

ABA Business Law Section
Uniform Commercial Code Committee
[General Scope and Provisions Subcommittee](#)

Kristen David Adams, Chairperson

“What Good Faith Cannot Do”

At the Spring 2008 Business Law Section Annual Meeting in Dallas, the General Scope and Provisions Subcommittee presented a program on the topic of good faith, entitled, “Are We Giving Good Faith a Bad Name?” The program included a brief selected bibliography of cases and articles discussing the topic of good faith. As a follow-up to that program, I thought it might be useful to present some of the cases on good faith that have been decided since the Spring meeting. This time, rather than focusing on the attributes of good faith, as the Spring program and bibliography did, I have focused on what good faith *cannot* do. Some of the propositions presented below are likely to be exceedingly familiar, while others may be less well known. Regardless of whether the cases discussed below present familiar concepts or new ones, it is my hope that it will be useful for readers to have a short list of recently decided cases, gathered in one place, discussing some of the limits on the UCC’s concept of good faith.

1. Bad Faith is Not Its Own Cause of Action.

The UCC’s definition of good faith does not give rise to an independent cause of action under the Code, but instead requires another, supporting cause of action. *Lechoslaw v. Bank of America, N.A.*, ___ F. Supp. 2d ___, 2008 WL 4145778 (D. Mass. 2008). Stated another way, a cause of action for breach of the implied obligation of good faith and fair dealing cannot be used as a substitute for a non-viable claim for breach of contract. *Belco Drug Corp. v. Global Supply Force, Inc.*, 2008 WL 2901595 (E.D. Pa. 2008); *Novelis Corp. v. Anheuser-Busch, Inc.*, 559 F. Supp. 2d 877 (N.D. Ohio 2008). Along the same lines, failure to act in good faith does not give rise to an independent cause of action in tort. *Adams v. Martinsville Dupont Credit Union*, ___ F. Supp. 2d ___, 2008 WL 4009040 (D.D.C. 2008); *TIG Ins. Co. v. Alfa Laval, Inc.*, 2008 WL 639894 (E.D. Va. 2008).

2. Article One’s Duty of Good Faith Does Not Apply Outside the UCC.

As recent examples, courts have held that the Article One duty of good faith does not apply to construction services, *Jay Cashman, Inc. v. Portland Pipe Line Corp.*, 559 F. Supp. 2d 85, 2008 WL 2447463 (D.Me. 2008), at-will employment, *Block Corp. v. Nunez*, 2008 WL 1884012 (N.D. Miss. 2008), or employment pursuant to a contract, *Erickson v. Brown*, 747 N.W. 2d 34, 2008 WL 755304 (N.D. 2008).

3. Good Faith Does Not Rewrite the Express Terms of a Contract.

Several courts this year have refused to consider extrinsic evidence, presented to vary the express terms of a contract, that was predicated upon Article One’s obligation of good faith. *See, e.g., Peach State Roofing, Inc. v. 2224 South Trail Corp.*, ___ So. 2d ___, 2008 WL 2150947 (Fla. App. 2008); *Novelis Corp. v. Anheuser-Busch, Inc.*, 559

F. Supp. 2d 877 (N.D. Ohio 2008); *Pierce v. QVC, Inc.*, 555 F. Supp. 2d 499, 2008 WL 1990449 (E.D. Pa. 2008). The *Novelis* decision includes some particularly good language on this point:

The implied duty of good faith and fair dealing in commercial contracts that [UCC Article 1] imposes controls the manner in which contracting parties carry out the obligations they have undertaken in a contract; it does not, however, give a court the power to impose additional obligations on one contracting party because a court concludes it is unfair to have the other shoulder a market risk that the former expressly bargained to avoid and the other expressly agreed to assume.

Id. at 85.

4. Good Faith Does Not Require a Party to Decline to Play its Best Hand.

This is related to the point made above, but I believe it merits special emphasis. In *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Finance Corp.*, 567 F. Supp. 2d 579 (S.D.N.Y. 2008), the court allowed a buyer to exercise its contractual right to walk away from the deal after a non-conforming tender, rather than permitting the seller to cure. The court rejected the seller's argument that the buyer was acting in bad faith by taking advantage of the fact that the market price for the goods had fallen significantly. In rejecting this argument, the court found that there was no reason not to give the buyer the benefit of its bargain, especially because both parties were "highly sophisticated and well advised commercial entities."

5. Good Faith Does Not Require a Certain Duty of Care.

As the court held in *J. Walter Thompson, U.S.A., Inc., v. First Bank Americano*, 518 F.3d 128, 2008 WL 564967 (2d. Cir. 2008), the UCC's duty of good faith does not impose a standard of care, but instead a standard of fair dealing. Notably, and as discussed in this newsletter's Spotlight column, the court in *In re Jersey Tractor Trailer Training, Inc.*, 2008 WL 2783342 (D.N.J. 2008), errs on this point.

6. Good Faith Does Not Apply to Parties With No Contractual Relationship

In *Kahn v. Volkswagen of America*, 2008 WL 590469 (Conn. Super. Ct. 2008), the court refused to allow a purchaser of a Volkswagen automobile to assert a claim against the car's manufacturer based on an alleged breach of Article 1's duty of good faith, because it found that there was no contract between the purchaser and manufacturer to which such a duty could attach.

If you should run across additional cases (or articles) discussing the contours of good faith, including what it can and cannot do, please send them my way at adams@law.stetson.edu. My plan is to continue to update the good faith bibliography that was begun earlier this year, and to make it available to anyone who might be interested.