the contract by investing time and money towards discovering a trivial breach.<sup>142</sup> This in turn would cause sellers to overinvest in inspecting goods to ensure compliance in efforts to avoid any trivial breach.<sup>143</sup> Thus, the implied covenant serves to avoid wasteful conduct and ensure performance meets each party's expectations.

---

133. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 393 (1980).

134. *Id.*

135. *Id.*

136. *Id.*

137. Chunlin Leonhard, *Subprime Mortgages and the Case for Broadening the Duty of Good Faith*, 45 U.S.F. L. REV. 621, 646 (2011).

138. *Id.*

139. Burton, *supra* note 133, at 403.

140. Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 652-53.

141. *Id.* at 653.

142. *Id.* at 653-54.

143. *Id.*

Another disadvantage of Indiana's approach to the implied covenant is that Indiana law creates more ambiguity and inconsistency when trying to determine when the implied duty of good faith applies. Courts in other jurisdictions have struggled with establishing a precise answer to when the implied covenant is to be applied, and Indiana courts are no different, often using slightly different language to explain when the duty of good faith is to be enforced.<sup>144</sup> In theory, this could lead to increased litigation costs. However, those opposed to expansive obligations of good faith argue in response that when contracting parties spend less time contract drafting, and instead rely on the implied covenant, the result is that the contracts lack clarity and completeness.<sup>145</sup> This in turn leads to increased costs of litigation for courts to fill gaps by implying terms in the deal.<sup>146</sup>

While this is a valid argument, it is important to remember the implied covenant is often unnecessary because, in most cases, parties will behave appropriately and consistently with the terms of an agreement.<sup>147</sup> Thus, the economic benefits associated with increased willingness to contract and money saved during contract drafting may outweigh any risk of increased litigation due to the proportion of contracts resulting in litigation alone. Further, while Delaware implies the duty of good faith and fair dealing in all contracts, this does not necessarily imply that it implements an overextending standard of good faith that overrides express terms. As previously mentioned, Delaware courts are still reluctant to imply obligations outside the express terms of the contract.<sup>148</sup>

Further, even if the cost of litigation were to increase slightly, this would be just a small cost in return for improved protection of parties in Indiana from being taken advantage of within the terms of the contract. Beyond just economic justifications for the implied duty of good faith, it is imperative to step back and consider the moral rationales behind the implied covenant as well. The main goal of the implied covenant is to ensure both "justice and to justice according to law."<sup>149</sup>

One of the primary concerns most often discussed surrounding the implied duty of good faith is that it will act as an impediment to an individual's freedom to contract and that this is harmful to the economy. Indiana's main policy concern behind its refusal to include the implied covenant in all contracts is the desire to protect one's freedom to contract. However, implying a duty of good faith does not necessarily have to threaten this freedom. The implied covenant only ensures that parties act in good faith in the *performance* of their already formed contractual agreements. Including a duty of good faith does not mean that an individual cannot contract to best serve his interests. In fact, parties are still free to bargain for contract terms that are favorable to their interests. The implied

---

144. Goren, *supra* note 10, at 291.

145. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 827 (1982).

146. *Id.*

147. Dobbins, *supra* note 88, at 251.

148. Altman & Raju, *supra* note 14, at 1479.

149. Summers, *supra* note 145, at 826.

covenant simply serves to ensure that parties do “not cross the line between fair and unfair dealing.”<sup>150</sup> This distinction is showcased in Delaware’s approach to the implied covenant. Under Delaware law, courts can maintain an individual’s freedom to contract while implying a duty of good faith in every contract by only applying the implied covenant in very limited circumstances and ruling that the express terms of the contract always control. Thus, it makes sense for Indiana to adopt Delaware law and impose the duty of good faith and fair dealing in all contracts considering that Indiana’s biggest policy considerations are still satisfied under Delaware’s approach.

Additionally, it is not necessarily true that a completely unrestricted freedom to enter contracts is better for the economy. Many current aspects of contract law, which are heavily influenced by the freedom of choice in a free market economy, rest on the presumption that “people have equal access to information and equal bargaining power.”<sup>151</sup> However, studies have shown that humans often follow illogical decision-making, which can be taken advantage of, resulting in unequal access to information and unequal bargaining power.<sup>152</sup> Contract law has also created a business environment where people only focus on maximizing profits.<sup>153</sup> Considering these factors, there is evidence of a need for a doctrine like the implied duty of good faith which can “prevent excessive opportunistic behavior in economic relationships.”<sup>154</sup>

Another potential disadvantage to Delaware’s approach stems from concerns that, when applying the implied covenant to every contract and every aspect of performance, it may be too difficult for courts to enforce without having a precise standard applicable to all situations. Those who oppose including the implied covenant in every contract claim argue that the approach becomes harmful because it can cause courts to adopt “an expansive view of good faith that imposes obligations” that either go beyond or are “contrary to the express terms of the parties’ agreement.”<sup>155</sup> However, courts have been applying this doctrine for years and there has been little evidence that they routinely overuse or abuse the implied duty of good faith in application.<sup>156</sup> Specifically, Delaware courts have made it clear that the express terms of an agreement always trump implied terms and that the implied covenant is unable to create any additional obligations not included in the written contract. Therefore, nearly all of the potential disadvantages or policy issues that may be raised are mitigated due to the careful and limited application of the implied duty of good faith and fair dealing by Delaware courts.

---

150. E.W. Thomas, *Good Faith in Contract: A Non-Sceptical Commentary*, 11 N.Z. BUS. L. Q. 391, 397 (2005).

151. Leonhard, *supra* note 137, at 637.

152. *Id.* at 638.

153. *Id.* at 645.

154. *Id.* at 639.

155. Dobbins, *supra* note 88, at 282.

156. Leonhard, *supra* note 137, at 651.

A final point in favor of Indiana adopting Delaware's approach is that the only barrier holding Indiana back from transitioning its approach is a simple matter of shifting jurisprudence. Indiana courts have already acknowledged that such a shift would be reasonable. In *Prudential Insurance Co. of America v. Crouch*, the court, in applying Indiana law, appeared to ignore precedent by relying upon the Restatement (2d) of Contracts to find that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."<sup>157</sup> As one may expect, this caused many to raise questions about the application of the implied covenant in Indiana. As a result, the court in *Ford Motor Credit Co.* walked back the previous ruling by reading *Crouch* more narrowly, finding that it stood for the "proposition that the implied covenant of good faith and fair dealing prevents an 'insurance agent from destroying his former employer's right to keep and enjoy premiums which were received during the [agent's] employment.'"<sup>158</sup> Most importantly, while explaining that *Crouch* does not impose a general duty of good faith and fair dealing in all contracts in Indiana, the court stated, "[w]hile such a duty seems manifestly reasonable and while Indiana courts have followed other portions of the Restatement of Contracts . . . this court must do its best to follow Indiana law as it exists, without grafting on even seemingly reasonable rules to those which exist."<sup>159</sup> This opinion acknowledges that implementing an approach to the implied covenant similar to Delaware's would be reasonable and consistent with Indiana's adoption of other language in the Restatement. Further, the court did not point to any policy considerations, rationales, or other barriers supporting its decision other than existing Indiana law. Thus, the absence of other significant barriers to Indiana implying the duty of good faith in fair dealing in all contracts provides additional support for such a transition.

As it stands today, Indiana's approach to the implied covenant is similar to Delaware's in its application in most cases. In both jurisdictions, the doctrine serves as a gap-filler for all of the aspects of a contract that are not covered by the express terms.<sup>160</sup> However, Indiana's approach fails to protect parties in arms-length contracts for services from opposing parties who are acting in bad faith pursuant to the contract's express language. While adopting the implied covenant in all contracts may appear to be a significant change for Indiana that could harm Hoosiers' ability to contract freely, in reality, it would be a useful judicial tool to be used only on rare and specific occasions, as evidenced in Delaware. Such a shift would likely not create many different results in a majority of cases while at the same time providing protection to parties unfairly harmed in addition to

---

157. *Prudential Ins. Co. of Am. v. Crouch*, 606 F. Supp. 464, 469 (S.D. Ind. 1985) (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981)).

158. *Ford Motor Credit Co. v. Garner*, 688 F. Supp. 435, 443 (N.D. Ind. 1988) (quoting *Crouch*, 606 F. Supp. at 470).

159. *Id.* at 443 (citation omitted).

160. See Mariana Pargendler, *Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered*, 82 TUL. L. REV. 1315, 1353 (2008).

enhancing economic efficiency in the marketplace.<sup>161</sup>

#### CONCLUSION

The implied duty of good faith is a doctrine that is inherently difficult to understand, which only emphasizes the benefits of uniformity among different jurisdictions. Despite this, the Supreme Court of Indiana has repeatedly ruled that under Indiana law, the implied duty of good faith is not implied in every contract.<sup>162</sup> On the surface, the difference between Indiana and a state like Delaware, which implies the implied covenant in all contracts, is a clash of fundamental ideas at the core of modern contract law. However, in reality, the approaches from each jurisdiction are far less different than they appear.

This Note examined the implied duty of good faith and fair dealing in contracts under both Indiana and Delaware law. Further, this discussion provided an overview of the approach to the implied covenant in each state, including an analysis of the specific applications and policy considerations, and provided a comparison to identify the similarities and differences in addition to the advantages and disadvantages of each approach. As a result, this Note argued that Indiana should adopt the majority approach used under Delaware law, implying a duty of good faith in all contracts. This conclusion is supported by the vast similarities between the two approaches, which would allow Indiana to easily make the change while still satisfying the public policy desire to protect the freedom to contract. Additionally, Indiana would benefit from the increase in economic efficiency for those drafting contracts outside the UCC as well as improved clarity of the law that comes with the more uniform majority approach. Although there may be some that are significantly harmed by Indiana's current laws on this doctrine, the advantages of implying the duty of good faith in all contracts are great enough to justify a change, in addition to avoiding the risk of harm to the few who are directly affected by the lessened protections under Indiana law.

---

161. Burton, *supra* note 133, at 393.

162. See *Allen v. Great Am. Rsr. Ins. Co.*, 766 N.E.2d 1157, 1162 (Ind. 2002); *First Fed. Sav. Bank of Ind. v. Key Mkts., Inc.*, 559 N.E.2d 600, 604 (Ind. 1990).