

GOOD FAITH & FAIR DEALING



COUNSEL'S CORNER

First, let me explain how this month's topic landed on my desk and in your email inbox folder. I am a licensed lawyer in both Texas and New York. As such, my clients come from a diverse geographic area. Property owners, tenants, landlords, developers, brokers, agents and property managers in New York have a different view of The Way Things Work than we do in Texas.

Some of their differing views of TWTW relate to an obligation of good faith and fair dealing. And, this duty (or, non-duty) then trickles down to the choice of law clause found in virtually every Contract and Lease.

Let me [try to] explain by using a recent case to illustrate.

Hilfiker Square owns land in which Thrifty Payless is a tenant. Recorded covenants prohibit construction without first obtaining 90% consent of the those who own and those who occupy the shopping center.

In 2010 Hilfiker had an opportunity to sign a long-term ground lease with a restaurant tenant. In 2011 Hilfiker started to request the needed consents in order to proceed with development and leasing.

All parties including the City agreed to the plan. But not Thrifty. Thrifty objected to the plan for three distinct reasons – parking utilization, driveway operations, and visibility.

Hilfiker engaged a third-party engineering firm and a third-party architectural firm to analyze and address these concerns. Each specialist concluded that development would not materially impact Thrifty's parking, driveways, or visibility.

Undaunted, Thrifty still refused to consent. So Hilfiker sued Thrifty Payless, alleging that Thrifty breached an implied covenant of good faith and fair dealing by depriving Hilfiker of its opportunity to enter into the ground lease with the restaurant-

tenant. Hilfiker claims that its damages are \$1.6 million, which corresponds to the amount the ground lease area would be worth if it were developed as projected.

Thrifty defended by claiming that the recorded covenants grant to Thrifty the absolute right to prevent Hilfiker from building a restaurant at Hilfiker Shopping Center. No reasons required. Consequently, Thrifty requested that the Court toss the case.

This case comes to us from Salem Oregon, and so far the only portion that has been litigated to completion is Thrifty's request that the Court dismiss the lawsuit.

The Oregon Court found that Oregon law imposes a duty of good faith and fair dealing in the performance and enforcement of every contract. The purpose, writes the Court, is to prohibit improper behavior and ensure the parties will refrain from any act that would have the effect of destroying or injuring the right of the other party to receive the "fruits" of the contract.

I suppose that Oregon contracts bear "fruit." But that's a digression.

From there, it wasn't a far stretch for the Oregon Court to conclude that Hilfiker had a reasonable expectation that Thrifty would negotiate, reasonably and in good faith, concerning any proposed amendments to the recorded covenants as long as such amendments are not materially adverse to Thrifty's financial interest.

And so Hilfiker's claim withstands Thrifty's Motion to Dismiss. See *Hilfiker Square, LLC v. Thrifty Payless, Inc.*, 6:16-cv-01855-MC; District Court of Oregon; November 29, 2016: <https://casetext.com/case/hilfiker-square-llc-v-thrifty-payless-inc>.

This is the place where I stress that Oregon's laws are different than those in Texas, at least on this point. Texans don't have a duty of good faith and fair dealing with respect to real estate purchases, sales, leasing, management, and development, unless that obligation is inserted into the document or unless a special relationship exists between the parties.

But Texas real estate brokers and agents do have a similar, implied duty!

Lessons learned:

1. The laws of each State (take Louisiana, as an extreme example) can be radically different than other States. See above.
2. This case illustrates why contracting parties need to be smart about the boilerplate choice of law clause hidden on Page 23 of the Contract or Lease. Depending on the clarity of your crystal ball, selecting Texas in that section may backfire.

3. The B/L: Some “standard” Contract and Lease provisions deserve attention and consideration. The choice of laws clause, often overlooked, might require more scrutiny.

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