

No. **18-7554**

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
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SUPREME COURT, U.S.

JACK FERM — PETITIONER

vs.

THE STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL — RESPONDENT(S)
ON PETITION FOR A WRIT OF CERTIORARI TO

(THE SUPREME COURT OF THE STATE OF NEVADA)

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

The implied covenant of good faith and fair dealing, as applied to Plea Agreements have been narrowly construed 'only to terms' stated in the agreement itself. Courts have failed to consider the actual purpose of the covenant, to protect the Spirit of the bargain. Conduct that was never considered during contract negotiations, yet affects the defendants negotiated benefit. The theory of the covenant begins with the premise, the essence of a contract is twofold (i) the written word, i.e. the literal interpretation, and (ii) the spirit of the contract, those matters that go to the heart of the agreement and protect the contracting party's intent. The covenants purpose, is not to interpret the literal terms, but those actions that protect each party from external contract aberrations. actions that work to deprive a party of the benefit of their bargain. In the real world the covenant should be measured not merely by terms included, but by those acts or conduct that lay outside the bargain and go to the heart of the agreement, its spirit and intent. The Supreme Court should set a standard by which the covenant applies to plea agreements breached by conduct that was not included in its corporeal presence: The Court is asked to establish a Standard which defines the contours of Plea Agreement's, Spirit. Raising the following questions.

Whether the court below erroneously held, a false statement, that petitioner had been convicted of a felony, placed on the internet by the Attorney General, which they knew was untrue, and which impaired petitioner's ability to become gainfully employed in order to make the agreed restitution payments, did not breach the plea agreement, or the 'Spirit the contract' through the implied covenant of good faith and fair dealing.

Whether upon a breached Plea Agreement by the Attorney General, which has caused financial loss to a defendant. The defendant has a right to sue the state for actual contract damages caused by that breach?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix to the petition and is

reported at ; or,

has been designated for publication but is not yet reported; or,

is unpublished.

The opinion of the United States district court appears at Appendix to the petition and is

reported at ; or,

has been designated for publication but is not yet reported; or,

is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix "D" to the petition and is

reported at ; or,

has been designated for publication but is not yet reported; or,

is unpublished.

The opinion of the court appears at Appendix "C" to the petition and is

reported at ; or,

has been designated for publication but is not yet reported; or,

is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: , and a copy of the order denying rehearing appears at Appendix .

An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was July 30, 2018. A copy of that decision appears at Appendix, C.

A timely petition for rehearing was thereafter denied on the following date: November 28, 2018, and a copy of the order denying rehearing appears at Appendix, D.

The Date the State court rendered its dismissal is February 27, 2017

The Date the State court declined reconsideration is

An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Procedural Due Process and equal application of contract law to all contracts USC
Amendment 14. Plea Agreements are not provided the same application as civil
contracts, yet Plea Agreements are contracts enforceable as are all contracts. The
Santobello v. New York, 404 U.S. 257; doctrine must be expanded to address the
implied covenant, spirit of the bargain, to Plea Agreements

STATEMENT OF THE CASE

There is an old but true adage, "no good deed goes unpunished"

In August of 2008 at the height of the foreclosure epidemic and with 90,000 homeowners in Clark County, Nevada, facing foreclosure, Petitioner decided to become involved. Petitioner, first, in or about June of 2008, had contacted the Nevada attorney General's office and requested their position regarding help for these people. He was informed they had no interest in the problem. Petitioner, thereafter, in an effort to help these people, set up the US Justice foundation with \$158,000 of his personal funds, employed 22 full time employees which included three full time attorneys' five paralegals and support staff,

Petitioner, a former radio talk show host, also became a regular on the Moore show over FOX TV discussing the then current foreclosure epidemic. The purpose of the foundation was to assist those property owners challenge the bank predatory loan practices which had resulted in the foreclosure crisis. Petitioner had set up the foundation because the Nevada Attorney General had said "she had no interest in the problem". Meanwhile, finding children were being uprooted from their schools, there friends, and family members, i.e. their pets were often being left at kill shelters. Petitioner could not just stand by and watch.

Petitioner had also used his TV appearances on the Moore show to pressure the Attorney General to become involved, she was able and could have stopped the foreclosures because the banks were making loans to people that had no means to

repay them. In some cases, we found borrowers had contracted to pay mortgage payments that exceeded their monthly income.

The Foundation had filed in its short existence, under six months, in excess of 315 lawsuits for the foundation clients. Most all had restraining orders signed by the various state court Judges, which stopped the foreclosures. The banks then removed the cases to the Federal courts, wrongfully, because the cases lacked true diversity. Nonetheless, at the time the Federal Judiciary were still supportive of the banking industry and had not yet learned of the extent of the banking industry's mortgage lending fraud.

The Banks subsequently foreclosed on millions of US properties. In 2008 alone, according to CNN Money, there were more than 3.1 million foreclosure notices recorded.

Having filed so many client lawsuits against the banks, they looked for a way to stop the Foundation from continuing. Using the federal court contempt power, as Petitioner was not a member of the Nevada Bar. The Honorable Federal Court Judge Roger Hunt ordered Petitioner to appear and show cause regarding contempt.

At the hearing which was in or about March 9, 2009, Petitioner was held in contempt for practicing law without a license, although petitioner had three attorneys on staff for that purpose. The Foundation was ordered to cease and desist, effectively closing it down.

Within two weeks of this hearing Petitioner was arrested, not for practicing law without a license, but for taking money without the intent to perform the services. Yet, Petitioner had filed in excess of 315 cases for clients in less than six (6) months. Several of those cases were already moving toward discovery. Additionally, petitioner had an over-head of \$100,000 a month for employees, rents and utilities which he met each month. Petitioner had also refunded some \$85,000.00.

A plea was immediately offered by the attorney General to one felony, and declined. After which the Attorney General sought from the Grand Jury an indictment. However, during this process, the Deputy attorneys General concealed exculpatory evidence, required by Nevada statutory and case law, Nevada Revised Statutes NRS 172.145, and reinforced in Sheriff V. Frank 103 Nev.160, 734 P.2d 1241, (1987) and also Brady, were ignored.

Because of the cease and desist order the foundation could not provide any additional paperwork. This required disclosure that would have explained away the crime was concealed from the Grand Jury. Because this required disclosure was concealed, an indictment followed.

The case laid dormant for the next two years. On September 21, 2011, Petitioner and the State of Nevada entered into a Nolo Plea Agreement for one Felony. (which was not to be adjudicated) thereby allowing Petitioner five (5) years to pay restitution, to those clients of his foundation, who failed to have money reimbursed after Petitioner had been ordered to cease and desist.

Petitioners expectation, by the Plea Agreement, was after he repaid the clients, which he had at that time the capability to do, he would ultimately be convicted of a Misdemeanor, he had agreed to the plea because the end promise was the misdemeanor. Petitioner had never considered at the time he entered the plea agreement, the Attorney General would place false statements about him being a convicted Felon, on the internet. His expectation was that the State would take no action that would impair his ability to earn a living and to make the required and agreed restitution.

However, directly after Petitioner entered his nolo Plea, the State of Nevada, on November 9, 2011, less than two months later, provided the media a knowingly false report that Petitioner had been convicted of a Class "B" Felony.

This statement was not only untrue, but it was known by the State to be untrue. They offered the plea agreement and were fully aware of its (no adjudication provision and requirement) meaning there was no conviction for any crime.

Nevertheless, as it was published all across the internet, broadcast over radio and in the local newspapers, it effectively caused potential employers or business clients to shun Petitioner, which impaired Petitioners ability to become gainfully employed or to earn a livelihood.

Petitioner had identified where this false claim had cost him in excess of \$340,000 by evidence of employment that had actually been offered until after he was researched on the net, and then the offer had been withdrawn. This did Not include the loss of

his own home for which he had made payments for the preceding 12 years, or the loss of his personal credit rating from which to this day he has not recovered from, or the forced liquidation of assets for a fraction of their value.

Petitioner sought relief by a civil action in the same state court. Where his complaint was summarily dismissed because, the court 'misidentified' the covenant's standard, finding there had to be a 'stated term' in the agreement that was breached and there was none. Petitioner sought a reconsideration, which was also denied.

Petitioner then appealed to the Nevada Court of Appeals and they also denied the appeal, from which denial petitioner sought review from the Nevada Supreme Court, it was also denied.

REASONS FOR GRANTING THE PETITION

The court should grant a writ for certiorari to review the questions presented for several important reasons. The core issue presented here is whether plea agreements, are subject to a 'spirit of the bargain' interpretation. Ninety-five percent of all criminal cases are resolved by a plea agreement, as they are on occasion breached, only 'specific stated terms' have been considered. Often it is the spirit of the bargain that has been breached. Which requires this court to fashion a 'rule' that would incorporate through the implied covenant of good faith and fair dealing, that the Spirit of the bargain should apply to criminal plea agreements.

And

Whether after the Attorney General has breached a plea agreement, through the spirit of that agreement, and which causes financial loss to a defendant. The defendant has a cause of action, for contract damages.

“The covenant of good faith and fair dealing... imposes obligations on both contracting parties that include the duty not to interfere with the other party’s performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.” *Centex Corp. v. United States*, 395 F.3d 1283,1304 (Fed.Cir.2005) (emphases added). “Both the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing.” *Precision Pine*, 596 F.3d at 820 n.1. What is promised or disclaimed in a contract helps define what constitutes “lack of diligence and interference with or failure to cooperate in the other party’s performance.” *Malone*, 849 F.2d at 1445.

In short, while the implied duty exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain, the nature of that bargain is central to keeping the duty focused on “honoring the reasonable expectations created by the autonomous expressions of the contracting parties.” *Tymshare, Inc. v. Covell*, 727 F. 2d 1145, 1152 (D.C.Cir.1984) (per Scalia, J.). ...

Justice Scalia understood there is more to contracts than their literal terms. He understood contracts have a spirit that supports the intent of the parties, and that this spirit applies to contract bargains. But this spirit has not been universally

accepted or applied, and as for Plea Agreements, it has rarely if ever been a functional reality.

In the real world of contracts, the implied contractual covenant of good faith and fair dealing, is ensnared in contradictory terms. It is both a 'gap filler' subject to the express terms of a contract and an overriding obligation notwithstanding the contract's express terms.

These doctrinal conflicts are not new. Confusion regarding the interaction between express terms and the Implied Covenant thrives in all states. Almost all acknowledge that the cases in which courts have applied the duty are rife with inconsistencies and confusion, even within single jurisdictions." (Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR. L. REV. 227, 228 (2005).

Yet, despite its universal applicability, and a century of history, courts concede that the basic contours of the Implied Covenant are largely undefined. *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)) (en banc))

Petition's purpose is to achieve two broad goals: (1) to explain why and how the Implied Covenant applies; (2) to impose order onto an increasingly sprawling and sometimes contradictory body of case law by setting a standard by which all jurisdictions can point to as settled law.

Typically, parties articulate their intent in the express terms of an agreement, and courts fulfill the parties' expectations by enforcing those terms against them. But the

law also recognizes that the expectations of contracting parties are not exclusively defined by the express terms of their agreement. (Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1147 (1995)) ("The assumption that most parties in fact reduce their entire agreement to a single, perfectly accurate writing [is] unrealistic."); and, Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1227, at 1272 (1999), (explaining that modern contract law rejects the presumption "that the only relevant understandings and expectations [of contracting parties] are those that have found their way into the express terms of the parties' writing")

Thus, like much of contract law, the Implied Covenant is fundamentally a doctrine invoked to protect and fulfill each party's reasonable expectations. *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (en banc) (noting that the Implied Covenant is invoked to "imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected."); 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.");

COURTS ACKNOWLEDGE CONTRACTS HAVE A SPIRIT:

A second definition provides that "parties are liable for breaching the [C]ovenant when their conduct frustrates the overarching purpose of the contract." *Amirsaleh I*, 2008 WL 4182998, at *9 & n.48. Still another definition describes the Covenant as a

"judicial convention designed to protect the spirit of an agreement." Amirsaleh I, 2008 WL 4182998, at *7 & n.41,

Despite varying diction, each definition articulates a common principle: that the Covenant implies terms into a contract to protect and fulfill each party's reasonable expectations. Amirsaleh II, 2009 WL 3756700, at *5 and Restatement id. at cmt (a)

Courts commonly characterize the Implied Covenant as a contractual "gap filler," invoked to imply terms only when it is necessary to address matters not otherwise addressed by the express terms of an agreement. *Gerber v. Enter. Prods. Holdings, LLC*, 2012 WL 34442, at *13 n.58. Where a contract is "truly silent" with respect to a given matter, the Covenant "fills" the "gap" with an implied obligation of good faith and fair dealing. As such, the Covenant reflects a sensible legal presumption: that in the absence of express terms reflecting a contrary bargained-for expectation, the parties to a contract reasonably expect honesty and fairness. Amirsaleh I, 2008 WL 4182998, at *1. Conceived in this way, the Implied Covenant is invoked not because of equitable considerations, but because the parties' contract is incomplete, and the Covenant is necessary to advance or protect their reasonable expectations. *Cincinnati SMSA LP v. Cincinnati Bell Cellular Sys. Co.*, 1997 WL 525873, at *5.

[T]he law presumes that parties never accept the risk that their counterparties will [act] in bad faith. Consequently, in every contract there exists an implied covenant of good faith and fair dealing.";

Alongside its conception as a gap filler, courts have also described the doctrine in broader terms, suggesting the Covenant is something more than a mere gap filler; it is an unwaivable, overriding obligation, beyond those expressed in the parties' agreement. For example, the Covenant "requires more than just literal compliance" with the express terms of a contract. *Dunlap*, 878 A.2d at 444 It requires parties "to preserve the spirit of the bargain" *Dunlap*, id —to adhere to the "substance" of their agreement rather than the "letter." *Dunlap*, id. In short, it requires each party to honor the other's reasonable expectations. *Dunlap*, id. Consequently, the Covenant may be invoked even if a party's actions "do[] not violate the express terms of the agreement." Because even in the absence of any gaps in the contract, each party is bound to an unwaivable, overriding obligation to refrain from conduct that would frustrate the other party's reasonable expectations. *Dunlap*, id. at 444-45

[The Implied Covenant] is triggered when the defendant's conduct does not violate the express terms of the agreement but nevertheless deprives the plaintiff of the fruits of the bargain."); *Amirsaleh I*, 2008 WL 4182998, at *9, ("[T]he implied covenant . . . protects the spirit of the agreement and may, therefore, be offended even when a party has not violat[ed] an express term of the agreement."); *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1016 ("A party may breach the implied covenant of good faith and fair dealing without violating an express term of the contract.").

The Covenant may be invoked to "preserve the spirit of the bargain rather than the letter, the adherence to substance rather than form." *Dunlap*, id. at 444

IMPOSSIBILITY OF ADDRESSING ALL CONDUCT THAT VIOLATE THE SPIRIT OF THE BARGAIN

No contract can address every aspect of every possible situation. *Amirsaleh I*, 2008 WL 4182998, at *1. After all, the limits of human imagination make it impossible for the parties to foresee every potential situation that could arise after the contract's formation. (Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214 (1995)) And even if it were possible. It would be impractical to raise, negotiate, and address every conceivable situation in the express terms of even the most prolix agreement. *Van Alstine*, *id.* note 6, at 1282. Instead, all contracts will have gaps—matters as to which the contract does not expressly articulate the parties' expectations. (David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1819 (1991)) To deal with these gaps, the court must construe meaning into the contract—it must infer the parties' unexpressed expectations. (Morrell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 28 (2000))

The implied duty of good faith and fair dealing is limited by the original bargain: it prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value. See *First Nationwide Bank v. United States*, 431 F.3d 1342, 1350 (Fed.Cir.2005) (duty was breached by legislation that “changed the balance of contract consideration”).

THE COURT SHOULD GRANT A WRIT FOR CERTIORARI BECAUSE;

1. The issue under consideration is not consistent among either the state's highest courts or the Federal Circuits and therefore a uniform application and standard i.e. a definition of the application of the Spirit of the bargain is required.

In Hilton the Nevada Supreme Court held: "[w]here the terms of a contract are literally complied with but one party to the contract deliberately countervenes [sic] the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing." 107 Nev. at 232, 808 P.2d at 922-23.

In Petitioner's State Court case, that is exactly what happened. The Plea agreement, which follows contract law, allowed Petitioner (5) years to pay the restitution, nonetheless, the State intentionally interfered with petitioner's ability to pay when they placed this false Felony claim into the various news circuits. Petitioner was after which unable to pay as he had agreed, and was ultimately convicted of that Felony, for which petitioner is still exhausting his state court remedies. The State of Nevada failed to apply the 'Spirit of the bargain rule' in Petitioner's case.

Petitioner filed a state court claim against the Office of the Attorney General for financial losses occasioned by, inter alia, what was alleged to be a breach of the implied covenant of good faith and fair dealing. The State court erroneously held "the covenant MUST be related to some claim in the Contract, and will not be allowed where the contract does not 'specifically' disclaim the conduct" effectively contradicting Nevada Law, the Restatement of the law of contracts, §204, §205 and the spirit of the bargain rule which is a form of gap filler, but with a broader application that includes the spirit of the bargain,

A definition of good faith and fair dealing for all cases has not yet been developed
Wade v. Kessler Institute, 778 A.2d 580 (N.J.Super. A.D. 2001)

Restatement (Second) of Contracts/Uniform Commercial Code– Good faith is defined in the Uniform Commercial Code as “honesty in fact in the conduct or transaction concerned.” – Fair dealing may require more than honesty (e.g., you cannot act in a way that is contrary to the spirit of the bargain, even if you give the opposing party notice of your actions).

– Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.

–Good faith performance: Subterfuges and evasions violate the obligation of good faith in performance even if the actor believes his conduct to be justified. Bad faith may be overt or may consist of inaction.

--A complete catalogue of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

• The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts.

- It also extends to dealings that are candid but unfair. Examples include: taking advantage of the necessitous circumstances of the other party to extort a modification of a contract for the sale of goods without a legitimate commercial purpose.

- Common descriptions of the covenant:

- The covenant requires a party in a contractual relationship to refrain from conduct that prevents the other party from receiving the fruits of the bargain. *Nemec v. Shrader*, 2009 WL 1204346, at *5 (Del.Ch. Apr.30, 2009); *Onderdonk v. Presbyterian Homes of New Jersey*, 425 A.2d 1057 (N.J. 1981).

- A party can be liable for a breach of the covenant when their conduct frustrates the overarching purpose of the contract. *Winshall v. Viacom Int'l, Inc.*, 55 A.3d 629, 636 & n.26 (Del. Ch. 2011) (quoting *Dunlap*, 878 A.2d at 442).

- In Pennsylvania, the doctrine of necessary implication dictates that, absent an express provision, the law will imply a contract between the parties to “perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.”

In the absence of an express provision, the law will imply, an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to

receive the fruits of the contract. *Somers v. Somers*, 613 A.2d 1211, 1215 (Pa. Super. 1992).

The Implied Covenant is fundamentally a doctrine invoked to protect and fulfill each party's reasonable expectations.

- *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (en banc) (noting that the Implied Covenant is invoked to “imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected.”).

- *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 444 (Del. 2005) (en banc) (“The implied covenant requires that [each party to a contract] act in a way that honors the [other's] reasonable expectations.”).

- *John B. Conomos, Inc. v. Sun Co., Inc.*, 831 A.2d 696, 707 (Pa. Super. 2003) (stating that “implied covenant of good faith and the doctrine of necessary implication are principles for courts to harmonize the reasonable expectations of the parties with the intent of the contractors and the terms in their contract.”).

The Covenant “Requires more than just literal compliance” with the express terms of the agreement; also requires the parties to “preserve the spirit of the bargain.” *Dunlap*, 878 A.2d at 444.

- The doctrine of necessary implication will be employed to imply an obligation where it is clear that an obligation is within the contemplation of the parties at the time of

contracting or is necessary to carry out their intentions, even without an ambiguity in the agreement. Slater v. Pearle Vision Center, Inc., 546 A.2d 676, 680 (Pa. Super. 1988)

• Analysis: The court expanded on the duty of good faith by describing it in various ways. In Pennsylvania, the doctrine of necessary implication dictates that, absent an express provision, the law will imply a contract between the parties to “perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.” Although a complete list of types of bad faith is impossible to define, “it is possible to recognize certain strains of bad faith which include: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.” The court found that this duty applied to at-will employment contracts. Somers v. Somers, 613 A.2d 1211(Pa. Super. 1992)

THE NEED FOR A RULE THAT DEFINES THE SPIRIT OF THE BARGAIN

No method has been developed to assist or control the parties and the court in defining the contours of a contract's spirit. In short, we know the contract has a spirit, but, how, when and to what extent does it exist? While the covenant is based on bad faith, just what is considered to be bad faith? Although there are some rules to guide us there are no rules to define the application of those ‘rules’, and for plea agreements they lack any force of law.

• Examples of bad faith include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." The Restatement *id.* and Somers, 613 A .2d at 1214.

"Evasion of the spirit of the bargain", is where the covenant falls short. Does this evasion stem merely from literal terms identified in an agreement, or from a broader notion of fairness?

Restatement §204. differentiates between "term of the promise" and "term of the contract." The former, like a promise and consideration, is an operative fact: it is "that portion of the intention or assent manifested which relates to a particular matter."

An agreed price term is a "term of the promise." The latter is that part of the resulting legal relationship that relates to a particular matter "whether or not the parties manifest an intention to create those relations. "Term of the contract," then, would include the duty to perform in good faith § 205, as well as a term supplied under § 204. Neither are agreed upon; both are imposed as part of the bargain contract. In other words 'Term of the contract' would include the spirit of the contract.

The Restatement (Second) of Contracts §205 provides: "Every contract imposes Upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment d to §205 states:

"Good faith performance. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the

obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance". (Underscore emphasis mine) Restatement id.

(see Restatement (Second) Of Contracts § 34 (1) (1979), Comment b) without the need to give the standard content. Although placed side by side, §§ 204 and 205 make no explicit reference to each other. One definition of bad faith, however, is conduct that violates "community standards of decency, fairness or reasonableness." Id. § 205, Comment a. Since this definition is consistent with the standards set to measure a term "reasonable in the circumstances," id. § 204, Comment d, it is probable that the sections reinforce and establish a floor below which a court cannot go to when applying the contracts spirit.

Yet, even with these apparent rules of interpretation, courts remain perplexed in their effort to actually define when, where, or how and what conduct is appropriate that meets the rules definition. Do they look beyond the four corners of the agreement or stay within its confines? Most courts have opted, incorrectly, to stay within the safety of the confines of the agreement and not go outside of it.

In Hilton, the Nevada Supreme Court had reached this same principle as the Tymshare court, yet in Petitioners case, dealing with a plea agreement the Nevada

Supreme Court found it necessary to discriminate between the two areas of law, a civil contract dispute and a criminal contract dispute i.e. a plea agreement. The high court failed to apply the same 'fairness of the Spirit of the bargain' of the law as it relates to fair dealing. Thus, a discriminatory application of the rule, where interest in a civil action and in a criminal action should overlap, they simply did not.

The implied duty of good faith and fair dealing is limited by the original bargain: it prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value. See *First Nationwide Bank v. United States*, 431 F.3d 1342, 1350 (Fed.Cir.2005) (duty was breached by legislation that "changed the balance of contract consideration").

And:

The Restatement (Second) of Contracts §205 provides: "Every contract imposes Upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment d to §205 states:

Good faith performance. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking

off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

The court should grant a writ for certiorari because;

2. This case presents a Second question Re: Santobello v. New York, 404 U.S. 257 (1971) and to what extent a plea agreement may be breached, through its spirit, by conduct not literally represented within the four corners of the agreement itself. Actions which go to the heart of the agreement rather than its literal terms.

In Santobello the Supreme Court underscored conduct that breached a specific stated term of a plea agreement and fashioned not only an appropriate remedy but the options available.

In Santobello and its progeny the breach was 'not based' on a term that had been omitted from the Plea agreement. Nor did Santobello discuss, even in dicta, 'the terms of the contract' and a standard that would guide courts in the further interpretation of a breach that occurred by conduct that essentially interfered with the spirit rather than the letter of the agreement.

The court should grant a writ for certiorari because;

3. This case presents a unique question of whether a defendant may sue the State, for financial recovery, where the state breached the plea agreements spirit rather than a stated term, and such breach caused financial loss to the defendant.

It is black letter law that all plea agreements follow contract law, it is also black letter law that the implied covenants of good faith and fair dealing apply to Plea Agreement. Nevada also acknowledges its existence.

Under contract law a broken promise gives rise to damage claims depending on the breach. Including all foreseeable and actual damages proximately caused by that breach.

CONCLUSION

The implied duty of good faith and fair dealing is a centuries-old concept and yet It still brings about a great deal of frustration and confusion. What does it mean? When Does it apply? Does it equally apply to criminal plea agreements? It even lacks equal application for plaintiffs and defendants within the same jurisdiction with different courts applying the covenant unevenly.

The current make-up of authority remains a patchwork of opinions that are so confusing, most jurists fail to even grasp it. Thus, the State and Federal Courts require a standard application of the covenant in order that parties within a state and in other states can enjoy the fruits of the 14th amendment.

So far, a standard has been elusive, with many judges in both jurisdictions misapplying how the Covenant is properly applied. Many believe, the covenant only applies where there is some written requirement within the body of the contract that is breached, however if this application were true, there would be no need for the covenant to exist. The breach of contract would determine the outcome of the matter.

Therefore, this reasoning, petitioner believes, is not based on common sense as the law requires.

The restatement (Second) of the law of contracts itself, the guide accepted in most jurisdictions fails to provide the answer for either principle in section 204.

Petitioner has himself been caught up in this dilemma. The State of Nevada, Court of appeals, expressly rejected its own standard applied to the covenant of good faith and fair dealing established by the Nevada Supreme court, in Re: Hilton Hotels Corp. v. Butch Lewis Productions 862 P.2d 1207 (1993). Their holding has not been overturned, but rather, they refused to apply it to Petitioner who had sued the State of Nevada for money damages occasioned by the state's intentional bad faith breach of a Plea Agreement which caused Petitioner extensive financial loss in excess of \$340,000.

Although the Hilton opinion appears to put the issue to rest, at least in Nevada, it remains unclear when and if the duty applies in criminal litigation over a broken plea agreement. In the Hilton case the Nevada Supreme court rightfully held "even though the contract was not breached, the covenant still applied" because one party interfered with the other party's reasonable expectations, nonetheless, even this opinion requires further clarification of the covenant's contours, as well as its application to plea agreements.

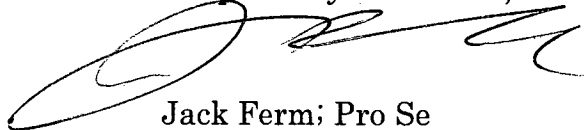
While Plea Agreements follow contract law and have, upon a breach, all of the defenses and avoidance issues of civil litigation. There has never been a standard that has applied a 'spirit of the bargain rule' to either civil agreements or plea agreements.

The courts have thus made a distinction and have, generally, only applied the covenant of good faith and fair dealing to terms literally stated within the four corners of the agreement, and have failed to incorporate the spirit of the bargain as a breach, where the plea agreement was silent and where the conduct of the State violated the spirit rather than the written word.

For all of the reasons noted herein Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Nevada Supreme Court's refusal to review the Nevada Appellate Courts decision.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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