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All the King's Horses and All the King's Men: Are Oregon Courts Putting the Good Faith Obligation Back Together Again?

"Men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith."[1] The principle of good faith enjoys a long history, and the growth of the good faith doctrine was one of the "truly major advances in American contract law" during the middle part of the twentieth century.[2] This advance was applauded by many. The recognition of the good faith doctrine was a "means to 'justice and to justice according to the law,'" allowing courts to arrive at equitable outcomes without using covert means.[3] However, one of the ongoing difficulties is providing meaning to the term "good faith."[4] Despite this difficulty, the obligation to perform and enforce contracts in good faith was included in two important sources of the law promulgated in the second half of the twentieth century. After much debate and discussion, the Uniform Commercial Code was enacted, and included a section imposing a good faith requirement in both performance and

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1 Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 195 (1968) (citing R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 188 (1922)).

2 Robert S. Summers, *The General Duty of Good Faith – Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 810 (1982) (recognizing the inclusion of section 205 as an important improvement over first Restatement, approved in 1932, which did not contain a Good Faith provision).

3 *Id.* at 826 (quoting Summers, *supra* note 1, at 198).

4 *See, e.g.*, Summers, *supra* note 1, at 199-200 (discussing the difficulty in determining the intended meaning when a judge uses the term "good faith").

enforcement of all contracts.[5] This inclusion was viewed as reviving the ancient, but largely forgotten principle of good faith.[6] The growth in prominence of the doctrine reached its peak with its inclusion in the Restatement (Second) of Contracts.[7]

The purpose of the good faith doctrine is to prohibit and provide remedy for improper behavior in the performance and enforcement of contracts.[8] While at first glance this seems to be a relatively simple rule, developing a comprehensive definition for good faith has proven challenging, if not impossible. Because the doctrine is implied into every contract, it is used in a wide variety of contexts and its definition often varies as the context changes.[9] Given this definitional difficulty, Professor Summers has argued that good faith is best conceptualized as an "excluder," providing meaning for the term by ruling out various acts of "bad faith" according to the context.[10] This approach, first put forward by Professor Summers in an influential 1968 article, was also adopted in the Restatement (Second).[11] While the Restatement

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5 U.C.C. § 1-304 (2004).

6 E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 669 (1963)

7 *See* Summers, *supra* note 2, at 812. Professor Summers listed five reasons that section 205 represented a major advance in contract law: (1) it reflected a large volume of case law and statutory development; (2) it, along with other equitable principles, represents a fundamental objective of the legal system – "justice, and justice according to law;" (3) although merely a minimal requirement, the good faith obligation is relevant in a wide variety of contractual matters, and it accordingly rules out bad faith in a diverse array of contexts; (4) the section embodies a general requirement to which judges can turn to fill gaps and qualify or limit rights and duties; and (5) because section 205 is a direct and explicit requirement, judges no longer need resort to covert means to redress bad faith. *Id.* at 811-12.

8 Best v. U.S. Nat'l Bank of Or., 303, Or. 557, 562, 739 P.2d 554, 557 (1987).

9 *Id.* at 562, 739 P.2d at 557; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context.").

10 Summers, *supra* note 2, at 816-21. In another article, Professor Summers provided a number of forms of bad faith conduct, and the meaning of good faith that would be derived from that conduct. Summers, *supra* note 1, at 203. Some examples include: Form of Bad Faith – "seller concealing a defect in what he is selling;" Meaning of Good Faith – "fully disclosing material facts;" Bad Faith – "contractor openly abusing bargaining power to coerce an increase in the contract price;" Good Faith – "refraining from abuse of bargaining power;" Bad Faith – "arbitrarily and capriciously exercising a power to terminate a contract;" Good Faith – "acting with some reason." *Id.* tbl. 1.

11 RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("Good faith performance . . . excludes a variety of types of conduct characterized as involving 'bad faith'. . . ."); *Id.* at cmt. d (providing examples of certain actions or inactions that are considered bad faith). Professor Summers' article was, indeed, influential. Robert Braucher, Professor of Law at Harvard Law School at the time, was the Reporter

(Second) did not attempt a definition of good faith, the reporter did list the general purposes of section 205: securing "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," and compliance with "community standards of decency, fairness or reasonableness."[12] In attempting to give meaning to the good faith obligation by excluding bad faith, ensuring that agreements remain consistent with the parties' reasonable expectations, and insuring compliance with community standards and fairness, the implied obligation of good faith reflects a very simple idea: Some expectations may be so fundamental or obvious to contractual parties that they neither discuss them in the negotiation process nor demand that they be reduced to writing.[13]

Unfortunately, in the years since the inclusion of the good faith provision in the Restatement (Second), many judicial opinions, including those of the Oregon Supreme Court, have eroded the strength and usefulness of the historical doctrine. This Comment will focus on the treatment of the implied obligation of good faith in Oregon courts. The first Part will discuss the evolution of the obligation as required under the Uniform Commercial Code and the Restatement (Second) of Contracts. The second Part will then turn to an examination of the current narrow meaning of the common law good faith obligation in Oregon. Part III will examine a number of cases that have followed the narrow Oregon rule, and predictably, resulted in harsh outcomes.

The final two Parts, however, will shift direction. Part IV will discuss recent Oregon decisions that have interpreted good faith as a broad obligation in the performance of contracts. This interpretation is similar to the way the Oregon courts viewed the obligation before the string of narrowing decisions handed down in the mid-nineties. Finally, Part V will conclude by suggesting a method to return the obligation of good faith to a prominent position in Oregon law.

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for the Restatement (Second) during the years that section 205 came to life. Professor Braucher acknowledged that *The General Duty of Good Faith – Its Recognition and Conceptualization* "substantially influenced the recognition and conceptualization" of the good faith requirement in the second Restatement. *See* Summers, *supra* note 2, at 810.

12 Summers, *supra* note 2, at 821 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981)).

13 Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1274 (1999).

Professor Farnsworth, in an article discussing the Uniform Commercial Code's obligation of good faith, and what he viewed as the "great fall" of the general obligation in Uniform Commercial Code Article 1, stated that it would be in the hands of the courts to ensure the obligation's future vitality.[14] He wrote: "[w]hether all the King's horses and all the King's men can put the obligation together again is a matter for the judiciary."[15] There is evidence that at least some Oregon courts are rising to the occasion.

I

THE MODERN DEVELOPMENT OF THE GOOD FAITH DOCTRINE

A. The Uniform Commercial Code

For the purposes of this Comment, the relevant history of the good faith doctrine began in 1957, the year in which the complete text of the Uniform Commercial Code (U.C.C.) and its comments were first published.[16] While the main focus of this Comment is the good faith obligation found in Oregon common law, the inclusion of a good faith requirement in the U.C.C. was an

[14] Farnsworth, *supra* note 6, at 674.

[15] *Id.*

[16] For an in-depth history of the early notions of good faith, and the early development of the good faith standards in both English law and American law, see James A. Webster, Comment, *A Pound of Flesh: The Oregon Supreme Court Virtually Eliminates the Duty to Perform and Enforce Contracts in Good Faith*, 75 OR. L. REV. 493, 497-509 (1996). Webster traces the history of the good faith obligation all the way back to Old Testament times, then follows it as it evolves and grows during the early Greek and Classical Roman periods. *Id.* at 497-98. Webster continues by discussing good faith as it developed first in the English equity courts, and eventually the law courts. *Id.* at 499-501. Eventually, commercial law saw justice and fairness as the most fundamental aspects of any exchange, and courts undertook a fact-based inquiry into both the honesty of the parties and the reasonableness of their actons in the specific context in which the actions were undertaken. *Id.* at 502. This broad and equitable notion of the good faith doctrine eroded as society began to industrialize. Along with that change came a perceived need for efficiency and certainty. *Id.* at 504. The result was a turning away from the inquiry into subjective meeting of the minds and the requirement of mutual assent, toward an objective view of the four corners of the contract. *Id.* Over time, many courts reacted to the failure of these strict rules to keep pace with the true nature of commercial transactions, by finding imaginative ways to achieve equitable results, even within the formalist structure of the law. *Id.* at 507. These developments coincided with the growth of the legal realist movement, which conceived of the law not as a fixed system of strict rules, but as flexible guidelines which should reflect and facilitate actual practices. *Id.* at 508-09. It was at this point in legal history that the drafters of the U.C.C. found themselves.

important first step in re-energizing the idea of good faith in American contract law. The U.C.C. was promulgated in order to, *inter alia*, simplify and make uniform the law governing commercial transactions.[17] By including the good faith obligation in such an important and far-reaching document,[18] the U.C.C. solidified the obligation's position as an important requirement of American law.

U.C.C. Article 1 contains the general requirement that "[e]very contract or duty within [the U.C.C.] imposes an obligation of good faith in its performance and enforcement."[19] The official comment that follows the section acknowledges that it "sets forth a basic principle running throughout the [U.C.C.]."[20] The definition provided for good faith is "honesty in fact *and* the observance of reasonable commercial standards of fair dealing."[21] Out of the nine articles of the U.C.C., good faith is defined in seven.[22] All but one of those definitions identifies good faith in the same manner that it is presently defined in Article 1.[23] Under the U.C.C., it is clear that the good faith obligation is meant to ensure that parties to a contract act in an honest and up-front manner with one another and that their behavior is reasonable within the context their actions occur. Roughly twenty years after the good faith obligation was included in the U.C.C., a second major source of contract law was handed down.

B. The Restatement (Second) of Contracts

Section 205 of the Restatement (Second) of Contracts is found in Chapter 9, titled "The Scope of Contractual Obligations."[24] The good faith obligation falls under the second topic of chapter

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17 U.C.C. § 1-103(a) (2004).

18 The Code has been adopted in some form by every state except Louisiana. Joel Iglesias, Comment, *Applying the Implied Covenant of Good Faith and Fair Dealing to Franchises*, 40 HOUS. L. REV. 1423, 1433-34 (2004) (citing E. ALLAN FARNSWORTH, CONTRACTS § 1.9, at 32 (3d ed. 1999)).

19 U.C.C. § 1-304.

20 *Id.* cmt. 1.

21 *Id.* § 1-201(20) (emphasis added). This definition differs from the original prerevision definition in that it contains the objective commercial reasonableness standard. This is a rather significant change and is discussed further *infra* Part I.C.

22 *Id.* Only Articles 6 and 7 fail to define good faith. *Id.*

23 *Id.* Article 5 is the only article that uses an alternative definition. Article 5 defines good faith solely in terms of subjective honesty. *Id.*

24 ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY – SELECTED PROVISIONS: RESTATEMENT OF CONTRACTS AND UNIFORM COMMERCIAL CODE 25 (3d ed. 2003).

9, *Considerations of Fairness and the Public Interest*.[25] The language of section 205 simply states, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[26] An attempt to add some definition to the requirement is made in the official comments that follow it. Comment a reviews the U.C.C. definition stating that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[27] The comment continues, "[g]ood faith performance or enforcement of a contract emphasizes *faithfulness to an agreed common purpose* and consistency with the *justified expectations* of the other party."[28] This comment also explicitly adopts Professor Summers' "excluder" definition.[29] Comment a refers to an objective standard, stating that some actions are bad faith because "they violate community standards of decency, fairness or reasonableness."[30] Accordingly, as defined in comment a, the Restatement (Second) includes both an objective and subjective good faith obligation. Comment d further points out that subjective good faith alone will not *always* be sufficient to satisfy the good faith obligation.[31]

The inclusion of the good faith obligation in section 205 was a very important advance. Because the American Law Institute, the institutional author of the various restatements, is comprised of distinguished professors, judges, and practitioners, courts generally give the assorted restatements tremendous respect.[32] Some even regard these formulations as "the law."[33] Therefore, the express inclusion of the good faith obligation provided a tool for courts to decide cases, taking into account their own sense of equity and fairness.

Of course, the inclusion of section 205 was not without its crit-

[25] *Id.*

[26] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[27] *Id.* cmt. a. The comment also includes the purely subjective "honesty in fact in the conduct or transaction concerned" definition from Article 1 of the original code. *Id.* Article 1 has since been revised, and the Article 1 definition is now the same as is found in Article 2. *See infra* Part I.C.

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

[29] *Id.* ("[Good faith] excludes a variety of types of conduct characterized as involving 'bad faith.'").

[30] *Id.*

[31] *Id.* at cmt. d ("Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified.").

[32] Summers, *supra* note 2, at 812.

[33] *Id.*

ics.[34] Nonetheless, the section was accepted, in part because there was ample authority for its inclusion. The obligation of good faith was repeatedly recognized in American case law.[35] In particular, the important state courts of New York and California rendered decisions allowing relief for various forms of bad faith.[36] Additionally, good faith's inclusion in the Restatement (Second) was supported by the obligation's inclusion in the U.C.C.[37]

C. Subjective or Objective Good Faith?

One of the early, and often ongoing, difficulties with the modern good faith obligation was determining whether the standard was one of subjective or objective good faith.[38]

A subjective good faith requirement requires only that a party "honestly" believe it is acting properly.[39] The test for subjective good faith is sometimes referred to as "the rule of 'the pure heart and the empty head.'"[40] An objective good faith requirement insists upon the additional element that the parties' actions be reasonable.[41] These relatively clear definitions, however, can lead to considerable confusion in application.

While it has been held that subjective honesty alone is not necessarily sufficient to establish good faith,[42] there do seem to be factual circumstances under which one test (objective or subjective) will carry much greater weight in a court's decision. In a paper he presented at a seminar in Rome in 1993, Professor Farnsworth illustrated this by providing the following example:

> Suppose that you are a publisher and I am a printer and we make a contract under which I am to print some books for you

[34] *Id.* at 825-30 (addressing some criticisms including the rationales underlying the good faith requirement, the "Excluder" analysis, and the general indefinability of good faith).

[35] *Id.* at 812-13.

[36] *Id.* at 812.

[37] *Id.* at 813. Some commentators, especially Professor Summers, viewed the Restatement (Second) version of the good faith obligation as a vast improvement on the original version of the obligation contained in the Code. *See id.* at 824-25.

[38] *See generally* Farnsworth, *supra* note 6, at 671-74.

[39] Allan E. Farnsworth [sic], *The Concept of "Good Faith" in American Law*, 10 Centre for Comparative and Foreign Law Studies Saggi, Conferenze e Seminari 7 (1993) (It.), *available at* http://soi.cnr.it/~crdcs/crdcs/farnswrt.htm.

[40] Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 Colum. L. Rev. 798, 812 (1958).

[41] Farnsworth, *supra* note 39, at 7.

[42] Best v. U.S. Nat'l Bank of Or., 303 Or. 557, 563, 739 P.2d 554, 558 (1987).

> and you are to take them and pay me if you are "satisfied" with my printing. The contract gives you some discretion in deciding whether you are "satisfied." You have to exercise that discretion in good faith . . . . [B]ecause it is not so difficult to judge the quality of printing, the test should be objective: Ought you reasonably to have been satisfied with my printing? If a jury decides that you ought reasonably to have been satisfied, the court will hold that you have broken our contract *even if you were honestly not satisfied*.
>
> Now suppose that you are a publisher and I am an author and we make a contract under which I am to write a novel for you and you are to publish it and pay me royalties if you are "satisfied" with my novel . . . . Suppose you refuse to publish my novel . . . . [A] court is likely to decide that the test should be purely subjective: Were you honestly not satisfied with the quality of my novel? The judge will *not ask . . . whether you ought reasonably to have been dissatisfied with my novel*.[43]

As Farnsworth's example illustrates, there are clearly some situations that mandate reliance on one test over the other.

The distinction between the subjective and objective tests was highly important after the original promulgation of the U.C.C. The original U.C.C. Article 1 defined good faith simply as "honesty in fact in the conduct or transaction concerned."[44] This definition applied throughout the U.C.C., with one exception: Former Article 2 provided that in that Article, "good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[45] Thus, the general good faith obligation was exclusively subjective, but the specific good faith obligation for merchants added an objective inquiry to the test.[46] However, over time various amendments and revisions brought the merchant version of good faith into other articles of the U.C.C.[47] Given these developments, the drafting committee of the revised Article 1 decided it was appropriate to bring the broader obligation of good faith

[43] Farnsworth, *supra* note 39, at 5-6 (emphasis added).

[44] U.C.C. § 1-201(19) (1958).

[45] U.C.C. § 1-201 cmt. 20 (2004).

[46] Professor Farnsworth argued that the deletion of the objective test from earlier versions of the code was a terrible error in the final product. Farnsworth, *supra* note 6, at 673-74. Farnsworth acknowledged that compromise and accommodation were necessary to gain support for a huge enterprise such as the U.C.C., but also urged courts to take it upon themselves to restore the objective standard to the entire Code. *Id.* at 674.

[47] U.C.C. § 1-201 cmt. 20.

into Article 1.[48] Accordingly, now both the revised U.C.C. and the Restatement (Second) of Contracts contain a definition of the good faith obligation with both a subjective and an objective test.

With this brief introduction to the good faith obligation and its conceptualization and recognition in modern American law, I will now explore the interesting, often confusing, and sometimes surprising realm of the good faith obligation as interpreted by the Oregon courts.

II
THE IMPLIED OBLIGATION OF GOOD FAITH IN OREGON

The decision most often cited in Oregon for establishing the proposition that a covenant of good faith and fair dealing is implied in every contract is *Perkins v. Standard Oil*.[49] In that case, the Oregon Supreme Court held that Standard Oil had an implied duty not to solicit its distributor's customers, even though the parties' contract provided Standard Oil with complete discretion in selecting its own customers.[50] The court based this decision on the one-sided and completely inequitable nature of the contract.[51] If Standard Oil was at liberty to solicit Perkins' customers, Perkins would have been "in a state of economic servility," a situation the court refused to believe was the intended result at the time the contract was signed.[52] By deciding the case in favor of Perkins, the Oregon Supreme Court acknowledged that the express terms of a contract will not be enforced if they do not conform to the implied obligation of good faith. *Perkins* would remain the common law good faith standard in Oregon for twenty-four years, until the court decided *Best v. United States National Bank of Oregon*.

[48] *Id.* The broad "merchant" definition is now only limited by Article 5's narrow definition. *Id.*

[49] Perkins v. Standard Oil, 235 Or. 7, 16, 383 P.2d 107, 112 (1963) (quoting 3 CORBIN ON CONTRACTS 278 (1993)); *see* Or. Univ. Sys. v. Or. Pub. Employees Union, Local 503, 185 Or. App. 506, 514, 60 P.3d 567, 571 (2002) (stating that "[i]n *Perkins* . . . , the Oregon Supreme Court first recognized that every contract includes an implied covenant of good faith and fair dealing").

[50] *Perkins*, 235 Or. at 10-15, 383 P.2d at 109-11.

[51] *Id.* at 16, 383 P.2d at 112.

[52] *Id.* at 17, 383 P.2d at 112.

A. The Best *Formulation*

In 1987, the Oregon Supreme Court decided *Best v. United States National Bank of Oregon*.[53] Between the years of 1973 and 1979, the bank had increased its fee for nonsufficient fund (NSF) checks from $3 to $5 for every "bad" check written.[54] The Bests were among the bank's customers who were charged this fee, and they brought a lawsuit, individually and as representatives of a similarly situated class of bank customers.[55] The suit alleged the bank's fees were unlawful because they greatly exceeded the costs the bank incurred for processing the NSF checks.[56] The customers' central claim was that the high fees breached the bank's obligation to set fees in good faith.[57]

The class alleged that the bank had an obligation to set fees in good faith, but that the bank had breached this obligation by setting fees that were excessive in relation to the cost to the bank.[58] The court acknowledged that although there was nothing in the account agreements that expressly limited the bank's authority to set fees, *all* contracts have an obligation for the parties to perform in good faith.[59] This obligation, the court reasoned, limited the bank's apparently unlimited authority.[60] The court, following the Restatement and its own precedent in *Perkins,* held that when a party has discretion, that discretion must be exercised within the confines of the reasonable expectations of the parties.[61] Importantly, the *Best* court stated that it was not necessarily sufficient that the bank acted honestly.[62] The good faith obligation requires more. Taking this statement into account, the *Best* court expressly stated that the common law obligation to act in good faith requires not only a subjective inquiry into the

[53] Best v. U.S. Nat'l Bank of Or., 303 Or. 557, 739 P.2d 554 (1987).

[54] *Id.* at 559, 739 P.2d at 555.

[55] *Id.* at 559, 739 P.2d at 555.

[56] *Id.* at 559, 739 P.2d at 555.

[57] *Id.* at 559, 739 P.2d at 555. Originally, the Bests alleged six claims for relief. Three of those claims were certified as class actions by the circuit court: "(1) that the [b]ank breached its obligation to set NSF fees in good faith, (2) that its NSF fees were unconscionable, and (3) that its NSF fees were an unlawful penalty for breach of contract." *Id.* at 559, 739 P.2d at 555. The court quickly dismissed the unlawful penalty and unconsionability claims, and focused on the good faith issue. *Id.* at 560-61, 739 P.2d at 556-57.

[58] *Id.* at 561, 739 P.2d at 556-57.

[59] *Id.* at 561, 739 P.2d at 557.

[60] *Id.* at 561, 739 P.2d at 557.

[61] *Id.* at 564, 739 P.2d at 558.

[62] *Id.* at 564, 739 P.2d at 558.

honesty in fact of the parties, but also an objective inquiry into the reasonable expectations of the parties involved.

Accordingly, the rule from *Best* can be summarized as follows: (1) the obligation to act in good faith is implied into all agreements, and the express terms of the agreement, even when followed, will not control the outcome of a dispute if the terms are not performed or enforced in good faith; and (2) the inquiry into good faith requires the court to examine the subjective mindset of the parties, as well as an objective investigation of their reasonable expectations.[63]

B. Tolbert, Pacific First & Uptown Heights: *Tightening the Noose on the Good Faith Doctrine*

It was not long before the Oregon Supreme Court began to retreat from the broad and equitable rule of *Best*, toward a more restrictive, classical view of the good faith doctrine.[64] On December 19, 1991, the court handed down its decision in *Tolbert v. First National Bank of Oregon*.[65] *Tolbert* also dealt with the right of a bank to set and adjust the fee charged for NSF checks.[66] The case began as a companion to *Best*, and the court's opinion started with an examination of its decision in that case.[67] The court reaffirmed the general rule that "there is an obligation of good faith in the performance and enforcement of every contract,"[68] and reiterated the central holding from *Best*: that "whether a specified price violates the obligation of good faith should be decided by the reasonable contractual expectations of the parties," and the fact that a party acted honestly is "not necessarily sufficient" to satisfy its good faith obligation.[69]

After summarizing the *Best* decision, the *Tolbert* court continued by pointing out that there were two important factual differences that distinguished *Tolbert* from *Best*.[70] First, unlike the bank in *Best*, the bank in *Tolbert* followed the practice of informing its customers of the bank's current NSF fee when an account

[63] *Id.* at 564-65, 739 P.2d at 558-59.

[64] Webster, *supra* note 16, at 525-25. Webster's excellent comment discussed the post-*Best* retreat from the broad view of the good faith obligation in Oregon. Significantly, Webster's comment is something of a starting point for this Comment.

[65] Tolbert v. First Nat'l Bank of Or., 312 Or. 485, 823 P.2d 965 (1991).

[66] *Id.* at 488, 823 P.2d at 966.

[67] *Id.* at 488, 823 P.2d at 967.

[68] *Id.* at 488, 823 P.2d at 967.

[69] *Id.* at 489, 823 P.2d at 967.

[70] *Id.* at 490, 823 P.2d at 968.

was opened.[71] Second, the bank in *Tolbert* informed its custumers by mail of changes in their service at or near the time that the changes were made.[72] The plaintiffs argued that these factual distinctions did not have legal significance and that *Best* should dictate a result in their favor.[73] The bank responded that the reasonable expectations of the parties *are irrelevant* when the depositors were made aware of the fees, but agreed to open their accounts anyway.[74]

The court agreed with the bank, specifically stating that "[t]he expectations of depositors are irrelevant if they have agreed to the NSF fees charged by the bank."[75] The court explicitly acknowledged that if a party is granted discretion by the express terms of a contract and exercises that discretion after prior notice, as a matter of law the parties' reasonable expectations will be met.[76] Thus, under *Tolbert*, the good faith limitation to a party's apparently unlimited discretion established in *Best* was narrowed significantly when the court held that a party exercising unrestricted discretion by the express terms of an agreement satisfies the good faith obligation as a matter of law.[77]

In decisions that came down in 1994 and 1995, the Oregon Supreme Court further solidified the narrow view of good faith it had established in *Tolbert*. First, in 1994, the court decided *Pacific First Bank v. New Morgan Park Corp*.[78] Pacific First Federal Savings (PFFB) was a tenant in a building owned by New Morgan Park.[79] On July 30, 1990, PFFB sent notice to New Mor-

[71] *Id.* at 490, 823 P.2d at 968.

[72] *Id.* at 491, 823 P.2d at 968.

[73] *Id.* at 491, 823 P.2d at 968.

[74] *Id.* at 491, 823 P.2d at 968.

[75] *Id.* at 492, 823 P.2d at 969.

[76] *Id.* at 494, 823 P.2d at 970. In a footnote, the *Tolbert* court abandoned another important part of the *Best* decision. The court stated that it is only the "common law 'objective' good faith standard which is applicable in this case." *Id.* at 494 n.6, 823 P.2d at 970 n.6. This appears to ignore the holding in *Best* that required both subjective and objective good faith. *See* Best v. U.S. Nat'l Bank of Or., 303 Or. 557, 564, 739 P.2d 554, 558 (1987); *see also supra* Part II.A.

[77] *Tolbert*, 312 Or. at 494, 823 P.2d at 970.

[78] Pac. First Bank v. New Morgan Park Corp., 319 Or. 342, 876 P.2d 761 (1994). The majority opinion in *Pacific First* was authored by then Justice Graber. Judge Graber currently sits on the Ninth Circuit Court of Appeals. An interesting fact is that Judge Graber was the author of an amicus curiae brief in the *Best* case. She wrote the brief on behalf of First Interstate Bank of Oregon, and given who her client was, presumably argued against the broad good faith obligation that case established.

[79] *Id.* at 344, 876 P.2d at 762.

gan Park that it planned to merge into its wholly owned subsidiary, Pacific First Bank.[80] The lease agreement required New Morgan Park's consent prior to any change of control.[81] After the merger, New Morgan Park informed PFFB that the merger was an assignment without consent and that PFFB was in violation of the lease.[82] PFFB filed suit for declaration that it became the tenant in compliance with the lease, and New Morgan Park countersued to recover possession of the property.[83] The trial court concluded that the merger *did not* require consent, but the court of appeals reversed, holding that "the merger was an 'assignment' requiring consent of Landlord and that failure to obtain that consent was a material breach of the lease agreement."[84]

After agreeing with the court of appeals by determining that the merger was a "transfer" within the meaning of the lease agreement, thus requiring consent on the part of New Morgan Park,[85] the Oregon Supreme Court went on to examine PFFB's claim that New Morgan Park should not be able to withhold such consent unreasonably. The court cited the reasonable expectations test from *Best*; however, it also cited *Tolbert*, for the rule that when a contract provides for a unilateral exercise of discretion, reasonable expectations are met when that discretion is exercised after notice.[86] The court further stated that "the obligation of good faith does not vary the substantive terms of the bargain . . . , nor does it provide a remedy for an unpleasantly motivated act . . . ."[87] The court turned to the express terms of the contract, which required prior written consent before transferring the lease, and determined that PFFB "could not have had an *objectively reasonable expectation* that [New Morgan Park's] right to grant or withhold consent to the transfer of the lease . . . was constrained in the manner suggested by [PFFB]."[88]

80 *Id.* at 345, 876 P.2d at 763.

81 *Id.* at 345, 876 P.2d at 763.

82 *Id.* at 345, 876 P.2d at 763.

83 *Id.* at 345-46, 876 P.2d at 763.

84 *Id.* at 346, 876 P.2d at 763-64 (citing Pac. First Bank v. New Morgan Park Corp., 122 Or. App. 401, 857 P.2d 895 (1993)).

85 *Id.* at 348-49, 876 P.2d at 764-65.

86 *Id.* at 351-52, 876 P.2d at 766-67 (citing Tolbert v. First Nat'l Bank of Or., 312 Or. 485, 823 P.2d 965, 970 (1991)).

87 *Id.* at 352-53, 876 P.2d at 767 (citing U.S. Nat'l Bank v. Boge, 311 Or. 550, 567, 814 P.2d 1082, 1092 (1991)).

88 *Id.* at 354, 876 P.2d at 768 (emphasis added).

Accordingly, the Oregon Supreme Court in *Pacific First* reaffirmed the narrow holding of *Tolbert*, that good faith does not limit discretion provided by the express terms of the contract, and further added the restriction that the good faith obligation does not even provide a remedy for a bad act if that act is allowed by the contract.

Less than one year later, the Oregon Supreme Court faced the good faith issue again in *Uptown Heights Associates, L.P. v. Seafirst Corp*.[89] The case involved a $7.5 million[90] loan from a bank to a developer, Uptown, to be used to construct a "high-end" apartment complex in Portland, Oregon.[91] Under the terms of the loan, Uptown was to pay monthly interest payments until the loan matured, at which time the principal amount would be due.[92] The loan agreement had a provision which allowed for two six-month extensions.[93] Due to a drop in the rental market, Uptown began to experience financial problems, which made it difficult to meet their financial obligation to the bank.[94] The bank agreed to the first extension, but, despite promises they would work with Uptown to resolve any problems surrounding the loan, refused to grant the second six-month extension.[95]

After refusing the extension, the bank transferred the Uptown loan to a special department for problem loans, and bank personnel began to threaten foreclosure.[96] In an effort to avoid the immeasurable harm to its investment and business reputation that would result from foreclosure, Uptown began to seek a buyer.[97] Uptown received an offer on the apartment complex, but just two days after Uptown informed the bank of the offer, the bank initiated a foreclosure action.[98] As a result, the offeror did not proceed any further.[99] A few months after a receiver was appointed by the court, Uptown was able to secure a second offer for the apartment complex, which would have resulted in a price

89 Uptown Heights Assocs., L.P. v. Seafirst Corp., 320 Or. 638, 891 P.2d 639 (1995).
90 *Id.* at 641-42, 891 P.2d at 641.
91 *Id.* at 641, 891 P.2d at 641.
92 *Id.* at 642, 891 P.2d at 642.
93 *Id.* at 642, 891 P.2d at 642.
94 *Id.* at 642, 891 P.2d at 642.
95 *Id.* at 642, 891 P.2d at 642.
96 *Id.* at 642, 891 P.2d at 642.
97 *Id.* at 642, 891 P.2d at 642.
98 *Id.* at 643, 891 P.2d at 642.
99 *Id.* at 643, 891 P.2d at 642.

of $8.1-8.6 million, an amount well over the outstanding amount on Uptown's loan.[100] Still, the bank refused on multiple occasions to extend the scheduled foreclosure sale.[101] Uptown and the second buyer were unable to work out a deal that would satisfy the bank's strict timeline, and the foreclosure sale took place.[102] Surprisingly, the bank was the winning bidder at the sale, and it quickly entered into a deal with the second potential buyer.[103] Uptown, of course, received nothing.

Uptown sued the bank, alleging, *inter alia*, that the bank breached its good faith obligation by refusing the second extension and continuing the foreclosure, even though Uptown had located a buyer who was going to pay more than the outstanding loan amount.[104] In affirming the dismissal of Uptown's good faith claim, the court relied on *Tolbert* and rejected Uptown's attempt to rely on the standard from *Best*.[105] The court stated:

> [I]f a written contract between the parties expressly allows for a particular remedy by one of the parties, in the face of a specified breach, the parties' objectively "reasonable expectations" under the contract include the invocation of that remedy in the face of that breach. The party invoking its express, written contractual right does not, merely by so doing, violate its duty of good faith.[106]

This ruling had the effect of further solidifying the rule that parties' reasonable expectations are determined by the express terms of their contract in a good faith inquiry.

C. A Summary of the Status of Good Faith in Oregon

The vitality of Oregon's good faith doctrine reached its peak when the Oregon Supreme Court announced a broad and equitable good faith obligation in *Best*. The Oregon Supreme Court, however, severely weakened that broad rule by issuing a series of decisions restricting the reach of the good faith obligation. The court in *Best* stated that the primary purpose of the good faith doctrine was to effectuate the reasonable expectations of the parties to a contract.[107] Accordingly, when a party is authorized to

100 *Id.* at 643, 891 P.2d at 642.
101 *Id.* at 643, 891 P.2d at 642.
102 *Id.* at 643, 891 P.2d at 642.
103 *Id.* at 643-44, 891 P.2d at 642.
104 *Id.* at 644, 891 P.2d at 642-43.
105 *Id.* at 644-46, 891 P.2d at 643-44.
106 *Id.* at 645, 891 P.2d at 643.
107 Best v. U.S. Nat'l Bank of Or., 303 Or. 557, 563, 739 P.2d 554, 558 (1987).

use discretion in the performance of a contract, as the bank in *Best* was, but the actual outcome from the use of the discretion is not within the reasonable expectations of the parties, the discretion has been exercised in bad faith.[108] Simply put, a party's apparently unlimited freedom to act under the express terms of a contract is limited by the implied obligation that the party act in good faith, according to both parties' reasonable expectations at the time the contract was created.[109]

Shortly after announcing this broad rule, the Oregon Supreme Court began the process of narrowing the good faith doctrine. First, in *Tolbert*, the court severely narrowed the reasonable expectations test of *Best*, limiting the inquiry only to the *objectively* reasonable expectations of the parties.[110] Under *Best*, a party's authority to act is restricted even when it appears they have unlimited discretion, but, under the significantly more narrow doctrine of *Tolbert*, a party exercising unlimited discretion according to the express terms of a contract satisfies its duty of good faith as a matter of law.[111] The later decisions in *Pacific First Bank* and *Uptown Heights* reaffirmed and strengthened this narrow view of good faith.[112] Accordingly, by the middle of the 1990s, the Oregon Supreme Court had crafted a narrow good faith doctrine. As one judge observed, in the cases that came after its decision in *Best*, the Oregon Supreme Court had "relegated the implied covenant of good faith . . . to some sort of legal museum for former remedies that are no longer used."[113]

D. Selected Outcomes Under Oregon's Narrow Good Faith Obligation

In the years since the Oregon Supreme Court crafted its narrow version of the good faith obligation, a number of Oregon Court of Appeals cases have followed the *Tolbert*, *Pacific First*, and *Uptown Heights* rulings. In doing so, many of the courts have furthered the emasculation of the good faith obligation in

108 *Id.* at 563, 739 P.2d at 558.

109 *See id.* at 561, 739 P.2d at 557.

110 Tolbert v. First Nat'l Bank of Or., 312 Or. 485, 494, 823 P.2d 965, 970 (1991).

111 *Id.* at 494, 823 P.2d at 970.

112 Pac. First Bank v. New Morgan Park Corp., 319 Or. 342, 354, 876 P.2d 761, 768 (1994); Uptown Heights Assocs., L.P. v. Seafirst Corp., 320 Or. 638, 645, 891 P.2d 639, 643 (1995).

113 *In re* Porter, 320 Or. 692, 711, 890 P.2d 1377, 1388 (1995) (Fadely, J., concurring).

Oregon. Predictably, many of these cases have had rather harsh results.

One such example is *Zygar v. Johnson*,[114] decided in 2000. The defendant buyer entered into a contract with the sellers for the purchase of a home in Springfield, Oregon.[115] On the first page of the agreement, under the caption "special conditions," the buyer's realtor entered a handwritten provision that stated the sale was, "subject to purchaser's approval of a pest [and] dry-rot report."[116] On the second page of the agreement, there was a printed paragraph requiring a pest inspection and allowing the buyer to terminate the agreement if the results were not approved, but also allowing the sellers to save the transaction by repairing the defect.[117]

The property was inspected, and four days later the buyer's realtor informed the sellers' realtor that he was no longer interested in the property.[118] In that conversation, the buyer's realtor told the sellers' realtor that the reason for the buyer's desire to discontinue the transaction was that the buyer's fiancée did not like the house.[119] A couple of days later the buyer's realtor sent a letter stating, *inter alia*, that the buyer refused to approve the pest and dryrot report.[120] Shortly after this initial letter, the buyer's attorney sent two letters to the sellers' attorney, setting forth the buyer's reason for not approving the report and reiterating the buyer's intention to terminate the deal.[121]

The sellers brought an action for breach of contract, and after unsuccessful arbitration, the buyer moved for summary judgment, which the trial court granted.[122] On appeal, the sellers put forth two arguments: (1) that the contract was ambiguous because the handwritten term allowed for termination, while the printed term allowed the sellers to fix the damage and move on with the sale; and (2) that there was a question of fact as to whether the buyer executed his right to terminate the contract in good faith—specifically, whether disapproval of the report was

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[114] Zygar v. Johnson, 169 Or. App. 638, 10 P.3d 326 (2000).
[115] *Id.* at 640, 10 P.3d at 327.
[116] *Id.* at 640, 10 P.3d at 327.
[117] *Id.* at 640-41, 10 P.3d at 327.
[118] *Id.* at 641, 10 P.3d at 327.
[119] *Id.* at 641, 10 P.3d at 327. The fact that buyer's fiancée did not like the house was confirmed in her deposition testimony. *Id.* at 645, 10 P.3d at 330.
[120] *Id.* at 641, 10 P.3d at 327.
[121] *Id.* at 641, 10 P.3d at 327-28.
[122] *Id.* at 642, 10 P.3d at 328.

"a 'pretext' and that the buyer's 'real motivation' for terminating the contract was that his fiancée did not like the property."[123]

The court first decided the issue of the alleged ambiguity. The court stated that the two provisions (one allowing the buyer the unqualified right to terminate, the other allowing the seller an opportunity to repair the damage and save the agreement) would create an ambiguity if there were no basis to choose between them.[124] However, Oregon has enacted a statute relating to the interpretation of a contract, which states that a handwritten term prevails over a term printed on a form.[125] Accordingly, the court held that the buyer had the right to terminate the agreement on the basis of his disapproval of the pest and dryrot report, and was not required to allow the seller the opportunity to repair the damage.[126]

The court then moved to the issue of whether or not the buyer's termination of the agreement was made in good faith. The sellers again put forth the argument, supported by both the statement of the the buyer's realtor and the deposition testimony of the buyer's fiancée, that the buyer's true reason for rejecting the contract had nothing to do with the report.[127] The buyer countered by arguing that the contract explicitly stated that he could terminate the agreement if he disapproved of the pest report, that he did disapprove of the report, and that the existence of other reasons for his dissatisfaction is not a proper basis upon which to conclude that he violated his good faith obligation.[128]

The court began its discussion by stating that while all contracts contain an implied obligation of good faith and fair dealing, an implied covenant "cannot contradict an express contractual term, nor otherwise provide a remedy for *an unpleasantly motivated act that is permitted expressly by the contract*."[129] The seller did not dispute that the inspection report identified some problems with the house, but argued that the buyer would have been content with the seller's offer to make repairs if his fiancée had liked the house.[130] However, the court determined

[123] *Id.* at 642, 10 P.3d at 328.
[124] *See id.* at 642-44, 10 P.3d at 328-29.
[125] *Id.* at 644, 10 P.3d at 329 (citing OR. REV. STAT. § 42.270 (2003)).
[126] *Id.* at 644, 10 P.3d at 329.
[127] *Id.* at 645, 10 P.3d at 329-30.
[128] *Id.* at 645, 10 P.3d at 330.
[129] *Id.* at 645, 10 P.3d at 330 (emphasis added).
[130] *Id.* at 646, 10 P.3d at 330.

that even if this were true, that fact would not be material.[131] In essence, the court held that once the buyer became dissatisfied with the inspection report he had the unqualified right to cancel the transaction, regardless of what his true motivations were.[132]

Another example of the potential for harsh outcomes under Oregon's currently toothless good faith obligation is provided by *Richardson v. Guardian Life Insurance Co. of America*.[133] The plaintiff, Richardson, was a dentist and sole shareholder in his dental practice.[134] He bought two business overhead expense policies from defendant insurance company Guardian, through defendant agent Bailey.[135] The policies covered business overhead in the event that the plaintiff became disabled.[136] Written in the pamphlet that accompanied the policy was the requirement that in order to qualify for coverage Richardson had to either own twenty percent of the practice or "have a contractual obligation" to pay the overhead expenses.[137] Shortly after purchasing the plan, Richardson's health deteriorated and he entered negotiations to sell all of his stock to one of his employees, Dr. Keys, which would allow her to take over the practice.[138] During negotiations for the sale, Richardson was told by Bailey that the policy might cover the overhead post-sale, and later Bailey told Richardson's attorney that "the policies *would* provide that coverage."[139] Richardson entered into an agreement to sell his stock, including a provision that he would cover the overhead expenses for one year.[140] The insurance company denied coverage a short time after the sale.[141]

Richardson made multiple claims,[142] including assertions of a

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131 *Id.* at 646, 10 P.3d at 330.

132 *Id.* at 647-48, 10 P.3d at 331.

133 Richardson v. Guardian Life Ins. Co. of Am., 161 Or. App. 615, 984 P.2d 917 (1999).

134 *Id.* at 617, 984 P.2d at 919.

135 *Id.* at 617, 984 P.2d at 919-20.

136 *Id.* at 617, 984 P.2d at 920.

137 *Id.* at 618, 984 P.2d at 920.

138 *Id.* at 618, 984 P.2d at 920.

139 *See id.* at 618-19, 984 P.2d at 920.

140 *Id.* at 619, 984 P.2d at 920.

141 *Id.* at 619, 984 P.2d at 920.

142 In addition to his good faith claim against both defendants, the plaintiff alleged breach of contract, estoppel to deny coverage, unfair claim settlement practices, bad faith denial of coverage, intentional infliction of emotional distress against the insurance company, and negligence and intentional infliction of emotional distress against agent Bailey. *Id.* at 619, 984 P.2d at 920.

violation of good faith and fair dealing against both the insurance company and its agent, Bailey.[143] After multiple motions by the defendants, the trial court granted their motions for summary judgment and dismissed all of the plaintiff's claims.[144]

On appeal, the court of appeals first upheld the trial court's ruling that the defendant did not breach the insurance contract by denying coverage.[145] The court determined that the language in a pamphlet stating that the plaintiff would be covered if he had a contractual obligation to pay the overhead expenses (which he did) was insufficient to make the otherwise clear terms of the agreement ambiguous.[146] Once the court determined there was no breach, they cited *Uptown Heights* and quickly affirmed the trial court's dismissal of the good faith claim against the insurance company, stating that "any implied covenant of good faith and fair dealing must be consistent with the terms of a contract, in this case the scope of coverage provided."[147]

The court also affirmed the trial court's decision that Bailey was under no duty to advise the plaintiff about potential coverage problems arising out of the sale, and accordingly affirmed the dismissal of the plaintiff's good faith claim against Bailey.[148] In essence, the court decided that despite the representation of coverage in the insurance pamphlet and the oral representation of coverage by Bailey, as a matter of law there was no breach of good faith in the insurance company's denial of coverage.

A significant feature of both these cases is that the Oregon Court of Appeals upheld a trial court grant of summary judgment in favor of the defendant on the plaintiffs' good faith claim. On review of a grant of summary judgment, the court of appeals must determine whether there is *any dispute on any material fact*, and the record must be reviewed in the light most favorable to the non-moving party.[149] Even with this high standard, because of the narrow application of the good faith obligation, the courts in these cases found, as a matter of law, that the implied obligation of good faith and fair dealing had not been breached.

It is clear from these outcomes that many Oregon courts have

[143] *Id.* at 619, 984 P.2d at 920.
[144] *Id.* at 619, 984 P.2d at 920-21.
[145] *Id.* at 623, 984 P.2d at 922-23.
[146] *Id.* at 623, 984 P.2d at 922-23.
[147] *Id.* at 624, 984 P.2d at 923.
[148] *Id.* at 628-29, 984 P.2d at 925-26.
[149] OR. R. CIV. P. 47(c) (emphasis added).

lost sight of the rule announced in *Best*, and in so doing have abandoned the underlying purpose of the good faith obligation: to provide for equitable and fair outcomes.

III

Are Oregon Courts Revitalizing the Good Faith Obligation?

Justice Unis dissented from the decision in *Pacific First* and wrote a concurring opinion to *Uptown Heights* (only because he agreed that it followed the precedent of the *Pacific First* decision with which he disagreed).[150] He wrote that the holdings in both cases were wrong because they failed to further the purpose of the good faith obligation as expressed in *Best*.[151] He ended his concurrence in *Uptown Heights* by stating: "I am hopeful that, in the future, the court will reconsider its analysis and restore vitality to the implied contractual duty of good faith and fair dealing, consistent with its purpose."[152] There is evidence that some Oregon courts are doing just that. While many cases, including those discussed above, have followed the narrow version of the good faith obligation advanced by the Oregon Supreme Court in *Tolbert* and its progeny, not all cases have resulted in such harsh outcomes. In fact, given some recent cases there appears to be reason to hope that the judiciary will resume its proper role in ensuring that parties to contracts perform in good faith.

A. Brown v. American Property Management[153]

Mr. Brown worked as a leasing agent for American Property Management (APM).[154] Brown had a written commission agreement with APM, which provided that he would be paid on the basis of lease income for office space that he successfully leased.[155] On July 5, 1995, Brown delivered a letter to his super-

150 *See* Uptown Heights Assocs., L.P. v. Seafirst Corp., 320 Or. 638, 655, 891 P.2d 639, 649 (1995) (Unis, J., concurring); Pac. First Bank v. New Morgan Park Corp., 319 Or. 342, 356, 876 P.2d 761, 769 (1994) (Unis, J., dissenting). Justice Fadeley joined Justice Unis in both of these opinions.

151 *Uptown Heights*, 320 Or. at 655, 891 P.2d at 649 (Unis, J. concurring) ("The purpose of the good faith . . . doctrine is to prohibit improper behavior in the performance and enforcement of contracts."(citation omitted)).

152 *Id.* at 655, 891 P.2d at 649 (emphasis added).

153 Brown v. Am. Prop. Mgmt., 167 Or. App. 53, 1 P.3d 1051 (2000).

154 *Id.* at 55, 1 P.3d at 1053.

155 *Id.* at 55, 1 P.3d at 1053.

visor, Vernon, alleging that he had not been paid for the successful completion of several leases.[156] Brown met with Vernon and another person, Tschida, a couple of weeks later to try to resolve the dispute.[157] There was no resolution, and Brown and Vernon agreed that Brown should not continue to work at APM until the dispute could be resolved.[158] Vernon followed up with a letter to Brown confirming that he voluntarily agreed to stop working at APM until the dispute over the commissions was resolved.[159] Another week passed and Brown attempted to return to work, but was told that he could not do so because he was on administrative leave status until his compensation issue was resolved.[160] After more than a month passed without resolution, Mr. Brown filed suit.[161]

After initially discussing Brown's wrongful termination action,[162] the court turned to his breach of contract claims. At issue were commissions from two leases, and for the purposes of the good faith analysis, it is the second lease with Hollywood Legal Services that is relevant. Hollywood was an existing tenant in the property managed by APM.[163] Brown negotiated a new lease with Hollywood, which provided Hollywood with expanded space and a lease extension of thirty-seven months.[164] A letter of intent for this lease was submitted to APM, which refused to approve the transaction.[165] When the approval process dragged on, Reid, a representative of Hollywood, became frustrated and demanded a meeting with Weston, the owner of APM.[166] After the meeting, Reid overheard Weston say, "Why should we pay [Brown] when we've done all the work?"[167] A short time later, APM approved the lease, but without the extension, resulting in a substantial reduction in Brown's commission.[168]

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156 *Id.* at 56, 1 P.3d at 1053-54.
157 *Id.* at 56, 1 P.3d at 1054.
158 *Id.* at 56, 1 P.3d at 1054.
159 *Id.* at 56, 1 P.3d at 1054.
160 *Id.* at 56, 1 P.3d at 1054.
161 *Id.* at 56, 1 P.3d at 1054.
162 The court of appeals affirmed the trial court's decision to grant summary judgment to Mr. Brown on whether he was wrongfully terminated under ORS 652.355. *Id.* at 56-60, 1 P.3d at 1054-56.
163 *Id.* at 62, 1 P.3d at 1057.
164 *Id.* at 62, 1 P.3d at 1057.
165 *Id.* at 62, 1 P.3d at 1057.
166 *Id.* at 62, 1 P.3d at 1057.
167 *Id.* at 62, 1 P.3d at 1057.
168 *Id.* at 62, 1 P.3d at 1057.

Brown alleged that APM acted in bad faith by refusing to approve the transaction he had negotiated.[169] At trial, APM moved for a directed verdict, arguing they had authority under their contract with Brown to reject lease proposals.[170] The trial court denied their motion, and a subsequent jury trial resulted in a verdict for Brown.[171]

APM appealed, contending that its contract provided them with discretion, and Brown was not entitled to any pay for leases APM did not approve.[172] The court stated that the law imposes a duty of good faith into all contracts in order to facilitate the contract in furtherance of the agreed-upon terms or the reasonable expectations of the parties.[173] The court then stated that "even in cases in which contractual obligations are conditioned on personal satisfaction, the right to disprove must be exercised in good faith."[174] The court concluded that Weston's comment was sufficient evidence of bad faith to uphold the trial court's denial of APM's motion for directed verdict.[175]

Brown is significant because it appears to break with the holding in *Tolbert*, and instead seems to follow the prior good faith obligation as articulated by the court in *Best*. While *Tolbert* held that a party exercising its discretion under the express terms of a contract had satisfied its good faith obligation as a matter of law, in *Brown* the court held otherwise, limiting APM's apparently unlimited discretion.

B. Cantua v. Creager[176]

The *Cantua* case involved multiple plaintiffs who brought multiple claims related to the actions of the defendant, Creager. Creager was the owner of Visual Changes Salon.[177] Creager's constant sexual and physical harassment and assault of employees, customers, and contract workers created an unpleasant work environment.[178] Among the many plaintiffs was King,[179] a make-

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169 *Id.* at 62, 1 P.3d at 1057.
170 *Id.* at 62, 1 P.3d at 1057.
171 *Id.* at 62, 1 P.3d at 1056.
172 *Id.* at 62, 1 P.3d at 1056.
173 *Id.* at 63, 1 P.3d at 1056.
174 *Id.* at 63, 1 P.3d at 1056.
175 *Id.* at 63, 1 P.3d at 1056.
176 Cantua v. Creager, 169 Or. App. 81, 7 P.3d 693 (2000).
177 *Id.* at 83, 7 P.3d at 695.
178 *Id.* at 84-85, 7 P.3d at 696.
179 *Id.* at 83, 7 P.3d at 695.

up tattooist who arranged to work out of the salon, in return for paying Creager twenty percent of her fees.[180] The informal lease agreement between the two was oral and was never reduced to writing.[181] Since the evidence did not show that King was a victim of Creager's unlawful touching, King's claims centered on the hostile workplace that was created by Creager's behavior towards others.[182] The trial court dismissed King's claims.[183]

The court of appeals affirmed a number of the dismissals based upon the fact that King did not meet the definition of "employee."[184] The court then turned to King's contract claim, which alleged that Creager failed to comply with the terms of the parties' informal lease agreement.[185] The court concluded that King presented sufficient evidence to reach a jury on the issue of Creager's alleged breach of good faith and fair dealing, and accordingly reversed the dismissal of the claim.[186]

The significance of *Cantua* is found in the cases that the court cited in laying out the good faith standard. The court cited *Perkins v. Standard Oil*[187] and *Best.*[188] Nowhere to be found in the decision was the narrow definition of good faith advanced in *Tolbert*.

C. Furrer v. Southwestern Oregon Community College[189]

Furrer v. Southwestern Oregon Community College was a class action brought by employees of Southwestern Oregon Community College (SOCC).[190] The plaintiffs alleged that in May 1987 SOCC adopted a policy offering benefits to certain early retiring employees if the school board determined that early retirement would benefit both the school and the employee.[191] In July 1997, the policy was modified to change some of the eligibility provisions.[192] This new policy allowed any employee who was (1)

180 *Id.* at 89, 7 P.3d at 699.
181 *Id.* at 89, 7 P.3d at 699
182 *Id.* at 89-90, 7 P.3d at 699.
183 *Id.* at 90, 7 P.3d at 699.
184 *Id.* at 94-95, 7 P.3d at 701-02.
185 *Id.* at 95, 7 P.3d at 702.
186 *Id.* at 97, 7 P.3d at 703.
187 Perkins v. Standard Oil, 235 Or. 7, 383 P.2d 107 (1963).
188 Best v. U.S. Nat'l Bank of Or., 303 Or. 557, 739 P.2d 554 (1987).
189 Furrer v. Sw. Or. Cmty. Coll., 196 Or. App. 374, 103 P.3d 118 (2004).
190 *Id.* at 376, 103 P.3d at 119.
191 *Id.* at 376, 103 P.3d at 119.
192 *Id.* at 376, 103 P.3d at 119.

hired before July 1997; (2) had ten years of accumulated service; (3) was fifty-five years old; and (4) was eligible for retirement under the state PERS, to request early retirement.[193] The determination of whether an employee was given early retirement was then in the hands of the SOCC board.[194] According to the plaintiffs, under the 1997 policy, the board regularly determined that it was mutually beneficial to approve employee requests for early retirement.[195] The policy was revised again on March 1, 2002.[196] The revision changed both the eligibility requirements for early retirement and the scope of the benefits awarded to employees who retired early.[197]

The plaintiffs alleged, *inter alia*, that the 2002 changes to the policy amounted to a breach of contract by SOCC.[198] The trial court dismissed the plaintiffs' claims for failure to state a claim because the court was "convinced that there [was] no legal theory that would support plaintiffs' argument that a contract could have been created under the facts they allege."[199] The plaintiffs then appealed from the judgment of dismissal.[200]

The Oregon Court of Appeals first addressed the plaintiffs' assertion that it was an error to dismiss their breach of contract claim. The plaintiffs argued that the pre-2002 agreement gave rise to contractual obligations that SOCC could not unilaterally modify.[201] They claimed that the "mutuality of benefit" provision in the policy did not render the board's obligation to consider requests illusory because in its application the board was subject to the good faith obligation.[202] Accordingly, the plaintiffs argued that the discretion to approve or disapprove requests was not unfettered.[203] SOCC responded by arguing that the pre-2002 policy had no contractual force because its board had total discretion and that discretion made the promise illusory.[204]

The court of appeals determined that the dispositive issue was

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193 *Id.* at 376, 103 P.3d at 120.
194 *Id.* at 376-77, 103 P.3d at 120.
195 *Id.* at 377, 103 P.3d at 120.
196 *Id.* at 377, 103 P.3d at 120.
197 *Id.* at 377, 103 P.3d at 120.
198 *Id.* at 378, 103 P.3d at 120-21.
199 *Id.* at 379, 103 P.3d at 121.
200 *Id.* at 379, 103 P.3d at 121.
201 *Id.* at 379, 103 P.3d at 121.
202 *Id.* at 379, 103 P.3d at 121.
203 *Id.* at 379, 103 P.3d at 121.
204 *Id.* at 379, 103 P.3d at 121.

whether SOCC had unlimited discretion to deny early retirement under the policy, which would make any obligation illusory.[205] The court quoted *Corbin on Contracts* and stated that a promise is not illusory when the promisor lacks an unconditional power to refuse to perform.[206] The court then cited its earlier decision in *Wyss v. Inskeep* and stated that if an employer's discretion includes the power to deny a benefit, its decision to do so must be made in good faith.[207]

The court's next step, however, is something of a surprise given the limiting of good faith under *Tolbert*. The court held that despite the board's apparently unlimited discretion under the policy, the good faith obligation did in fact provide a limit to that discretion, and that limit was enough to keep the promise from being illusory.[208] In so holding, the court cited *Best*, without any reference to *Tolbert* and its progeny.[209]

Conclusion

The Oregon Supreme Court announced that the purpose of the good faith doctrine was to prohibit and provide remedy for improper behavior in the performance and enforcement of contracts.[210] Unfortunately, through a string of narrowing decisions in the 1990s, the court constricted the good faith obligation to the point that it has become almost completely ineffective in accomplishing its rightful purpose: securing equitable and just outcomes. Not all hope for a return of the doctrine is lost, however. Recent decisions from the Oregon Court of Appeals have re-

[205] *Id.* at 380, 103 P.3d at 121.

[206] *Id.* at 380, 103 P.3d at 121.

[207] *Id.* at 380-81, 103 P.3d at 122.

[208] *Id.* at 381, 103 P.3d at 122. Because the promise was meaningful, the court reversed the trial court's dismissal of the breach of contract claim. *See id.* at 381, 103 P.3d at 122.

[209] *Id.* at 381, 103 P.3d at 122. In comparing the *Furrer* decision with the decision in *Richardson*, it appears that the courts are not clear as to the status of good faith in Oregon. *See supra* notes 133-149 and accompanying text. The same court of appeals judge is the author of both opinions, yet the good faith obligation is given two different treatments. In *Richardson*, the good faith doctrine is not allowed to place any limitation on the defendant's actions under the terms of the contract and the case cited is *Uptown Heights*. Richardson v. Guardian Life Ins. Co. of Am., 161 Or. App. 615, 624, 984 P.2d 917, 923 (1999). However, as is mentioned in the text accompanying this note, in *Furrer*, the good faith doctrine is invoked to place a limitation on the party involved, and the case cited is *Best*. It is likely time for the Oregon Supreme Court to reconsider the good faith obligation and clarify the status of the doctrine.

[210] Best v. U.S. Nat'l Bank of Or., 303 Or. 557, 562, 739 P.3d 554, 557 (1987).

verted to the previous formulation of good faith, and have moved back toward the broad obligation announced in *Best*.

Will more courts follow this lead? This is not only a question, but also a challenge. A revival of the good faith doctrine will only be successful if led by the courts. The rule announced in *Best* is more consistent with the purpose of the good faith obligation's inclusion in the U.C.C. and the Restatement (Second), and is more consistent with the thirty years of Oregon precedent that the *Tolbert* decision ignored. It is time for Oregon courts to return to that doctrine, and in the words of former Justice Unis, "[R]estore vitality to the implied contractual duty of good faith and fair dealing, consistent with its purpose."[211]

[211] Uptown Heights Assocs., L.P. v. Seafirst Corp., 320 Or. 638, 656, 891 P.2d 639, 649 (1995) (Unis, J., concurring).