

Good Faith Revisited: Some Brief Remarks Dedicated to the Late Richard E. Speidel—Friend, Co-Author, and U.C.C. Specialist

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I. INTRODUCTION¹

The late Richard E. Speidel, my longtime friend and co-author, was Professor of Law at the University of Virginia (1966–1977), Boston University (1977–1980), Northwestern University (1980–2007), and the University of San Diego (2000–2007).² While Dick, as he was known, Professor James J. White, known as Jim, of the University of Michigan Law School, and I, were attending an Association of American Law Schools annual meeting in Chicago in the mid-1960s, Mr. Roger Noreen of the West Publishing Company—as it was then called—arranged for us to meet together. He then invited us to co-author and co-edit teaching materials for so-called integrated U.C.C. courses in law schools devoted to the Uniform Commercial Code (Code or U.C.C.). In this period, the Code was being adopted across the United States by the state legislatures, and it was also adopted by Congress for federal jurisdictions.

Dick, Jim, and I threw ourselves into the West book project, and the first edition of R. Speidel, R. Summers, and J. White, *Teaching Materials on Commercial Transactions*, published by West, appeared in 1969.³ The casebook was soon widely adopted for use in second- and third-year courses in American law schools, and it continued to be so used for many years. However, so-called curriculum reform in the law schools ultimately led to abandonment of integrated commercial law courses in most law schools and the casebooks for such courses naturally fell into relative disuse.

Speidel, White, and I worked together from the mid-1960s, and not only as co-authors. We, of course, taught the U.C.C. in courses at our own law schools, and in these courses, we used the book we had co-authored in various updated editions. We also gave dozens of invited lectures over many years on the U.C.C. and on general contract law across the country to lawyer groups and to members of the judiciary. We also gave many special lectures on the Code and contract law to students and faculty at various law schools. The U.C.C. had been drafted in the 1950s in large part by one of the truly great commercial law minds of the twentieth century, Karl N. Llewellyn of the University of Chicago

1. This short piece on good faith in honor of the late Richard E. Speidel is the third publication of mine on good faith. The two earlier ones are much longer and are: Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) [hereinafter Summers, *Good Faith*], and Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) [hereinafter Summers, *General Duty*].

2. See ASS’N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS 2006–2007, at 1038 (2006).

3. RICHARD E. SPEIDEL ET AL., *TEACHING MATERIALS ON COMMERCIAL TRANSACTIONS* (1969).

Law School, who served as Chief Reporter of the Code project.⁴ This made our lecturing, writing, and other work together on this subject all the more inspired and absorbing. Richard Speidel was an extraordinarily fine lecturer—informative, up-to-date, well organized, clear, and sometimes even quite humorous!

After a distinguished career teaching and writing in the fields of contracts, commercial law, and arbitration law, Professor Speidel retired from full-time teaching in 2007. He continued to teach part-time as a member of the San Diego Law Faculty until 2008.

In addition to being a fine scholar, teacher, and colleague, Richard Speidel was a remarkable friend. It was my privilege to know him well for more than forty-five years. I, of course, learned a great deal working with him on the U.C.C. and general contract law. He had a deep and wide-ranging grasp of the U.C.C., the accumulating case law thereunder, and general contract law. Also, he was always eager to share his understanding and to engage in discussion.

One of Professor Speidel's favorite subjects was good faith in general contract law and under the U.C.C. He discussed good faith in various writings. He devoted one entire article of his to this subject.⁵ Here, in regard to the U.C.C., I will focus, but only in a general way, on U.C.C. section 1-304—formerly section 1-203—which imposes a general obligation of good faith. I will also address, but again only in a general way, the *Restatement (Second) of Contracts* and general contract law dealing with good faith. I will not undertake to provide extended analyses of the U.C.C. or *Restatement*, nor extended analyses of the case law under the Code or in general contract law. To do that would require several articles or a book, and my earlier articles offer extended analyses.⁶ In addition, the White and Summers treatise on the U.C.C.—now in its fifth edition—includes extensive analyses of Code case law.⁷

4. See General Comment to U.C.C., 1 U.L.A. xix (2004). Professor Llewellyn's initial and enduring interest in contracts and commercial law was fostered by his mentors at Yale Law School, Arthur Corbin and Wesley Hohfeld. See Steve Sheppard, *Introduction to KARL N. LLEWELLYN, THE BRAMBLE BUSH*, at ix, xv (2008).

5. Richard E. Speidel, *The "Duty" of Good Faith in Contract Performance and Enforcement*, 46 J. LEGAL EDUC. 537 (1996).

6. See articles cited *supra* note 1.

7. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE: PRACTITIONER TREATISE* (5th ed. 2006).

II. THE GENERAL IMPORTANCE OF THE OBLIGATION OF GOOD FAITH

I believe there is no obligation in all of the U.C.C. and in general contract law of more overall importance than the general obligation of good faith. It can come into play in almost any contractual setting.⁸ When in play, its bearing can be of profound import. It can fill significant gaps in contracts. It can operate to qualify statutory law and case law. It can invoke remedies. It can even operate to override some law.

Well-advised contracting parties, when duly alerted, may be called upon to alter their behavior in major ways to avoid breach of the duty of good faith. Moreover, breach of the duty can bring into operation major forms of remedial law. Not only monetary damages and other remedies may become available, but certain defenses may come into play, too.

As indicated, the general obligation of good faith appears in the U.C.C. and in general contract law, including section 205 of the *Restatement (Second) of Contracts*. It also appears in various official comments of the U.C.C. It is widely invoked not only in general contract case law but also in U.C.C. case law.⁹ The obligation has been and continues to be the subject of extensive scholarly writing.¹⁰

III. THE GENERAL OBLIGATION OF GOOD FAITH UNDER THE U.C.C.

The general obligation of good faith under the U.C.C. is set forth in section 1-304 of the Code, which is substantially the same as former section 1-203. Section 1-304, entitled “Obligation of Good Faith,” provides:

8. See Summers, *Good Faith*, *supra* note 1, at 216 (“Cases have been discovered which, if taken as a whole rather than by states, require good faith at every stage of the contractual process, from preliminary negotiation through performance to discharge, and in nearly all kinds of contracts.”).

9. See, e.g., *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984); *Fremont v. E.I. DuPont DeNemours*, 988 F. Supp. 870 (E.D. Pa. 1997); *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434 (Del. 2005); *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370 (Mass. 1980); *Aluevich v. Harrah’s*, 660 P.2d 986 (Nev. 1983); *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187 (N.H. 1989); *Best v. U.S. Nat’l Bank of Or.*, 739 P.2d 554 (Or. 1987). Indeed, the case law here is vast.

10. See, e.g., Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984) [hereinafter Burton, *Reply*]; Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1 (2005) [hereinafter Houh, *Empty Vessel*]; Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003); Saul Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645 (1997); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988).

“Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.”¹¹ Most states have adopted section 1-304 or a virtually identical provision.¹²

The official comments to section 1-304 state that “[t]his section sets forth a basic principle running throughout the Uniform Commercial Code.”¹³ The official comments also explain that the principle applies more broadly than merely to those situations in which a specific code provision explicitly states an obligation of good faith. Rather, the good faith principle extends generally “to the performance or enforcement of every contract or duty within [the] Act.”¹⁴ In addition, the comments state that the Code’s general obligation of good faith is “further implemented by Section 1-303 on course of dealing, course of performance, and usage of trade.”¹⁵

The comments also include an important clarification to the effect that section 1-304 on good faith “does not support an independent cause of action for failure to perform or enforce in good faith.” Rather, section 1-304 provides “that a failure *to perform or enforce*, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power.”¹⁶ The comments also stress that “the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.”¹⁷

Although section 1-304 states the general obligation to act in good faith, the actual definition of good faith appears in a separate section of the Code. Prior to 2001, former section 1-201(19) defined good faith

11. U.C.C. § 1-304 (2008) (alteration in original). The official comment to section 1-304 explains that “[e]xcept for changing the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-203.” *Id.* § 1-304 cmt. (providing a summary of “[c]hanges from former law”).

12. *See* U.C.C. § 1-304 (amended 2001), 1 U.L.A. 22 (Supp. 2009). *See also* Nat’l Conference of Comm’rs on Unif. State Laws, A Few Facts About the Revised Uniform Commercial Code Article 1, General Provisions 2001, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc1.asp (last visited Aug. 1, 2009) (listing thirty-four states that have adopted the Revised U.C.C. Article 1 General Provisions of 2001).

13. U.C.C. § 1-304 cmt. 1 (2008).

14. *Id.*

15. *Id.*

16. *Id.* (emphasis added).

17. *Id.*

narrowly as “honesty in fact in the conduct or transaction concerned.”¹⁸ Now, however, section 1-201(b)(20) defines good faith more broadly to include “honesty in fact and the observance of reasonable commercial standards of fair dealing.”¹⁹ As the official comments make clear, there is a significant difference between former section 1-201(19) and current section 1-201(b)(20). The former section’s definition of good faith “contained no element of commercial reasonableness.”²⁰ The present section, by contrast, is “comprised of two elements—honesty in fact *and* the observance of reasonable commercial standards of fair dealing.”²¹ One commentator recently explained the change as follows: “[T]he new standard for determining good faith under Article 1 is no longer only subjective, but rather requires decision-makers to use both a subjective and an objective standard, incorporating fairness.”²²

Good faith is not explicitly conceptualized in Code text or comments as an “excluder,” though there are some Code cases invoking this concept, which operates to rule out or exclude various forms of bad faith.²³ Now turning to the excluder concept, which is a concept that found its way into the *Restatement* and general contract law.

IV. THE GENERAL OBLIGATION OF GOOD FAITH UNDER THE *RESTATEMENT (SECOND) OF CONTRACTS* AND IN GENERAL CONTRACT LAW—GOOD FAITH AS AN “EXCLUDER”

Section 205 of the *Restatement (Second) of Contracts* provides that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”²⁴ Along with the comment and Reporter’s note that accompany it, section 205 acknowledges the existence of a general duty of good faith in American contract law.

It has recently been observed that an article of mine on good faith that appeared in the *Virginia Law Review* in 1968²⁵ “has since become one of

18. *Id.* § 1-201(19) (2000).

19. *Id.* § 1-201(b)(20) (2008).

20. *Id.* § 1-201 cmt. 20.

21. *Id.*

22. Margaret L. Moses, *The New Definition of Good Faith in Revised Article 1*, 35 UCC L.J. 47, 47 (2002). Many of the good faith cases on bad faith in performance and enforcement under the U.C.C. remain good law today. *See, e.g.*, *Orange & Rockland Utils., Inc. v. Amerada Hess Corp.*, 397 N.Y.S.2d 814, 819–22 (App. Div. 1977).

23. *See, e.g.*, *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (“Despite its evolution, the term ‘good faith’ has no set meaning, serving only to ‘exclude a wide range of heterogeneous forms of bad faith.’”); *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1380 (Mass. 1980) (ruling out forms of bad faith in determining that a company acted in good faith and lawfully terminated an agreement).

24. *RESTATEMENT (SECOND) OF CONTRACTS* § 205 (1981).

25. Summers, *Good Faith*, *supra* note 1.

the most influential in modern contract law.”²⁶ The central thesis of my article was adopted in the *Restatement*.²⁷ The official comments to the *Restatement* specifically endorse my conceptualization of good faith as what I called “an excluder”: “The phrase ‘good faith’ is used in a variety of contexts, and its meaning varies somewhat with the context. . . . [I]t excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.”²⁸

In the 1982 article in the *Cornell Law Review* that I wrote on good faith as an “excluder,” I provided an account of six major types of conceptualization in the law, one of which is of the excluder type, and I focused in detail in that article on the general nature of excluder conceptualizations.²⁹ I will not repeat those analyses here.

V. THE “EXCLUDER” ANALYSIS AND THE U.C.C.

Unlike the *Restatement (Second) of Contracts*, the U.C.C. text in section 1-203, in related U.C.C. sections, and in official comments, does not explicitly adopt my excluder conceptualization of the obligation of good faith. However, my law review articles articulating the excluder analysis of good faith are cited in various U.C.C. cases.³⁰ The reader may also consult the four volumes of White and Summers, *The Uniform Commercial Code*’s treatment of good faith in text and footnotes.³¹

26. Houh, *Empty Vessel*, *supra* note 10, at 5.

27. See Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13, 15 (1981) (“[Restatement s]ection 205 states that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. . . . [This principle’s] elaboration in the comment owes a great deal to the work of Professor Summers.”).

28. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981). Cf. Summers, *Good Faith*, *supra* note 1, at 201 (“[G]ood faith is an ‘excluder.’ It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith.”).

29. See articles cited *supra* note 1, and J. AUSTIN, SENSE AND SENSIBILIA (G.J. Warnock ed., 1962), cited therein.

30. See *supra* note 9 and accompanying text.

31. WHITE & SUMMERS, *supra* note 7.

VI. SOME POSSIBLE OBJECTIONS TO THE GOOD FAITH DOCTRINE AND THE “EXCLUDER” ANALYSIS

Various published objections have been put forth to the good faith doctrine and to my “excluder” analysis of good faith. I will now merely address in general terms only two of these objections. I will also ignore various distortions and misinterpretations that also appear in the literature.

First, it has been contended that the notion of good faith as a conception excluding bad faith is essentially question begging and also affords insufficient general guidance.³² I offer several responses here. The “excluder” analysis does focus first and specifically on any possible bad faith ruled out, and the reasons that may be given for so ruling in specific circumstances. This kind of initially “merely negative” focus is, however, itself very specific and thus provides its own detailed form of guidance. Moreover, an individual judge, lawyer, or scholar who happens to be intellectually more at home with so-called positive rather than negative conceptions can also readily construct, for any such specific “negative” form of bad faith so ruled out, a corresponding and relatedly *specific* positive form of good faith, and can then, if this happens to be intellectually more congenial, work from there, directly or by way of analogy to determine whether the action or inaction at hand is or is not in good faith. Moreover, in a concrete case, a specific reason or specific reasons can be given—as courts commonly do—for ruling out particular behavior as an instance of bad faith, and such reason or reasons so given can provide further guidance not only in the case at hand, but in future, sufficiently similar cases, too. Such a reason or reasons can also be faithfully reformulated to support recognition of the corresponding specific form of good faith involved. As a very simple and straightforward example, consider the form of bad faith in illustration 6 in comment d to *Restatement* section 205: “A contracts to perform services for B for such compensation, ‘as you in your sole judgment, may decide is reasonable.’ After A has performed the services, B refuses to make any determination of the value of A’s services. A is entitled to their value as determined by a court.”³³ Here, it is plainly bad faith for B simply to make no determination. After all, B has agreed to make such a determination upon completion of A’s performance. It is also plain enough how one would formulate the corresponding form of good faith performance that B was to render here:

32. See, e.g., Burton, *Reply*, *supra* note 10, at 508–09.

33. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d, illus. 6 (1981).

the exercise of reasonable judgment by *B* as to the value of *A*'s services. After all, this is what *B* has agreed to do.

A second type of possible objection to the good faith doctrine is even more fundamental and is not itself frontally focused on the excluder conceptualization as such. This objection is that any general requirement of good faith, however conceptualized, is essentially moralistic and to be opposed for that reason. It is often not wholly clear what is meant by "moralistic" here. If the objection is that good faith analysis necessarily becomes merely a matter of "personal morality" and so "subjective," and therefore unpredictable in application, then there are several answers.

First, if there really is something to the "merely subjective" objection, then the very considerable case law that has now accumulated today would very likely confirm it. Yet I discern relatively little conflict in the case law as to what constitutes good faith (or bad faith). Moreover, there is relatively little of what might be called overextension or under extension of good faith in the case law. Indeed, outcomes are often quite predictable.

Second, it is important to distinguish here between the truly moral and the merely moralistic. Many truly moral ideas do generally inform the content of contract and commercial law, and desirably so. The good faith requirement can certainly be characterized as a moral idea, though, as taken over in the law, it undergoes some specification or other alteration, as with almost any concept imported from outside the law. The good faith requirement derives force partly from the basic moral norm that promise makers should generally keep promises, a norm that applies both to express promises and to implicit ones. Yet a significantly moral idea such as good faith, when adopted or recognized in contract law, does not thereby necessarily become transformed into a moralistic idea, with the negative implication that it is therefore objectionable. If this were so, many contractual notions, in addition to good faith, would be so objectionable, for many contractual norms and notions in addition to good faith may be characterized as originally in whole or in part moral in nature. As examples, one may cite notions of conscionable contract terms, notions of honest and nonfraudulent representations, and notions of the absence of duress or other undue coercion in contracting. Anyone claiming the contrary in the case of good faith, as such, must accept the burden of showing how the partially moral nature of the good faith obligation makes it thus *distinctively* objectionable, and therefore unfit for importation into general contract law and the U.C.C. I know of no

one who has shown as much, and there is vast literature on good faith. Moreover, I do not believe it can be shown that the partially moral nature of good faith necessarily makes it at all objectionable for adoption in the law.

VII. CONCLUSION

I was privileged to meet Dick Speidel first in New York city in 1962 at one of New York University Law School's earliest summer seminars for teachers of law—this one for teachers of contracts. Dick and I agreed to stay in touch thereafter. And to my great good fortune, we did, indeed for the next forty-five years. I was fortunate to have known him not only because he was certainly one of the most distinguished scholars and teachers of his generation with many academic and public service accomplishments to his name, but also because Dick was a great person who by nature was open and friendly. The law school faculty world could use more of this type. Indeed, Dick was open and friendly both at a distance and up close. He was always ready to laugh, too. No solemn and detached intellectual, he! He was most kind and generous of spirit, too.

I last saw Dick a few days before he died. Jim White, my wife Dorothy, and I flew to Chicago to see him, knowing the end was near. He was in a wheelchair, and he knew he had little time left. We nevertheless had some good talk about our old times together and about much else. Dick's usual attentiveness to the current work of his friends, and also his generous disposition, came out, too, even on this somber occasion. Because I knew Dick had not received a copy of my recent book—*Form and Function in a Legal System*—I brought along an inscribed copy and handed it to him. He glanced at the inside briefly, and then looked up and said: "Thanks, Bob. I recall you started this book about eight or nine years ago." I then said: "Yes—I'm a slow thinker." I remember his kind reply, word for word: "No, Bob—you are careful and reflective, and this is a big subject." Here, you have a glimpse of Dick's close attentiveness to the doings of his friends, and a glimpse of his characteristically generous disposition. Dick Speidel, with all his special attributes, will be missed by his family, by his friends, by his former students, by his colleagues, and by many others. Another giant has fallen.