

3044 IMPLIED DUTY OF GOOD FAITH (PERFORMANCE OF CONTRACT)

Question _____ asks whether (defendant) breached the duty of good faith in performing (his) (her) contract with (plaintiff).

Under Wisconsin law, the contract between (defendant) and (plaintiff) requires that each party act in good faith towards the other party and deal fairly with that party when (performing) (enforcing) (carrying out) the expressed terms of the contract. This requirement to act in good faith is a part of the contract just as though the contract stated it.

In this case, the plaintiff claims defendant had an obligation to use good faith when performing the following contractual term: (insert contractual term).

As to this term, (plaintiff) claims that (defendant) breached the contract's good faith obligation by: (insert relevant conduct).

Whether the duty to act in good faith has been met in this case should be determined by deciding what the contractual expectations of the parties were. Therefore, in deciding whether the defendant breached the duty of good faith by (e.g., terminating the contract, invoking the force majeure clause), you should determine the purpose of the agreement; that is, the benefits the parties expected at the time the agreement was made.

This duty of good faith means that each party to a contract will not do something which will have the effect of injuring or destroying the (rights) (ability) of the other party to receive the benefits of the contract.

[A contracting party can breach the duty of good faith even if (he) (she) did not violate any express term of the contract.]

[It is not a breach of the duty of good faith if a course of action available to (plaintiff) could have avoided the harm and this course was not followed.]

SPECIAL VERDICT

Did (defendant) breach the duty of good faith in performing (his) (her) contract with (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were first approved in 1975 and revised in 1998. The comment was updated in 2006.

This instruction addresses only the duty of good faith in the performance of a contract. It does not cover negotiations. Under Hauer v. Union State Bank of Wautoma, 192 Wis.2d 576, 598, 532 N.W.2d 456 (Ct. App. 1995), there can be an implied duty of good faith during negotiation and formation in a non-UCC case. But there may be a lesser duty during this time. Market Street Assoc. Ltd. Ptrshp. v. Frey, 941 F.2d 588, 594-96 (7th Cir. 1991). Tort liability for the breach of the duty of good faith is limited to cases involving insurance companies. Foseid v. State Bank of Cross Plains, 197 Wis.2d 772, 792, 541 N.W.2d 203, 211 (Ct. App. 1995). Hauer v. Union State Bank of Wautoma, supra at 595. See Wis JI-Civil 2760, 2761.

Absent proof of an underlying tort, punitive damages are not recoverable for breach of the duty of good faith. Hauer v. Union State Bank of Wautoma, supra at 603.

Wisconsin common law reads the duty of good faith into every contract. Estate of Chayka, 47 Wis.2d 102, 108, 176 N.W.2d 561, 564 (1970); Hauer v. Union State Bank of Wautoma, supra at 598. See also Crown Life Ins. Co. v. LaBonte, 111 Wis.2d 26, 44, 330 N.W.2d 201 (1983); Metropolitan Ventures v. GEA Assoc., 2006 WI 71, 291 Wis.2d 393, 717 N.W.2d 58.

In Metropolitan Ventures, supra, ¶ 36, the court said "the duty of good faith arises because parties to a contract, once executed, have entered into a cooperative relationship and have abandoned the wariness that accompanied their contract negotiations, adopting some measure of trust of the other party."

Type of Conduct. Courts have found different types of conduct to constitute a breach of the duty of good faith. In some cases, the breaching conduct has been found actionable under other legal theories. In Chayka, supra, at 108-09, otherwise tortious conduct (fraud) was found to be a breach of the duty of good faith. In Market Street Assoc., supra at 595, the 7th Circuit Court of Appeals, applying Wisconsin law, described the duty of good faith as ". . .halfway between a fiduciary duty (the duty of utmost good faith) and the duty to refrain from active fraud." Generally, scienter is not an element in a contract action. Failure to perform a contract need not be willful or negligent to constitute a breach. Restatement (Second) of Contracts, § 235, comment a (1979). Wisconsin does not recognize an action for tortious breach of contract. Anderson v. Continental Ins. 85 Wis.2d 675, 271 N.W.2d 368 (1978); Autumn Grove Joint Venture v. Rachlin, 138 Wis.2d 273, 405 N.W.2d 759 (Ct. App. 1987).

A failure to give notice is not necessarily a breach of the duty of good faith. Wis JI-Civil 3044 discussed in Schaller v. Marine Nat'l Bank of Necedah, 131 Wis.2d 389, 402, 388 N.W.2d 645 (Ct. App. 1986).

The conduct need not be a breach of the express terms of the agreement to violate the duty of good faith. Chayka, supra at 107; Foseid, supra at 796; Where a party not at the mercy of the other could have taken steps to avoid the harm but didn't, the duty of good faith is not breached. Schaller, supra at 403; Where a party's conduct is found to be specifically authorized by express terms of a written agreement, there is no breach of good faith. Super Value Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988).

Separate Claim. A claim for breach of the implied duty of good faith may be maintained separately from a claim for breach of contract. Foseid, supra at 794-95.

Uniform Commercial Code. R. Eisenberg, "Good Faith Under the Uniform Commercial Code," 54 Marq. L. Rev. 1 (1971)

Wis. Stat. § 401.201(19) is discussed in Schaller v. Marine Nat'l Bank of Neenah, supra at 402. The UCC definition of good faith may limit the common law duty in cases where the definition applies. Market Street Assoc., supra at 596.

Wis. Stat. § 401.203 is applicable only to performance and enforcement of agreements under the UCC. The duty of good faith under this section does not apply during negotiation and formation of contracts. A breach of the duty of good faith under the UCC cannot be brought as a separate claim. Hauer v. Union State Bank of Wautoma, supra at 595-97.