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The Paradox That Is Georgia's Implied Covenant of Good Faith and Fair Dealing

While Georgia courts hold that a party exercising an express contract right must do so in good faith, those same courts hold that a party exercising an express contract right cannot breach the implied covenant. How can those two statements coexist?

BY J. MATTHEW MAGUIRE JR.

We learned in law school that a duty of good faith and fair dealing is implied in nearly all contracts. This is an easy concept to grasp in the abstract, but not so easy to apply in the real world because of confusing and sometimes conflicting case law. While Georgia courts hold that a party exercising an express contract right must do so in good faith, those same courts hold that a party exercising an express contract right cannot breach the implied covenant. How can those two statements coexist? Similarly, if, as the cases instruct, one cannot breach an implied duty without also breaching an express duty, how is the implied covenant not a legal redundancy?

This article seeks to clarify this confusing area of the law by outlining at a high level the general rule in Georgia that a duty of good faith is implied in all contracts; exploring the exception to the general rule applicable to contracts that grant a party sole or absolute discretion; examining the paradox that a party exercising an express contractual right must use good faith but that a party exercising an express contractual right can never be guilty of bad faith; attempting to reconcile the leading cases that give rise to this paradox and offering an alternative and more workable approach to analyzing these types of cases; and finally, concluding with a brief explanation for why an implied covenant claim is still a valuable tool for litigators despite some limitations in its substantive reach.

The Contours of Implied Covenant of Good Faith and Fair Dealing

The concept of an implied duty of good faith and fair dealing seems to have first arisen in Georgia in the early 20th century. In *Palmer Brick Co. v. Woodward*, the Supreme Court of Georgia ruled that where a mining lease's only compensation to the lessor was a royalty, the law implied a duty on the lessee to actually mine the property within a reasonable time; otherwise, the lessor would receive no benefit.[1] The modern rule is often stated as follows: "where the manner of performance

is left more or less to the discretion of one of the parties to the contract, he is bound to the exercise of good faith."[2]

The implied covenant does not block the use of terms that actually appear in a contract but merely fills gaps in a contract to effectuate the parties intent.[3] This is because "[a]n implied term in an agreement exists where it is reasonable and necessary to effect the full purpose of the contract and is so clearly within the contemplation of the parties that they deemed it unnecessary to state."[4] Other courts appear less willing to fill gaps, especially when it is a sophisticated party that is seeking relief. In *Sosebee v. McCrimmon*, for example, the Court of Appeals of Georgia rejected an attorney's attempt to impose a lien on his former client's recovery after the attorney had terminated the representation in a contingent fee matter.[5] The court held that "[t]his Court will not revise this agreement to fill a contractual void under the pretext of contract construction. Courts are not at liberty to revise contracts while professing to construe them."[6] In keeping with the gap-filler model, "there is no independent cause of action for violation of the covenant apart from breach of an express term of the contract."[7] Thus, allegations of a party's improper motive are irrelevant without a breach of an express contract provision.[8]

Most frequently, the implied covenant acts as a guardrail that keeps the parties operating within a zone of reasonableness and requires them to "refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[9] Less frequently, though, the implied covenant can also impose an affirmative obligation to act because "one who undertakes to accomplish a certain result agrees by implication to do everything to accomplish the result intended by the parties."[10]

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The Absolute Discretion Exception to the General Rule

While it is an "overarching presumption" that a duty of good faith is implied in all contracts, "[t]he exception to this general rule occurs only if the contract expressly (not impliedly) provides otherwise."[11] This means that the covenant does not apply if the contract grants a party absolute or sole discretion to take or refrain from taking some action. The best case to illustrate this principle is *Hunting Aircraft, Inc. v. Peachtree City Airport Authority*.[12] Hunting operated an aviation maintenance facility on land owned by the Peachtree City Airport Authority. Because it needed to cross the Authority's property to access the airport runways, Hunting entered into a written contract with the Authority for a 25-year easement that could be renewed for another 25 years with both parties' consent, "which shall not be unreasonably or arbitrarily withheld."[13] Importantly, the agreement also said that the Authority could declare Hunting in default if it assigned its easement rights without the Authority's prior written consent.[14]

When the Authority refused without explanation to consent to Hunting's proposed assignment to a third party, Hunting sought a declaration that the Authority was breaching the implied covenant by attempting to force Hunting into a default so it could either secure the property for itself or extract additional fees from Hunting.[15] In response, the Authority urged the court to find that the implied

covenant did not apply because absolute discretion to withhold approval of the assignment could be "inferred" from the terms of the contract.[16] The court rejected the Authority's invitation, ruling that absolute discretion cannot be inferred but must be granted expressly by the contract terms.[17] The court was clearly concerned that a contrary ruling would allow the exception to swallow the rule.

> The granting of discretion to a party triggers a duty to act in good faith; it does not eviscerate it (absent express language so stating). As stated by then Circuit Judge [Antonin] Scalia, "to say that every expressly conferred contractual power is of this nature is virtually to read the doctrine of good faith (or of implied contractual obligations and limitations) out of existence."[18]

The court then held that a jury must decide whether the Authority's conduct (if proven) could constitute a breach of the implied covenant:

> A finder of fact would be authorized to find that denying consent to the proposed transaction on the basis that the Authority hoped to secure the property for itself or hoped to extract additional fees from Hunting constituted unreasonableness or failure to act in good faith.[19]

While Georgia courts are fairly consistent in refusing to imply a duty of good faith when a party has absolute discretion, the decisions are not uniform. In *Capital Health Mgmt. Grp., Inc. v. Hartley*, for example, Hartley's shareholder agreement with Capital Health required the company to purchase her shares upon a change in control if she was either still employed by the company or if her employment had previously been terminated due to disability.[20] Importantly, the agreement granted the Capital Health board "sole discretion" to determine what constitutes a disability."[21] A change in control occurred after Hartley's separation so her buyout rights depended on whether her separation was due to disability or a company reorganization.[22] Citing *Hunting Aircraft* and evidence that Hartley was terminated because she was disabled, the Court of Appeals ruled that a jury must decide whether the company's refusal to purchase Hartley's shares was "out of an improper pecuniary motive."[23] In so ruling, the Hartley court ignored the statement in *Hunting Aircraft* that a party's good or bad faith is irrelevant if the contract gives them sole discretion to act.[24] There is no way to reconcile *Hartley* with *Hunting Aircraft* or, for that matter, with binding Supreme Court of Georgia precedents such as *Charles v. Leavitt* that also observe the sole discretion exception.[25]

There are also a handful of decisions that take a different route but still arrive at the same conclusion reached by the court in *Hartley* by requiring good faith performance because if "sole discretion" really meant what it said, the contract would fail for lack mutuality. In *Newport Timber Corp. v. Floyd*, for example, a two-year logging contract provided that if weather conditions prevented "practical timber harvesting operations hereunder," the contract shall be extended by the number of days equal to the bad weather days with the grantee (Newport) having "the uncontrolled and absolute right to determine when, as and if weather conditions" justify the extension.[26] The grantor claimed the contract had expired and sought a preliminary injunction when Newport threatened to reenter the property to continue harvesting.[27] Notwithstanding the "uncontrolled and absolute discretion" term, the court ruled that Newport was still required to act "in a sound and honest manner and in good faith," because any other construction would render the contract unenforceable for lack of consideration.[28] Although the court did not say so, it seems to have applied the commonly cited rule of contract construction that "[t]he construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part."[29]

The Paradox That a Party Exercising a Contract Right Must Use Good Faith but That a Party Exercising a Contract Right Can Never Be Guilty of Bad Faith

Georgia's implied covenant decisions paradoxically hold that a party exercising an express contractual right must do so in good faith but that a party can never be found to have acted in bad faith if they are exercising an express contractual right. The best way to understand this paradox is to analyze the leading cases on each end of the spectrum. The *Hunting Aircraft* case (discussed in detail above) is one of the best examples of the former category holding that a party exercising an express contract right—in that case to approve or not approve a proposed assignment—must do so in good faith.[30]

Another example can be found in *ULQ, LLC v. Meder*.[31] The ULQ operating agreement gave the company manager the right to terminate company officers "either with or without cause … whenever in [the manager's] judgment the best interests of the Company will be served thereby."[32] If the officer is also a member of the company, he or she must sell the membership interest back to the company.[33] When the manager (who was also the majority owner) terminated Meder for alleged abusive conduct, Meder countered that the manager's true motive was to benefit himself by allowing ULQ to buy Meder's interest "for nothing, at a time when the company was about to take off financially."[34] Citing *Hunting Aircraft*, the court held that a jury must decide whether the manager had acted reasonably and in good faith.[35]

The Supreme Court of Georgia employed similar reasoning in a foreclosure case called *West v. Koufman*.[36] In that case, Koufman bought a tract of land from West and executed a security deed that allowed West to accelerate the debt and

foreclose on the property if liens are filed against the property.[37] When West initiated foreclosure proceedings after four liens materialized, Koufman sought (and obtained) a preliminary injunction by claiming that West had actively solicited the liens just so he could foreclose on the property.[38] The Court affirmed, holding that Koufman's allegation, if proven, could constitute a breach of the duty of good faith and fair dealing.[39]

In sum, these three cases—*Hunting Aircraft*, *ULQ* and *West*—found viable implied covenant claims based on allegations that a party acted in bad faith when exercising express contract rights. Compare these results with *Martin v. Hamilton State Bank*, which also involves the exercise of an express contract right in a manner alleged to be in bad faith, but yields a different result.[40] In *Martin*, the borrower defaulted on bank notes that allowed the bank to pursue various enumerated default remedies including pursuing collection or negotiating with the buyer to restructure the debt.[41] The notes stated that the bank had discretion—but not sole discretion—to choose its remedies, and that the selection of one remedy did not foreclose any other.[42] When the bank chose to pursue collections instead of restructuring, the borrower cried foul.[43]

In ruling for the bank,[44] the court in *Martin* borrowed this colorful language from the Seventh Circuit:

> *Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of "good faith."* Although courts often refer to the obligation of good faith that exists in every contractual relation, this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document. "Good faith" is a compact reference to an implied undertaking not to take opportunistic advantage *in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.* When the contract is silent, principles of good faith ... fill the gap. They do not block use of terms that actually appear in the contract.[45]

Five years later, the Court of Appeals of Georgia relied heavily on *Martin* to find no breach of the implied covenant in *Brazeal v. NewPoint Media Group, LLC*.[46] Brazeal's employment agreement was for a one-year term that would automatically renew unless either party provided 90 days' notice of their intent to not renew.[47] The contract also authorized NewPoint to terminate "at any time for any reason or for no reason whatsoever, with or without Cause," but a termination without cause entitled Brazeal to a nine-month severance benefit.[48] Brazeal claimed NewPoint's decision to not renew the contract violated the implied covenant because it deprived him of the severance benefit.[49] The Court of Appeals ruled for NewPoint, holding that "[t]here can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him the right to do."[50]

An Attempt to Reconcile the Paradoxical Holdings

The results reached in all of these cases—*Hunting Aircraft*, *ULQ* and *West*, on the one hand, and *Martin* and *Brazeal*, on the other—are difficult to reconcile. All five cases involve allegations that a party exercised an express contract right in bad faith, and yet they reach different results. The court in *Brazeal* attempted to distinguish *Hunting Aircraft* as follows:

> In *Hunting Aircraft* ..., whether to consent to the assignment was subject to an implied obligation of good faith so as not to *unreasonably* deprive the party seeking to assign his ability to do so, or allow the authority to declare the other party in default merely by withholding its consent *for no good reason.*
>
> Here, the Agreement provides several ways in which the employment relationship could end and did not require either party to pick the method that would be most advantageous, or less damaging, to the other party. This was the Agreement negotiated by the parties, and the parties were free to exercise their discretion in deciding which method to use so long as they otherwise complied with the terms of the Agreement respecting their choice. ... *There can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly allow.*[51]

In essence, the court's distinction was that while both the Authority and the bank exercised express contract rights, the Authority did so in an unreasonable manner while the bank did so in a reasonable manner. This is not helpful for several reasons. First, conduct that is unreasonable is merely bad faith conduct by a different name. Second, some of these cases were decided as a matter of law even though a jury must generally decide whether a party has acted reasonably or unreasonably (or, for that matter, in good faith or in bad faith).[52] This is not to say that the courts were wrong to grant summary judgment in *Martin* and *Brazeal*, but what happens in a closer case like *280 Partners, LLC v. Bank of North Georgia*?[53] There, the plaintiff borrower alleged that the defendant bank refused to extend a loan's maturity date based on the borrower's failure to make the final interest payment after being told by the bank to *not* make that payment.[54] The court affirmed summary judgment to the bank because the terms of the note did not require the bank to extend the maturity date.[55] The only real distinction between *280 Partners*, on one hand, and *Hunting Aircraft* and *ULQ* on the other, is that the defendant's behavior in the former case was not perceived by the court to be as egregious as the defendants' behavior in the latter two cases. This is not a sound basis for granting summary judgment.

Additionally, focusing on whether a party acted unreasonably (or in bad faith) does not account for those decisions that implied a duty of good faith without any evidence of wrongful conduct. In *Myung Sung Presbyterian Church v. North American*

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Association of Slavic Churches & Ministries, for example, one church leased land to another for the purpose of allowing the lessee to erect a temporary modular building on the land.[56] This required the lessor to obtain a zoning variance, but when the lessor failed to renew the variance several years later, the court found for the lessee without even inquiring into whether the lessor's failure was inadvertent or intentional. It was enough that the failure deprived the lessee of the purpose of the contract:

> The express lease provisions imposing a duty on NAASCM to remove the modular building from the property if at any time the City of Norcross required removal of the building is not inconsistent with an implied duty for MSPC to apply for a zoning variance. This provision expressed an understanding that the lease did not contain a promise that it would run for the full term because there was no guarantee that the City would grant an application for another zoning variance. Rather, the lease contained an implied requirement that MSPC would apply for and make a good faith effort to obtain a variance from the City.[57]

Focusing on the wrongfulness of the conduct, as most courts generally do, also creates a conflict between two rules that are invoked whenever summary judgment is granted in an implied covenant case. The first rule is that "[t]here can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him a right to do."[58] The second rule, which is an outgrowth of the first, is that if a party is exercising a right expressly granted under the contract, the party's motive for doing so is irrelevant.[59] In practical terms, the cases that keep the issue from the jury—like *Martin*, *Brazeal* and *280 Partners*—explain that they did so because alleged breaching party was exercising an express contract right; whereas the cases that allow the case to go to the jury—like *Hunting Airport*, *ULQ* and *West*—generally follow the rule that a party exercising an express contract right must do so in good faith. But if the party cannot breach the implied covenant while exercising an express contract right, how can the party's lack of good faith ever come into play as it did in *Hunting Aircraft*, *ULQ* and *West*? This is difficult terrain for the practitioner to navigate.

The key to smoothing out these inconsistencies may lie in a statement from the *Martin* decision (and repeated in *Brazeal* and elsewhere) that good faith means not taking "opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties."[60] This approach to determining whether terms should be implied in a contract marries the parties' contractual intent with the concept of foreseeability. Thus, the borrower in *Martin* cannot claim he was taken advantage of when the bank elected to sue him because the express terms of the note made this foreseeable and within the parties' contemplation. No matter how malevolent the bank's motive, it could not be liable for doing what had been contemplated all along and addressed expressly in the contract.

If the courts in *Hunting Aircraft*, *ULQ* and *West* had focused less on the parties' motive and more on whether the conduct could have been reasonably anticipated at the time the contract was drafted, the results would still have been the same. In *Hunting Aircraft*, the court could have focused on how the Authority's decision on the proposed assignment deprived Hunting of its expectancy in a long-term contract. In *ULQ*, the court could have focused on the unforeseen deprivation of plaintiff's ownership interest in the company, and the *West* court would have focused on the unforeseen deprivation of the borrower's equity in the secured property occasioned by the lender's solicitation of third-party liens. This approach would avoid altogether the tension between the rule that a party must exercise express contractual rights in good faith on one hand, and the rule that a party cannot be guilty of bad faith if they are exercising an express contract on the other hand.

Focusing on the parties' contractual intent will also promote uniformity in the decisions because it removes subjectivity from the equation. This is because a party's contractual intent is judged objectively based on the words that appear within the four corners of the agreement and the surrounding circumstances.[61] Thus, a jury was not needed to determine the implied covenant claims in *Martin* and *Brazeal* because those defendants exercised their contractual rights in precisely the manner intended (as reflected in the express terms of the agreement), but a jury was needed in *Hunting Aircraft*, *ULQ* and *West* because those defendants exercised express contractual rights in an unforeseen manner.[62] This seems to be a much better and more workable approach than the patchwork of conflicting rules that the courts are currently applying.

Conclusion

This article started as others have in the past, with me throwing up my hands in frustration because I cannot make sense of a particular area of the law. Having read and re-read Georgia's leading implied covenant cases and still not finding much of a common thread running through them, I return to the question posed in the introduction because it is much easier to answer: What does the implied covenant offer to a plaintiff that cannot otherwise be gained by showing a breach of an express term in the contract? First, depending on the court's approach, a party pursuing an implied covenant claim may have more latitude in discovery. A party's motivation for breaching a contract is always fair game under O.C.G.A. § 13-6-11, but when the reasons why a party exercised an express contractual right become relevant, a broader scope of discovery could require disclosure of some helpful internal communications. Second, accusing a party of breaching the duty of good faith and fair dealing sounds much more impactful than

accusing them of breaching the contract. Third, evidence of bad motive in a close case may be just enough to sway certain courts and juries into finding a breach. In the meantime, perhaps the Supreme Court of Georgia will finally step in to clarify the law of implied covenants. ●

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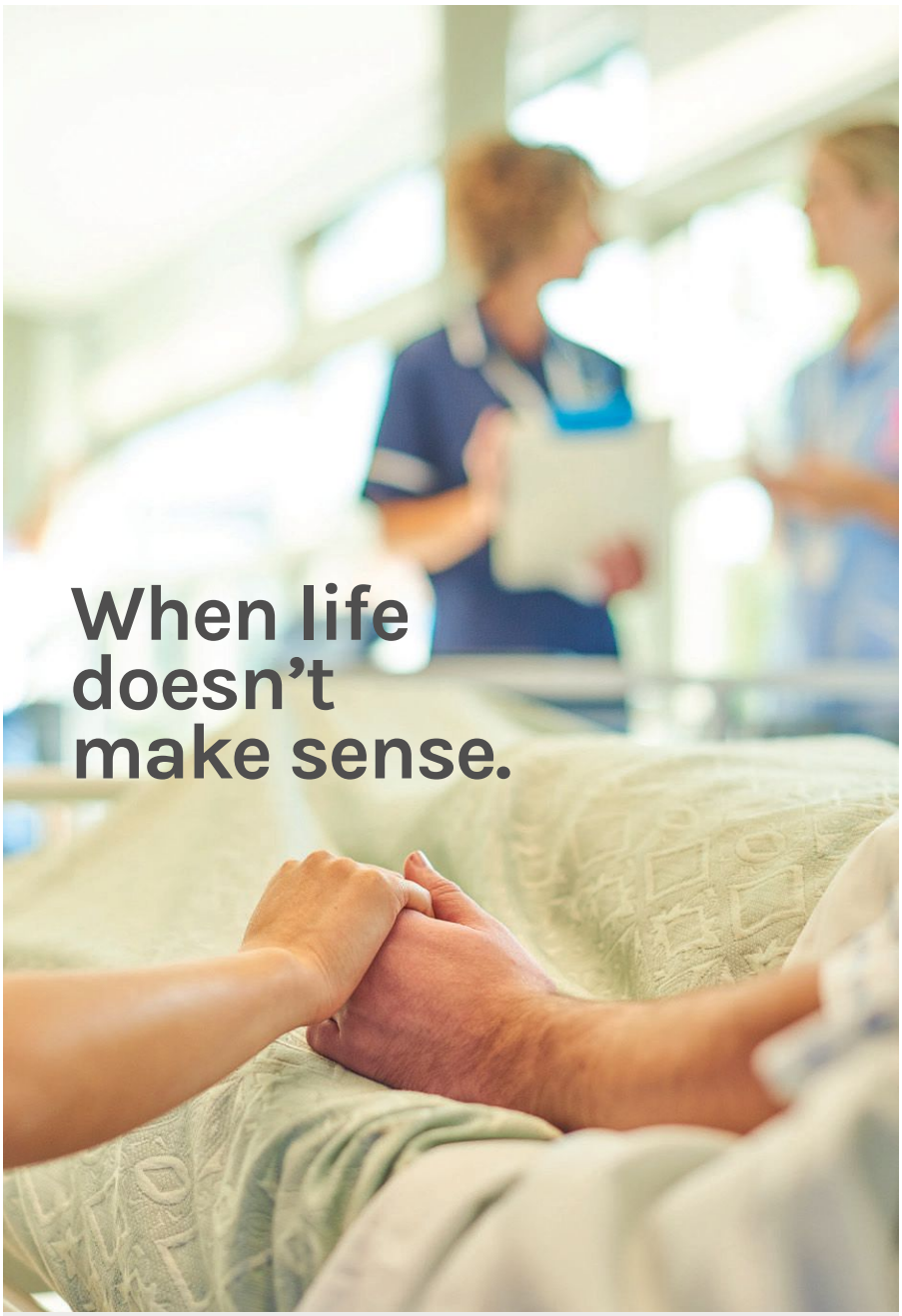
Endnotes

1. 138 Ga. 289 (1912) ("But surely it was never in the contemplation of the parties to so important a contract as this that the lessee could use the leased premises, with houses, wells, railroad, and all the other privileges granted, and arbitrarily refuse to mine the clay for the purpose of making brick, and thus defeat the plaintiffs in their right to collect any of the rent at all."). The implied covenant is codified in the Uniform Commercial Code, O.C.G.A. § 11-1-203, but this statute is only applicable to contracts involving the sale of goods.
2. Hunting Aircraft, Inc. v. Peachtree City Airport Auth., 281 Ga. App. 450, 452 (2007) (emphasis removed).
3. Martin v. Hamilton State Bank, 314 Ga. App. 334, 335-336 (2012) ("When the contract is silent, principles of good faith ... fill the gap. They do not block use of terms that actually appear in the contract.) (*quoting* Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357(III) (7th Cir.1990) (citations omitted).
4. Fisher v. Toombs County Nursing Home, 223 Ga. App. 842, 845 (1996) (nursing home contract implied duty on nursing home to inform patient's wife of his discharge). If a term is not in a contract, the court must determine whether the omitted term is "absolutely necessary" to carry out the parties' intent:

   > [T]he introduction of an implied term into the contract of the parties can only be justified when the implied term is not inconsistent with some express term of the contract and where there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that it is absolutely necessary to introduce the term to effectuate the intention of the parties. Consequently, though courts are generally reluctant to make contracts for the parties, they will imply promises or duties when justice, good faith, or fairness so demand. Higginbottom v. Thiele Kaolin Co., 251 Ga. 148, 149 (1983).

5. 228 Ga. App. 705, 706 (1997) (while fee agreement gave client the right to terminate the representation and created a lien in favor of the attorney in that event, agreement did not address what was to happen if the attorney withdrew representation and the court refused to imply terms that had not been contemplated by the parties).
6. The Sosebee court might have reached a different result if the party seeking relief had not been the attorney who drafted the agreement because the more sophisticated the party, the more likely it is that they will be held to the bargain they made. *See, e.g.*, WirelessMD, Inc. v. Healthcare.com Corp., 271 Ga. App. 461, 467 ("The choice lies between implying a promise to correct an apparent injustice in the contract [or] holding the parties to the bargain which they have made. The latter alternative has especial force where the bargain is the result of elaborate negotiations in which the parties are aided by counsel, and in such circumstances it is easier to assume that a failure to make provision in the agreement resulted not from ignorance of the problem, but from an agreement not to require it.") (*quoting* Emerson Radio Corp. v. Orion Sales, 253 F.3d 159, 168 (3d Cir. 2001)).
7. *Id.* at 468 ("The implied covenant of good faith modifies, and becomes part of, the provisions of the contract itself. As such, the covenant is not independent of the contract.").
8. Augustin v. Walker Lake Emergency Grp., PC, 364 Ga. App. 856, 863 (2022) (evidence of retaliatory termination irrelevant because employer had the right to terminate contracts without cause).
9. Wanna v. Navicent Health, Inc., 357 Ga. App. 140, 154 (2020). In West v. Koufman, 259 Ga. 505, 505 (1989), for example, the court enjoined a lender from foreclosing on property despite security agreement giving him that right if liens are filed against the property because borrower presented evidence that the lender had solicited third parties to file liens in order to pave the way for foreclosure. *See also* Southern Business Machines of Savannah, Inc. v. Norwest Financial Leasing, LLC, 194 Ga. App. 253 (1990) (assignee of rents had express right to contact lessees to collect rent, but violated the implied covenant by making over 50 harassing calls to one lessee thus prompting the lessee to terminate the lease and obligating the assignor to make up the shortfall in collections).
10. Wanna, 357 Ga. App. at 154 (express duty provide D&O coverage to physician is complemented by an implied duty to inform physician of the basis for a regulatory compliance issue raised against him so that he could avail himself of the D&O coverage). *See also* Camp v. Peetluk, 262 Ga. App. 345, 350 (2003) (parties must "perform their promises and provide such cooperation as is required for the other party's performance"); Myung Sung Presbyterian Church v. North American Association of Slavic Churches & Ministries, Inc., 291 Ga. App. 808 (2008), disapproved on other grounds by George v. Hercules Real Estate Svcs., Inc., 339 Ga. App. 843 (2017) (When the purpose of a long term lease was



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to enable lessee to erect a temporary modular building on the leased premises, the lessor violated the implied covenant by failing years later to seek a new zoning variance to permit the building to remain on the premises).

11. Hunting Aircraft, Inc., 281 Ga. App. at 453.
12. *Id.*
13. *Id.* at 451.
14. *Id.*
15. *Id.*
16. *Id.* at 453. The Authority's specific argument was that since the assignment clause did not contain limiting language that consent "shall not be unreasonably or arbitrarily withheld" as was found elsewhere in the contract, the parties intended for the Authority to have sole discretion to withhold consent. Id.
17. *Id.*
18. *Id.* at 454 (*citing* Tymeshare, Inc. v. Covell, 727 F.2d 1145, 1153-54 (D.C. Cir. 1984) and Rhode Island Charities Trust v. Engelhard Corp., 109 F. Supp. 2d 66 (D.R.I. 2000), aff'd, 267 F.3d 3 (1st Cir. 2001) (applying Tymeshare's analysis to Georgia law)).
19. *Id.*
20. 301 Ga. App. 812 (2010).
21. *Id.* at 814.
22. *Id.* at 816.
23. *Id.* at 820.
24. Hunting Aircraft, 281 Ga. App. at 453.
25. 264 Ga. 160, 160 (1994) ("Charles' evaluation of his financial condition was left to his unfettered control and discretion and need not have been exercised in good faith."). *See also* Faith Enterprises Grp., Inc. v. Avis Budget Grp., Inc., No. 1:11-CV-3166-TWT, 2012 WL 1409403, at *7, n.2 (N.D. Ga. Apr. 20, 2012) (refusing to follow Hartley because it conflicts with the Supreme Court's holding in Charles v. Leavitt.).
26. 247 Ga. 535, 536 (1981).
27. *Id.*

28. *Id.* at 540. *Accord* Tyson v. McPhail Properties, Inc., 223 Ga. App. 683 (1996) (agreement that gave McPhail the absolute discretion to approve or disapprove of Tyson's sale of property still required McPhail to act reasonably; otherwise, the provision requiring the parties to split the profits from such sale would be rendered meaningless).
29. O.C.G.A. § 13-2-2(4).
30. 281 Ga. App. at 453.
31. 293 Ga. App. 176 (2008).
32. *Id.* at 177.
33. *Id.*
34. *Id.* at 180.
35. *Id.* ULQ may stand on slightly different footing than *Hunting Aircraft* because the *ULQ* contract required that terminations be in the best interest of the company. 293 Ga. App. at 178 ("The distinguishing feature in the agreement at issue, however, is that although ULQ could terminate Meder without cause, ULQ could only do so whenever in its manager's judgment the best interests of the company would be served thereby."). The business judgment rule would require judicial deference to this decision making process, but there would still have to be evidence that the decision was made in a deliberative way. Fed. Deposit Ins. Corp. v. Loudermilk, 295 Ga. 579, 581 (2014). It was appropriate for the court to send this issue to the jury given the conflict in the evidence between company's stated reason for termination and the employee's evidence of the true reason for termination.
36. 259 Ga. at 505.
37. *Id.*
38. *Id.*
39. *Id.*
40. 314 Ga. App. 334 (2012).
41. *Id.* at 336.
42. *Id.*
43. *Id.* at 334.
44. *Id.* at 337. The court relied on Automatic Sprinkler Corp. of Am. v. Anderson, 243 Ga. 867, 868 (1979), which held: "[t]here can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him the right to do." In fact, courts will not even question the motive of a party that has exercised an absolute right under a contract. *Id.* at 869 (*citing* Schaeffer v. King, 223 Ga. 468, 470 (1967)). The corollary to this rule is equally prevalent in Georgia case law: "[t]here is no independent cause of action for violation of a duty of good faith and fair dealing in the performance of a contract apart from breach of an express term of the contract." Bankston v. RES-GA Twelve, 334 Ga. App. 302, 304 (2015).
45. *Id.* at 335-36 (*quoting* Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990) (emphasis added).
46. 340 Ga. App. 689 (2017) (physical precedent only).
47. *Id.* at 689.
48. *Id.* at 690-691.
49. *Id.*
50. *Id.* at 693.
51. 340 Ga. App. at 693–94 (citations omitted) (emphasis added).
52. *See, e.g.,* Patel v. Burt Dev. Co., 261 Ga. App. 436, 440 (2003) (whether a party acted reasonably or exhibited the good faith or diligence implied in the contract is clearly a material issue of fact). *See also* DeMarco v. State Farm Mut. Auto. Ins. Co., 346 Ga. App. 882, 885 (2018) (While "it is the general rule that what is a reasonable time under the circumstances attending the transaction is a matter for determination by a jury," courts are authorized to determine that a delay in a party's performance is unreasonable as a matter of law.).
53. 352 Ga. App. 605 (2019).
54. *Id.* at 607.
55. *Id.* at 610.
56. 291 Ga. App. 808 (2008), disapproved on other grounds by George v. Hercules Real Estate Svcs., Inc., 339 Ga. App. 843 (2017).
57. *Id.*
58. Automatic Sprinkler Corp. of Am. v. Anderson, 243 Ga. 867, 868 (1979).
59. *See, e.g.*, Martin, 314 Ga. App. 334, 336-337 (bank's "motivation" in choosing between alternative legal remedies available in the event of a borrower's default was immaterial in an action by the bank to recover an indebtedness). *Accord* Augustin v. Walker Lake Emergency Grp., PC, 364 Ga. App. 856, 862 (2022) (even if employer's motive in terminating a contract was retaliatory, the fact that the employer had the right to terminate the contract without cause defeats implied covenant claim as a matter of law).
60. 314 Ga. App. at 335 (emphasis added).
61. N. Georgia Elec. Membership Corp. v. City of Dalton, 197 Ga. App. 386, 387 (1990) (courts discern contractual intent objectively by examining the "meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestations of assent, or that meaning which the other contracting party knew the first party ascribed to his manifestations of intent.'"). This is consistent with the three-step methodology courts employ to construe contracts: (1) determine whether contract language is clear and unambiguous and, if so, apply contract as written; (2) if not, apply rules of contract construction to resolve ambiguity which, of course, include implying a duty of good faith; and (3) if the ambiguity remains, the jury must determine what the parties intended. Augustin, 364 Ga. App. at 859.
62. This is also consistent with the principle that foreseeability may only be decided as a matter of law "where the relevant facts are plain and indisputable." Watson v. Gen. Mech. Servs., Inc., 276 Ga. App. 479, 482 (2005).