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Recommended Citation
Minnesota Law Review. 1238.
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Case Comment

Sailing the Uncharted Seas of Bad Faith:
*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*

In 1971, Seaman's Direct Buying Service, Inc., sought to lease a large space in a new marina planned by the city of Eureka, California. Since Seaman's intended to operate a marine fuel distributorship, the city demanded written evidence of a binding oil supply contract between Seaman's and an oil company before agreeing to the lease. Seaman's negotiated extensively with Standard Oil Company of California to meet the city's requirement, and Standard knew that Seaman's needed the oil supply contract to obtain the lease. In 1972, after Seaman's and Standard agreed on all major points, Standard wrote a letter to Seaman's describing the terms of the proposal. Seaman's, a closely held corporation with three shareholders, operated as a ship chandler, a dealer that sells supplies and provides miscellaneous services to vessels. Its activities included selling tax-free goods to vessels for offshore use and running a small fueling station as the consignee of Mobil Oil Company. In the early 1970's, the city of Eureka decided to redevelop the waterfront area where Seaman's was located by building a modern marina with the assistance of the federal Economic Development Administration (EDA). Seaman's entered into a lease with the city for a small area in the new marina with the understanding that it could renegotiate for the larger space it wanted in order to expand its operations and sublease the remaining area.

1. Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354, 356 (1984). Seaman's, a closely held corporation with three shareholders, operated as a ship chandler, a dealer that sells supplies and provides miscellaneous services to vessels. Its activities included selling tax-free goods to vessels for offshore use and running a small fueling station as the consignee of Mobil Oil Company. In the early 1970's, the city of Eureka decided to redevelop the waterfront area where Seaman's was located by building a modern marina with the assistance of the federal Economic Development Administration (EDA). Seaman's entered into a lease with the city for a small area in the new marina with the understanding that it could renegotiate for the larger space it wanted in order to expand its operations and sublease the remaining area. Id.

2. Id.

3. Seaman's negotiated with several oil companies for a supply contract but focused its efforts on Mobil and Standard. Id.

4. Standard acknowledged that its letter of October 11, 1972, was a response to the city's pressure on Seaman's to produce "written documentation of the deal it was negotiating with Standard which would provide tangible evidence of Seaman's ability to pay rent on increased space in the project." Appellant's Opening Brief at 5, Seaman's Direct Buying Serv. v. Standard Oil Co., 181 Cal. Rptr. 126 (Cal. Ct. App. 1982), vacated, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984) (citations to trial record omitted). Although Standard argued that the letter was intended merely to give Seaman's something to reassure the city that Standard was serious about carrying on the negotiations, Seaman's maintained that the letter was a binding contract. Appellant's Opening Brief, supra, at 7.

5. In the letter, dated October 11, 1972, Standard stated that its purpose
man's presented the letter to the city as evidence of an oil supply contract, and the city granted the lease.\textsuperscript{6} A year later, when the brunt of the Arab oil embargo hit the United States, oil supplies tightened and prices rose.\textsuperscript{7} Standard notified Seaman's that, because of a federal fuel allocation program, Standard could not supply Seaman's as described in the 1972 letter.\textsuperscript{8} Undaunted, Seaman's instigated a series of requests and appeals to the Federal Energy Office.\textsuperscript{9} The agency was "to confirm our various conversations regarding our mutual desires to establish Seaman's Direct Buying Service as a Chevron Marine Dealer, and to ensure mutual understanding of the terms of our proposal." Appellant's Opening Brief, \textit{supra} note 4, at 6 (citation to trial record omitted). Standard proposed the following terms: "(1) to sign a Chevron Marine Dealer agreement with Seaman's for an initial term of 10 years; (2) to advance Seaman's the cost of the new fueling facilities, or up to $75,000, which sum was to be amortized over the life of the agreement at the rate of one cent per gallon of oil; (3) to provide a 4.5 cent discount per gallon off the posted price of fuel; and (4) to sign an agreement providing for Standard's right to cure in case of default by Seaman's." Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, __, 686 P.2d 1158, 1160-61, 206 Cal. Rptr. 354, 356-57 (1984). Standard concluded that "this offer is subject to our mutual agreement on the specific wording of contracts to be drawn, endorsement and/or approval by governmental offices involved, and continued approval of Seaman's credit status at the time the agreements are to go into effect." \textit{Id.} at __, 686 P.2d at 1161, 206 Cal. Rptr. at 357 (footnote omitted). Agents of both Standard and Seaman's signed the letter. \textit{Id.}


\textsuperscript{8} Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, __, 686 P.2d 1158, 1161, 206 Cal. Rptr. 354, 357 (1984). Standard and Seaman's also had signed a temporary marine dealership agreement in 1973 for fuel supplies while the new marina was being built, but the final documents for the ten-year contract discussed in the October 11, 1972, letter had never been signed. Standard indicated, however, that it would be willing to go ahead with the contract were it not for the federal fuel allocation program. One of Standard's agents even assisted Seaman's in obtaining and completing forms to request a fuel supply authorization from the Federal Energy Office (FEO). \textit{Id.}

\textsuperscript{9} \textit{Id.} at __, 686 P.2d at 1161-62, 206 Cal. Rptr. at 57-58. Seaman's initially was successful in getting the FEO to issue a supply order, but Standard appealed the order, arguing that the FEO had erroneously designated Standard as the base period supplier of Seaman's. Standard claimed that it had no binding contract with Seaman's and that Mobil was actually the Seaman's base period supplier. Standard defended its decision to appeal the FEO order, contending that it would set a bad precedent if Standard let the erroneous order stand because the order would force Standard to share its limited oil supply with the base customer of another oil company, thus depleting the supply for its own customers. Appellant's Opening Brief, \textit{supra} note 4, at 10. Standard won its appeal; the FEO rescinded its order. \textit{Seaman's}, 36 Cal. 3d at __, 686 P.2d at 1162, 206 Cal. Rptr. at 358. Standard was jubilant at this result;
told Seaman's that it would issue a supply order only if Seaman's could establish that it had a valid supply contract with Standard.\textsuperscript{10} Even though Seaman's told Standard that it could not afford a trial to prove the existence of a contract, Standard refused to stipulate that one existed; Standard's representative laughed and told Seaman's, "See you in court."\textsuperscript{11} Without a supply contract, Seaman's could not meet its obligation to the city and soon went out of business.\textsuperscript{12}

Shortly thereafter, Seaman's sued Standard for breach of contract and tortious breach of the implied covenant of good faith and fair dealing.\textsuperscript{13} At trial the jury found for Seaman's on both counts and awarded punitive damages on the tort claim amounting to roughly twenty-eight times the compensatory damages for Standard's breach of contract.\textsuperscript{14} The California Court of Appeal agreed that Standard's 1972 letter created an enforceable contract but held that no tort cause of action existed for breach of the implied covenant of good faith and fair dealing in a commercial contract.\textsuperscript{15} On appeal, in Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 1162, 206 Cal. Rptr. 354, 358 (1984), the court reversed the jury's verdict on the intentional interference claim, finding that the trial court's instructions were erroneous. See id. at 131-32. 

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\textsuperscript{11} Id.

\textsuperscript{12} See id. Seaman's went out of business instead of seeking a declaratory judgment that a contract existed. As a result, Seaman's eventually defaulted on its rent prepayment and lost its lease with the city of Eureka. Appellant's Opening Brief, supra note 4, at 11.

\textsuperscript{13} Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 1162, 206 Cal. Rptr. 354, 358 (1984). Seaman's also accused Standard of tortious interference with its contractual relationship with the city of Eureka and of fraud. At trial, Seaman's won on all but the fraud count. Id.

\textsuperscript{14} The jury awarded compensatory damages of $397,050 for breach of contract, $397,050 in compensatory and $11,058,810 in punitive damages for tortious breach of the implied covenant of good faith and fair dealing, and $1,588,200 in compensatory and $11,058,810 in punitive damages for intentional interference with an advantageous business relationship. Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 1162, 206 Cal. Rptr. 354, 358. The trial court reduced the punitive damages to $1 million on the bad faith claim and to $6 million on the intentional interference claim. Id.

\textsuperscript{15} Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 181 Cal. Rptr. 126, 136 (Cal. Ct. App. 1982), vacated, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984). The court also reversed the jury's verdict on the intentional interference claim, finding that the trial court's instructions were erroneous. See id. at 131-32.
rect Buying Service, Inc. v. Standard Oil Co., the California Supreme Court found it unnecessary to decide whether the facts justified extending tort liability for breach of the implied covenant of good faith to a commercial contract. Instead, the court created a new tort, holding that a party that breaches a contract and then denies the contract's existence "in bad faith and without probable cause" is liable in tort. The court reasoned that denying the existence of a contract in bad faith is more culpable conduct than merely breaching a contract because "[i]t offends accepted notions of business ethics." The court then added, without explanation, that the creation of a tort for bad faith denial of contract would not disrupt bargaining in commercial transactions.

This Comment argues that bad faith denial of the existence of a contract is a variation of the tortious breach of the implied covenant of good faith and fair dealing, not a separate tort. Moreover, as Seaman's illustrates, the policy reasons for imposing tort liability for breach of the implied covenant of good faith do not apply to commercial contracts. Consequently, this Comment concludes that courts should not award tort damages for bad faith breaches of commercial contracts. Instead, courts should take a functional approach in fashioning remedies for bad faith breaches, first focusing on the plaintiff's expectations under the contract and then modifying the rules that govern traditional contract remedies to reflect those expectations.

17. See id. at __, 686 P.2d at 1160, 206 Cal. Rptr. at 356. The court acknowledged that the implied covenant of good faith exists in all contracts but noted that a breach of the covenant giving rise to tort remedies is marked by a "special relationship" between the parties, "characterized by elements of public interest, adhesion, and fiduciary responsibility." Id at __, 686 P.2d at 1166, 206 Cal. Rptr. at 362. The court cited the insurance and employment contexts as examples of such special relationships. See id. at __, 686 P.2d at 1166 & n.6, 206 Cal. Rptr. at 362 & n.6. Although it expressed some reservations, the court intimated that an extension of the tort to the commercial context might be appropriate under the right circumstances. See id. at __, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63.
18. See id. at __, 686 P.2d at 1167, 206 Cal. Rptr. at 363. The court remanded the case for a new trial, however, since the jury was not instructed that in order to impose tort liability it had to find that Standard denied the existence of the contract in bad faith. See id. at __, 686 P.2d at 1170, 206 Cal. Rptr. at 366.
19. Id. at __, 686 P.2d at 1167, 206 Cal. Rptr. at 363.
20. See id.
I. BAD FAITH DENIAL OF CONTRACT AND TORTIOUS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH: ALL IN THE FAMILY

The obligation to perform in good faith is inherent in every contract.\(^\text{21}\) Traditionally, breach of this implied covenant of

\footnotesize{\begin{align*}
21. & \text{ See U.C.C. § 1-203 (1978); Restatement (Second) of Contracts § 205 (1981). Attempts to define "good faith" under both the Uniform Commercial Code and the common law have generally resulted in vague statements.}

The Uniform Commercial Code defines good faith as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19). This language suggests a subjective standard of good faith, one that focuses on the actor's actual state of mind. Yet commentators argue that although the subjective standard may be appropriate for the Code provisions concerning good faith purchase, e.g., U.C.C. §§ 2-403(1), 3-302(1)(b), the purpose of which is to facilitate the transfer of goods and commercial paper, an objective standard, focusing on fairness or reasonableness, is the proper measure of the obligation of good faith performance. See Farnsworth, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 668-72 (1963); Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 207-15 (1968).

The special provision for merchants in article 2 incorporates an objective standard, stating that for a merchant good faith "means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b). Some courts have applied an objective standard of good faith even to nonmerchants by reading § 1-203 together with § 1-103, which incorporates general contract principles to the extent that they are not inconsistent with the Code. See Preston v. United States, 696 F.2d 528, 538-39 (7th Cir. 1982) (applying Wisconsin law); Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846, 851 (3d Cir. 1964) (applying Pennsylvania law). But see Steinmetz v. Bradbury Co., 618 F.2d 21, 25 (8th Cir. 1980) (applying Iowa law in stating that "good faith means no more than honesty in fact in the transaction" but noting that a higher standard exists for merchants).

In non-UCC cases, courts have phrased the good faith obligation in various ways. See e.g., Brown v. Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949) ("In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement."); Colwell Co. v. Hubert, 248 Cal. App. 2d 567, 575, 56 Cal. Rptr. 753, 759 (1967) ("This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose."); Brown v. Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949) ("In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement."); Colwell Co. v. Hubert, 248 Cal. App. 2d 567, 575, 56 Cal. Rptr. 753, 759 (1967) ("This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.");) (quoting Harm v. Frasher, 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367, 374 (1960)); Warnock v. Bonneville Gen. Agency, Inc., 271 Or. 634, 638, 533 P.2d 333, 335 (1975) (noting that "it is an implied provision in every contract that neither party will engage in any act that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.");) (quoting Perkins v. Standard Oil Co., 235 Or. 7, 16, 383 P.2d 107, 112 (1963) (quoting 3 A. CORBIN, CORBIN ON CONTRACTS § 561, at 278 (1960)); Gregerson v. Jensen, 617 P.2d 369, 373 n.9 (Utah 1980) (stating that "parties are obliged to cooperate with each other in good faith in the performance of a contract").

The most accurate description of the phrase "good faith" is that it has no
good faith has given rise to ordinary contract damages. In a contract action, consequential damages for breach of the implied covenant of good faith are available only to the extent that they reasonably could have been foreseen by the parties at the time of contracting. A plaintiff also must prove its contract damages with reasonable certainty, which often is a difficult task when the damages consist mostly of lost profits. Moreover, punitive damages generally are not available in a contract action.

In two landmark cases, however, the California Supreme Court departed from these traditional limitations by holding that a breach of the implied covenant of good faith in the insurance context may give rise to tort liability. Damages for tortious breach of the implied covenant are not limited by the

definite meaning of its own: "In a particular context, the phrase takes on specific meaning, but usually this is only by way of contrast with the specific form of bad faith . . . ruled out." Summers, supra, at 201; see also id. at 203 (contrasting specific examples of bad faith and good faith). Thus, courts generally define good faith by explaining what it is not. See generally 3 A. CORBIN, CORBIN ON CONTRACTS § 541, at 97 (1960) (discussing the implied covenant of good faith and fair dealing); 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 670, at 159 (W. Jaeger 3rd ed. 1961) (same).


23. This is the famous foreseeability rule of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854). See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 14-5, at 524 (1977). There actually are two rules of damages in Hadley. The first rule permits recovery of general damages, those arising naturally from the breach itself. An example of general contract damages is the difference between the contract price and the fair market value of performance at the time of breach. The second rule, the foreseeability rule, prohibits recovery of damages arising as a consequence of the breach unless they were reasonably foreseeable by the parties at the time of contracting. Id. at 525. Lost profits during a factory shutdown caused by the breach of contract is an example of such consequential damages.


25. J. CALAMARI & J. PERILLO, supra note 23, § 14-3, at 520. This generally has been true no matter how malicious the breach. Id. For an excellent discussion of this rule and its exceptions, see Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change, 61 MINN. L. REV. 207 (1977).

26. See Crisci v. Security Ins. Co., 66 Cal. 2d 425, 430-31, 426 P.2d 173, 176-77, 58 Cal. Rptr. 13, 16-17 (1967) (holding that an insurer's unreasonable refusal to settle with a third party within the insured's policy limits violated the implied covenant of good faith, giving rise to tort liability); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 660-61, 328 P.2d 198, 202 (1958) (same). The California Supreme Court later held that an insurer may commit a tortious breach of the implied covenant of good faith by unreasonably refusing to pay
In addition, punitive damages are available for tortious breach of the implied covenant if the insurer's behavior amounts to malice, fraud, or oppression; bad faith alone is insufficient. Although many jurisdictions now recognize a cause of action for tortious breach of the implied covenant of good faith in the insurance context, most courts confronting the issue have refused to extend to the commercial context tort liability for breach of the implied covenant.


30. Two California appellate courts had already rejected claims of tortious breach of the implied covenant of good faith in commercial contracts by the time Seaman's reached the California Supreme Court. See Wagner v. Benson, 101 Cal. App. 3d 27, 33, 161 Cal. Rptr. 516, 520 (1980) (bank that lent money to investor did not commit a tortious breach of the implied covenant of good faith by failing to provide investor with management information on the investor's high-risk investment); Sawyer v. Bank of Am., 83 Cal. App. 3d 135, 139, 145 Cal. Rptr. 623, 625-26 (1978) (bank did not commit a tortious breach of the implied covenant of good faith in its refusal to admit liability for breaching a contract by failing to obtain insurance on borrower's truck).

Several other jurisdictions have rejected tort claims for breaches of the implied covenant of good faith in commercial contracts. See, e.g., Kennedy
The majority in Seaman's created the new tort of bad faith denial of the existence of a contract in order to avoid deciding whether to extend tort liability for breach of the implied covenant of good faith to the commercial context. There is, however, no basis for an independent tort of bad faith denial of

Elec. Co., Inc. v. Moore-Handley, Inc., 437 So. 2d 76, 81 (Ala. 1983) (refusing to extend the tort cause of action used in insurance cases to a commercial sales contract); Pure Oil Co. v. C.L. Dukes, 101 Ga. App. 786, 787, 115 S.E.2d 449, 450 (1960) (alleged violations of plaintiff's contractual rights to occupy leased premises and to purchase petroleum products from defendant did not give plaintiff a right of action in tort, despite allegations of defendant's "willful," "malicious," and "arbitrary" breach, in the absence of any allegations of facts disclosing a violation of a public duty owed by the defendant to the plaintiff); Wild v. Rarig, 302 Minn. 419, 442, 234 N.W.2d 775, 790 (1975) (scientist alleging breach of a contract to sponsor a research project was not entitled to recover breach damages for the malicious breach of an implied covenant of good faith), cert. denied, 424 U.S. 902 (1976); Aluevich v. Harrah's, 99 Nev. 215, 217, 660 P.2d 986, 987 (1983) (refusing to extend a tort cause of action for breach of the implied covenant of good faith to a commercial lease because the contract did not involve "a special element of reliance such as that found in partnership, insurance, and franchise agreements"), cert. denied, 104 S. Ct. 998 (1984).

For federal cases rejecting the theory of tortious breach of the implied covenant of good faith in the commercial context under applicable state law, see Battista v. Lebanon Trotting Ass'n, 538 F.2d 111, 118 (6th Cir. 1976) (under Ohio law an insurer may be subject to tort liability for breach of its implied duty of good faith and fair dealing with respect to its insured, but tort liability does not extend to ordinary contracts between businesspersons because the special considerations present in a consumer-held insurance contract do not apply); California Wholesale Elec. Co. v. Micro Switch, 1983-1 TRADE CASES (CCH) ¶ 65,253, at 69,503 (C.D. Cal. 1983) (plaintiff not entitled to tort relief for breach of the covenant of good faith since tort remedies for alleged contractual breaches do not extend to commercial relationships); Brown-Marx Assocs., Ltd. v. Emigrant Sav. Bank, 527 F. Supp. 277, 283 (N.D. Ala. 1981) (under Alabama law plaintiff could not recover from bank under tort theory of bad faith for bank's alleged intentional and malicious refusal to close on a loan commitment since the tort of bad faith was limited to the insurance context), aff'd, 703 F.2d 1361 (11th Cir. 1983); Iron Mountain Sec. Storage v. American Specialty Foods, 457 F. Supp. 1158, 1169 (E.D. Pa. 1978) (Pennsylvania law does not allow tort recovery for breach of implied contractual duty of good faith when breach occurred in ordinary commercial contract for repurchase of promissory note).

This refusal to extend the availability of tort remedies beyond the insurance context is not unanimous, however. See Forty Exchange Co. v. Cohen, 125 Misc. 2d 475, 491-93, 479 N.Y.S.2d 628, 638-40 (N.Y. Civ. Ct. 1984) (recognizing the existence of a tort for bad faith breach of a commercial lease but finding the breach in this case privileged); cases cited infra notes 83-84 (tort liability for bad faith breaches in the banking and franchise contexts). For two excellent discussions of the growth of the tortious breach of the implied covenant of good faith in noninsurance contracts, see Diamond, The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions?, 64 MARQ. L. REV. 425 (1981); Louderback & Jurika, supra note 29.
Bad faith breach of contract. Bad faith denial of contract may seem similar on a superficial level to the torts of abuse of legal process and wrongful civil proceedings in that all three are intended to protect persons from unwarranted litigation. These other two torts are different from the one invented in Seaman's, however, because they are designed to deter the frivolous initiation of a legal process or proceeding, not the defense of a suit brought by another party. Allowing a tort cause of action for the malicious assertion of a defense could lead to endless lawsuits over the parties' behavior during litigation. In addition, the need to create a tort to deter the imposition of a defense in bad faith is limited since a motion for summary judgment provides an efficient way of disposing of a truly baseless defense. Finally, there is a countervailing principle in the adversary system of encouraging a defendant to raise any defense it wishes. The Seventh Circuit has used this last rationale to reject the theory that a defendant commits a tort by denying liability for breach.

32. The tort of abuse of legal process occurs when a party willfully uses a legal process, such as attachment, garnishment, or arrest, to accomplish a purpose for which it was not intended. Id. § 120, at 898-99. The tort of wrongful civil proceedings occurs when an unsuccessful plaintiff has initiated its action without probable cause and for a purpose other than securing the proper adjudication of the claim. RESTATEMENT (SECOND) OF TORTS § 674 (1977). Since the act of raising a defense is an authorized response to a claim, the plaintiff cannot argue that it is an abuse of legal process, even if the defendant's motives are unethical. See W. KEETON, supra note 31, at 898. Similarly, a defendant who merely interposes a defense is not subject to an action for wrongful civil proceedings. See id. § 120, at 893; Annot. 65 A.L.R.3d 901, 911-14 (1975).
34. See Annot., supra note 32, at 909-10. The motion to strike a pleading, FED. R. CIV. P. 12(f), CAL. CIV. PROC. CODE § 436 (West Supp. 1983-1984), is not as useful as is a motion for summary judgment since many courts will not examine the good faith of the defendant on a motion to strike. See Annot., supra note 32, at 909. The Federal Rules of Civil Procedure provide for a sanction of expenses, including attorney's fees, and possibly even contempt of court if it appears to the judge at any time that affidavits presented for, or in opposition to, a motion for summary judgment were made "in bad faith or solely for the purpose of delay." FED. R. CIV. P. 56(g); cf. CAL. CIV. PROC. CODE § 437c(i) (West Supp. 1983-1984) (if a court determines that an affidavit submitted in connection with a motion for summary judgment is offered in bad faith, it may award the other party reasonable expenses incurred as a result of the filing of the affidavit).
35. See Ritter v. Ritter, 381 Ill. 549, 555, 46 N.E.2d 41, 44 (1943).
of contract in bad faith.\textsuperscript{36}

Furthermore, the primary authority the court in Seaman's used to support its creation of a new tort, \textit{Adams v. Crater Well Drilling},\textsuperscript{37} is factually and theoretically distinguishable from Seaman's. \textit{Adams} was an action for restitution in a situation bordering on extortion.\textsuperscript{38} Even if Standard had no basis for denying the existence of the contract, its behavior did not approach the level of coercion found in \textit{Adams}.\textsuperscript{39} Also, in \textit{Adams} the theoretical basis for restitution and punitive damages was the deterrence of unjust enrichment in the absence of a contract.\textsuperscript{40} This theory is inapplicable in Seaman's since even if

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\textsuperscript{36} See Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 729 (7th Cir. 1979), \textit{cert. denied}, 445 U.S. 917 (1980). The court reasoned that imposing punitive damages on a party for asserting defenses that it felt were appropriate, even if they turned out to be without merit, would violate the public policy favoring unfettered access to the courts:

Nothing in the case law suggests that [tort] liability may stem from the \textit{defense} of a lawsuit or from the decision to defend rather than settle. Such a rule would infringe basic rights in our system of jurisprudence. Under our jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant in causing the plaintiff to sue him or in defending the action. The rule is the same even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent.

\textit{Id.} at 729 (quoting Ritter v. Ritter, 381 Ill. 549, 555, 46 N.E.2d 41, 44 (1943)) (first emphasis in original, second one added).

\textsuperscript{37} \textit{276 Or.} 789, 556 P.2d 679 (1976), \textit{cited in Seaman's}, 36 Cal. 3d at __, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

\textsuperscript{38} \textit{See Adams}, 276 Or. at 793-95, 556 P.2d at 680. The plaintiff argued that the defendant had overcharged him for drilling a well. The defendant, knowing that its claim was baseless, threatened to begin legal proceedings if the plaintiff did not pay his account immediately. The plaintiff, fearing that a lawsuit would aggravate the condition of his critically ill wife, paid the overcharge. The trial judge decided that the plaintiff had failed to state a cause of action for fraud, but the Arizona Supreme Court shaped his complaint to state a cause of action for money had and received. \textit{See id.} at 791-93, 556 P.2d at 680-81.

\textsuperscript{39} \textit{See supra} note 38. Note that in \textit{Adams}, the defendant originally had threatened a baseless proceeding against the plaintiff. Standard, in contrast, merely raised a defense to the assertion of Seaman's that it had a contract with Standard. Although in \textit{Adams} the defendant's behavior in threatening a lawsuit did not constitute wrongful civil proceedings or abuse of legal process, \textit{see supra} note 32, it came close to doing so. The award of punitive damages against the \textit{Adams} defendant may be consistent with the policy of protecting persons against baseless lawsuits, but that policy does not apply to a defendant such as Standard that initiates no proceedings and merely defends itself.

\textsuperscript{40} The \textit{Adams} court relied on a California Supreme Court case, \textit{Ward v. Taggart}, 51 Cal. 2d 736, 336 P.2d 534 (1959), \textit{cited in Adams}, 276 Or. at 794, 556 P.2d at 682, to support its award of restitution and punitive damages. In \textit{Ward},
there was technically no binding agreement, Seaman's had not begun to perform at the time that Standard denied the contract's existence and, therefore, Seaman's had bestowed no benefit on Standard that could result in unjust enrichment. Moreover, Standard's anticipatory repudiation of what the court found to be an enforceable contract meant that Seaman's had a right to damages for breach of contract, which would encompass its restitutionary interest as well as the potential gains prevented by the breach. Consequently, the authority cited by the Seaman's court does not support its creation of a new tort of bad faith denial of contract.

Chief Justice Bird argued in her separate opinion that,

the court upheld an award of $72,049.20 in compensatory damages and $36,000 in punitive damages against a real estate broker who made a secret profit at the plaintiffs' expense by overstating a seller's asking price, buying the property himself, and then selling the property to the plaintiffs at the overstated price. See Ward, 51 Cal. 2d at 739-40, 336 P.2d at 535-36. The court reasoned that punitive damages were necessary in this situation since restitution alone would have no real deterrent effect. See id. at 743-336 P.2d at 538; see also Davis v. Tyee Indus., Inc., 58 Or. App. 292, 294, 296-98, 648 P.2d 388, 389, 391-92 (1982) (upholding an award of $6,195.81 in compensatory damages and $90,000 in punitive damages against an employer that wrongfully withheld an employee's commissions by crediting the sales to the company itself), aff'd, 295 Or. 467, 668 P.2d 1186 (1983). Adams, Ward, and Davis were all actions for restitution, based on the principle that if the defendant commits a tort such as fraud, misrepresentation, or conversion resulting in its unjust enrichment at the plaintiff's expense, the plaintiff may "'waive' the tort action and sue instead on a theoretical and fictitious contract of restitution of the benefits which the defendant has so received." W. KEETON, supra note 31, § 94, at 672-73; see Dawson, Duress Through Civil Litigation, 45 Mich. L. Rev. 571, 577-78 (1947) (noting that the threat of litigation can result in unjust enrichment by forcing an unfair settlement and thus can give rise to an action in restitution).

Adams, Davis, and Ward, however, were not ordinary restitution cases, in which it merely would be unjust to let the defendant keep the plaintiff's money. For instance, the court in Davis stated that the Adams defendant's behavior amounted to the tort of coercion. See Davis, 58 Or. App. at 298, 648 P.2d at 692. In both Davis and Ward the defendants' conduct constituted the tort of conversion; the defendants intentionally withheld the plaintiffs' profits, knowing that they had no right to retain them. See id. Such obvious tortious conduct by the defendants in these cases may account for the courts' awards of punitive damages.

41. See Seaman's, 36 Cal. 3d at __, 686 P.2d at 1161-62, 206 Cal. Rptr. at 357-58.
42. See U.C.C. § 2-610(b); J. CALAMARI & J. PERILLO, supra note 23, § 14-5, at 579.
43. The court also cited Jones v. Abriani, 169 Ind. App. 556, 350 N.E.2d 635 (1976). Jones is inapposite, however, since it involved blatant overreaching by a seller of a defective mobile home against a young married couple that had spent their entire savings on the new home. See id. at 560-63, 350 N.E.2d at 639-40.
44. See Seaman's, 36 Cal. 3d at __, 686 P.2d at 1170-77, 206 Cal. Rptr. at 366-73
despite the majority's attempt to disguise what it was doing, the new tort was really a form of tortious breach of the implied covenant of good faith. Using insurance cases as a guide, she noted that an insurer commits a tortious breach of the implied covenant of good faith when it acts unreasonably in light of the justifiable expectations of the insured. She maintained that although the nature and extent of the duty imposed by the implied covenant of good faith vary from one contract to another depending on the expectations of the parties involved, parties in most commercial contracts have a fundamental expectation of compensation in case of breach, an expectation that makes the possibility of breach acceptable. Thus, she argued, "When the breaching party acts in bad faith to shield itself entirely from liability for contract damages, . . . the duty of good faith and fair dealing is violated." In applying this approach to the agreement Seaman's had with Standard, however, Chief Justice Bird argued that because Seaman's needed the supply contract with Standard to obtain a lease in the new marina, the expectations of Seaman's did not include the possibility of a breach. Seaman's therefore could recover in tort, she concluded, if it


45. See id. at __, 686 P.2d at 1171, 206 Cal. Rptr. at 367. Chief Justice Bird would have had the court hold that, under certain circumstances, a breach of contract can form the basis of a tort action for breach of the implied covenant of good faith. See id.


47. See Seaman's, 36 Cal. 3d at __, 686 P.2d at 1171-72, 206 Cal. Rptr. at 367-68. For example, since one of the reasons an insured takes out liability insurance is to avoid litigation, the insured develops a reasonable expectation that the insurer will not refuse a settlement offer without cause. The insurer therefore breaches the implied covenant of good faith by unreasonably refusing a settlement offer. Id. at __, 686 P.2d at 1172, 206 Cal. Rptr. at 368 (citing Crisci v. Security Ins. Co., 66 Cal. 2d 425, 430, 426 P.2d 173, 176-77, 58 Cal. Rptr. 13, 16-17 (1967)).

48. See Seaman's, 36 Cal. 3d at __, 686 P.2d at 1172, 206 Cal. Rptr. at 368.

49. See id. at __, 686 P.2d at 1173, 206 Cal. Rptr. at 369. Chief Justice Bird noted that in many instances, breaching a contract results in the most economically efficient allocation of resources. See id. (citing R. Posner, Economic Analysis of Law 55 (1972)).

50. See Seaman's, 36 Cal. 3d at __, 686 P.2d at 1173, 206 Cal. Rptr. at 369.

51. See id. at __, 686 P.2d at 1175, 206 Cal. Rptr. at 371. She stressed that Standard knew that Seaman's needed a binding contract with an oil supplier. See id.
could demonstrate that Standard repudiated the contract in bad faith.\footnote{See id. Even though Chief Justice Bird found that Standard's denial had to be made in bad faith to support tort liability, she thought there was sufficient evidence of bad faith in the record to avoid remanding. See id. at _, 686 P.2d at 1177, 206 Cal. Rptr. at 373.}

Chief Justice Bird's reasoning, premised on the assumption that the possibility of breach was not within the parties' justified expectations, is flawed because a party to a commercial contract should recognize that a breach by the other party is always a possibility.\footnote{See Farnsworth, Legal Remedies For Breach of Contract, 70 COLUM. L. REV. 1145, 1147 (1970) ("Our system . . . is not directed at compulsion of promisors to prevent breach; rather, it is aimed at relief to promises to re-dress breach.") (emphasis in original). Chief Justice Bird's analysis seems more relevant to whether the losses incurred by Seaman's were sufficiently foreseeable to qualify as consequential damages. See supra note 23 and accompanying text.} Nevertheless, Chief Justice Bird was correct in recognizing that Standard breached the implied covenant of good faith if it denied the existence of the contract in bad faith. Although Seaman's could not reasonably have assumed Standard would never breach, it did have a justifiable expectation of being able to recover contract damages if Standard did breach. The implied covenant, which requires that "neither party do anything which will deprive the other of the benefits of the agreement,"\footnote{See supra note 5 (setting forth the terms of the agreement).} protects this expectation of reasonable compensation as one of the benefits inherent in entering a contract. Even though the parties had not worked out the specifics of all the contract terms,\footnote{See supra note 5 (setting forth the terms of the agreement).} Standard apparently had made a binding agreement to supply Seaman's.\footnote{See supra note 5 (setting forth the terms of the agreement).} When Standard could not meet its obligation to Seaman's, however, Standard tried to avoid all liability by arguing that the letter was too indefinite to constitute a contract.\footnote{See id. at _, 686 P.2d at 1162, 206 Cal. Rptr. at 358-59. The court responded to Standard's argument in no uncertain terms: "Put simply, this contention is not well taken." Id. at _, 686 P.2d at 1162, 206 Cal. Rptr. at 358.} If there was no legitimate basis for denying the existence of the contract, Standard
acted in bad faith by attempting to deprive Seaman's of a benefit it reasonably could have expected by entering a contract—adequate compensation in case of Standard's breach.58 Thus, although the Seaman's majority felt compelled to create a new tort to handle fact situations like that in Seaman's, Standard's behavior actually amounted to a breach of the implied covenant of good faith.59

58. On remand, the jury ultimately must determine whether Standard denied the existence of the contract in bad faith, but it is difficult to imagine a reasonable basis for Standard's disputing the contract's existence. The Seaman's court held that a denial must be made in bad faith and without probable cause to constitute a tort. See id. at __, 686 P.2d at 1167, 206 Cal. Rptr. at 363. The court did not explain what it meant by "probable cause," but presumably it would be determined under the objective "reasonable person" standard used in actions for wrongful civil proceedings. See Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis, 88 YALE L.J. 1218, 1234 n.113 (1979).

59. A comparison of Seaman's with Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970), illustrates the lack of any meaningful distinction between the new tort created in Seaman's and the tortious breach of the implied covenant of good faith. In Fletcher, the plaintiff hurt his back and began collecting disability benefits under his policy with the defendant insurance company. The insurance company first attempted to limit its liability by manufacturing a meritless dispute over the policy language, then denied liability altogether, and ultimately demanded reimbursement for the earlier payments, alleging that the plaintiff had misrepresented his physical condition when applying for the policy. Id. at 388-90, 89 Cal. Rptr. at 84-85. When the plaintiff objected, the company offered to drop its claim for reimbursement if the plaintiff would allow it to cancel his policy and release it from further litigation, threatening to sue if the plaintiff refused. Id. at 390-91, 89 Cal. Rptr. at 86. The court held that this behavior constituted a tortious breach of the implied covenant of good faith, stating that "the implied-in-law duty of good faith and fair dealing imposes upon a disability insurer a duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him of the benefits of the policy." Id. at 401, 89 Cal. Rptr. at 93.

Like the insurance company in Fletcher, Standard attempted to use the threat of prolonged and expensive litigation to deprive an innocent party of its justifiable expectations. Compare Note, The Expanding Availability of Punitive Damages in Contract Actions, 8 IND. L. REV. 668, 679 (1975) ("By the assertion of pure economic power, with no reasonable color of legal right, Western National attempted to compel Fletcher to give up a valid legal claim against them.") with Seaman's, 36 Cal. 3d at __, 686 P.2d at 1167, 206 Cal. Rptr. at 363 (criticizing a party that, without any legitimate defense, seeks to avoid liability on a meritorious contract claim by adopting a "see you in court" position).

Some courts restate the insurer's obligation of good faith as the duty of the insurer to give as much consideration to the insured's interests as it gives to its own. See, e.g., Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 460, 521 P.2d 1103, 1109, 113 Cal. Rptr. 711, 717 (1974). Application of this standard to Fletcher indicates that the insurer breached the implied covenant of good faith and fair dealing by failing to give as much consideration to the interests of the
Even if Standard breached the implied covenant of good faith by denying the existence of the contract, its conduct should not necessarily be considered tortious, as it would be in the insurance context. Although the majority expressed a reluctance to extend tort remedies for breach of the implied covenant of good faith to the commercial setting, it did not rule out that possibility, and its failure to distinguish its new tort from a breach of the implied covenant of good faith only exacerbated the confusion. Instead of dodging the issue, the court should

insured in receiving his disability payments as it gave to its own interests in limiting its liability. The Seaman's majority imposed the same duty to respect the rights of the other contracting party on Standard by declaring that a bad faith refusal to acknowledge the existence of the contract was a tort. Under the majority's analysis, if a clear contract right existed, Standard was obliged to give the potential losses Seaman's faced from Standard's denial of the existence of the contract as much consideration as it did Standard's potential gain. The court stated that the act of denying the existence of a contract in bad faith "goes beyond the mere breach of contract. It offends accepted notions of business ethics." Seaman's, 36 Cal. 3d at __, 686 P.2d at 1167, 206 Cal. Rptr. at 353. Thus, Standard's alleged tortious behavior in denying the existence of a contract without cause is indistinguishable from what the California courts have in the past called a tortious breach of the implied covenant of good faith.

60. See supra notes 28-29, 46 & 59 and accompanying text.
61. The Seaman's court stated:
When we move from such special relationships [as that between insurer and insured] to consideration of the tort remedy in the context of the ordinary commercial contract, we move into largely uncharted and potentially dangerous waters. Here, parties of roughly equal bargaining power are free to shape the contours of their agreement and to include provisions for attorney fees and liquidated damages in the event of breach. They may not be permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured. In such contracts, it may be difficult to distinguish between breach of the covenant and breach of contract, and there is the risk that interjecting tort remedies will intrude upon the expectations of the parties. This is not to say that tort remedies have no place in such a commercial context, but that it is wise to proceed with caution in determining their scope and application.
Seaman's, 36 Cal. 3d at __, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63 (footnote omitted and emphasis added).
62. Since the Seaman's decision was handed down, the California appellate courts have been struggling with the new tort of bad faith denial of contract. In Quigley v. Pet, Inc., 162 Cal. App. 3d 223, 208 Cal. Rptr. 394 (1984), Quigley, an independent trucker, alleged that Pet wrongfully rescinded its contract with Quigley to haul nuts and then invited Quigley to enter a new contract at a much lower rate. Pet countered by alleging that Quigley had misrepresented the proper rate in the original contract. Id. at __, 208 Cal. Rptr. at 396-97. At trial, the jury awarded Quigley $592,800 in compensatory damages and $3.8 million in punitive damages for tortious breach of the implied covenant of good faith, even though Quigley had asked for only $2 million in punitive damages. Id. at __, 208 Cal. Rptr. at 398. The court stressed
have openly rejected tort remedies for breach of the implied
covenant of good faith in the commercial context because the
special factors justifying tort liability in the insurance context
are inapplicable in the commercial setting.

II. INAPPLICABILITY IN THE COMMERCIAL CONTEXT
OF THE POLICIES SUPPORTING TORT
LIABILITY FOR BAD FAITH BREACH
OF CONTRACT

In fashioning a cause of action for tortious breach of the
implied covenant of good faith in insurance cases, courts have
emphasized three distinguishing characteristics of the insurance
context that justify the more onerous tort remedies for breach

the narrowness of the Seaman's opinion but noted the uncertainty it produced
in a case such as Quigley:

The decision to rescind a contract recognizes the contract [sic] exist-
ence, and threatens its survival. Is the Seaman's tort limited to a de-
nial that a contract has ever existed? Does it include a party's
unfounded denial that a contract now exists? Assuming the contract
[sic] existence is acknowledged, do disputes over its terms and per-
formance become tortious because the party "doth protest too much"?
Id. at __, 208 Cal. Rptr. at 403 (emphasis in original). The Quigley
court strongly suggested that because of the inherent uncertainties in interpreting
contracts, the parties should be given the benefit of the doubt when they
merely dispute the terms of the contract instead of denying its existence. See id.
Nonetheless, the court remanded for a new trial in light of the new Sea-
mans tort since when Pet rescinded the contract, it informed Quigley's bank
that no contract existed. The issue on remand is whether that denial was in
bad faith. Id. at __, 208 Cal. Rptr. at 404.

Another post-Seaman's case, Rulon-Miller v. IBM, 162 Cal. App. 3d 241,
208 Cal. Rptr. 524 (1984), confirmed the fears of the court in Quigley that con-
licts over contract terms could turn into tort actions. Rulon-Miller claimed
that IBM committed a tortious breach of the implied covenant of good faith by
terminating her employment because of her romantic relationship with an em-
ployee of a competitor. Although the court in Seaman's suggested that tort li-
ability for breach of the implied covenant of good faith and fair dealing might
be appropriate in the employment context, see Seaman's, 36 Cal. 3d 752, __,
686 P.2d 1158, 1166 & n.6, 206 Cal. Rptr. 354, 362 & n.6, the Rulon-Miller court
tried to mold the plaintiff's case into the tort of bad faith denial of contract,
see Rulon-Miller, 162 Cal. App. 3d at __, 208 Cal. Rptr. at 532-33. Although the
defendant in Rulon-Miller did not deny the existence of the employment con-
tract, it did deny that certain rights existed under the contract. Id. at __, 208
Cal. Rptr. at 533. The court's application of Seaman's in this context exempli-
fies the danger recognized by the court in Quigley of "convert[ing] routine
contract cases into contract-tort jury trials." Quigley, 162 Cal. App. 3d at __,
208 Cal. Rptr. at 403. For a more accurate application of the Seaman's reason-
123, 127-29 (1984) (applying special factors from the insurance context to the
employment context in order to determine whether a breach of the implied
covenant of good faith was tortious).
of the implied covenant of good faith: the quasi-public-service nature of the insurance industry, the use of adhesion contracts resulting from the disproportionate bargaining power of the insurer over the insured, and the fiduciary quality of the insurer's relationship with the insured.63 Similar characteristics have motivated courts to extend tort liability and punitive damages for either breach of the implied covenant of good faith or some analogous cause of action to the employment64 and consumer65


64. The California Supreme Court has acknowledged that a tort action for breach of the implied covenant of good faith might be appropriate in the employment context but elected not to decide the issue. See Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1337 n.12, 164 Cal. Rptr. 839, 846 n.12 (1980). In Seaman's the court expressly mentioned the employment context as one having "similar characteristics" to the insurance context and "deserving of similar legal treatment." Seaman's, 36 Cal. 3d at __, 686 P.2d at 1166 & n.6, 206 Cal. Rptr. at 362 & n.6.

Appellate courts in California, however, have held that there is an implied covenant of good faith and fair dealing in employment contracts, the breach of which may give rise to tort liability and punitive damages. See, e.g., Wallis v. Kroehler Mfg. Co., 160 Cal. App. 3d 1109, __, 207 Cal. Rptr. 123, 128-29 (1984) (holding that a cause of action for tortious breach of the implied covenant of good faith is available when employer stopped payments without cause under an agreement not to compete); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 479, 199 Cal. Rptr. 613, 619 (1984) (assuming that California recognizes the tort cause of action but finding that plaintiff failed to allege facts sufficient to show that defendant acted in bad faith); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, __, 189 Cal. Rptr. 20, 23-24 (1983) (approving punitive damages award of $2 million, at least part of which was attributable to the employer's breach of the implied covenant of good faith, when employer threatened to blacklist employee unless he gave up his contract rights), retransferred, __ Cal. 3d __, 696 P.2d 82, 211 Cal. Rptr. 690 (1985); Cleary v. American Airlines, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (1980) (alternative holding) (finding that employee stated cause of action for breach of the implied covenant of good faith, making available punitive damages, because employer arbitrarily dismissed employee after many years of service despite existing procedures for dismissal); see also Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1318-19 (9th Cir. 1982) (applying California law on a pendent contract claim to uphold an award of punitive damages in a case in which employer arbitrarily dismissed employee in contravention of employer's personnel policy), cert denied, 459 U.S. 859 (1982); cf. Rulon-Miller v. IBM, 162 Cal. App. 3d 241, __, 208 Cal. Rptr. 524, 532-33 (1984) (relying on the Seaman's tort of bad faith denial of contract rather than the tortious breach of the implied covenant of good faith in affirming award to employee of compensatory and punitive damages). See generally Louderback & Jurika, supra note 29, at 211-15 (analyzing California cases discussing the breach of the implied covenant in the employment context).

The Montana Supreme Court has recognized a cause of action for the tortious breach of the implied covenant of good faith in the employment context,
contexts. Although the facts in Seaman's provide an appealing

holding that an employer could breach the covenant by failing to follow the procedures described in an employee handbook for discharging employees. See Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 184, 638 P.2d 1063, 1067 (1981); see also Gates v. Life of Mont. Ins. Co., 269 Mont. __, __, 668 P.2d 213, 216 (1983) (on appeal after remand, upholding award of $1,891 in compensatory damages and reinstating award of $50,000 in punitive damages for the tortious breach of the implied covenant of good faith). The Montana Supreme Court, however, may be narrowing its approach in the employment context. In Dare v. Montana Petroleum Marketing Co., 269 Mont. __, 687 P.2d 1015, 1017 (1984), the court held that tort liability for breach of the implied covenant of good faith and fair dealing would be available only if the employer's representations created a reasonable belief that the employee had job security and would not be discharged without cause. See id. at __, 687 P.2d at 1020.


65. Most of the insurance cases cited supra notes 28-29, 46 & 59 can be characterized as consumer cases since the insureds generally were not savvy businesspersons. Moreover, as in many consumer contracts, the terms in insurance contracts are highly standardized and often confusing. See, e.g., Schmidt v. Pacific Mut. Life Ins. Co., 268 Cal. App. 2d 735, 737, 74 Cal. Rptr. 367, 368 (1969). Even though courts use a variety of approaches to impose tort liability and punitive damages on a dominant party that breaches a noninsurance consumer contract, the actions considered tortious are similar in substance to those constituting a breach of the implied covenant of good faith and fair dealing in the insurance context.

Indiana courts, for example, have allowed punitive damages in insurance cases for "oppressive breach of contract" rather than under the rubric of breach of the implied covenant of good faith. See Vernon Fire & Cas. Ins. Co. v. Sharp, 161 Ind. App. 413, 416, 316 N.E.2d 381, 384 (1974), modified on other grounds, 264 Ind. 599, 349 N.E.2d 173 (1976). Some Indiana courts apply the same theory of oppressive breach of contract to consumer contracts. In Jones v. Abriani, 169 Ind. App. 556, 350 N.E.2d 635 (1976), a young married couple purchased a mobile home from a local dealer. After the seller delivered the home, the couple soon discovered both major and minor defects in the home's construction. The sellers refused to return the couple's deposit and made no attempt to fix most of the defects. Id. at 560-63, 350 N.E.2d at 639-40. The Jones court upheld a punitive damages award against the seller. See id. at 579, 350 N.E.2d at 641. In Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 291 N.E.2d 92 (1972), the court held that the plaintiff's allegation that the defendant car dealership was guilty of oppressive conduct in failing to return the truck she had left for repair was sufficient to support an award of punitive damages. See id. at 639, 291 N.E.2d at 98. In neither Jones nor Jerry Alderman Ford did the court link the award of punitive damages to a clearly discernable tort, such as fraud. In contrast, the court in Hibschman Pontiac, Inc. v. Batchelor, 340 N.E.2d 377 (Ind. App. 1976), aff'd in part, rev'd in part, 266 Ind. 310, 362 N.E.2d 845 (1977), held that an oppressive breach of contract, unaccompanied by an independent tort, does not warrant punishment through
case for an award of damages more generous than those typically recoverable under contract law, the Seaman’s court should not have extended tort liability to a breach of the implied covenant of good faith on those facts because only the first of the three characteristics justifying such an extension in the insurance context—the public interest element—applies in the fuel dealership context.

The public interest justification for extending tort liabil-

the award of punitive damages. See id. at 379-80; see also Standard Land Corp. v. Borgardus, 154 Ind. App. 283, 313, 289 N.E.2d 803, 820 (1972) (refusing to sanction award of punitive damages for oppressive breach of a commercial contract in the absence of fraud). On the appeal of Hibschman, however, the Indiana Supreme Court took a broad reading of the facts and found some evidence of fraud, malice, or oppression “mingled into” the claim of breach of warranty; hence, punitive damages could be awarded as long as their deterrent effect served the public interest. See Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 314-15, 362 N.E.2d 845, 847-48 (1977). Because Hibschman involved overcharging by a car dealer against a consumer, it is unclear whether the Indiana Supreme Court would impose punitive damages in a commercial contract negotiated at arm’s length. See generally Note, supra note 59, at 681-89 (analyzing Indiana’s tort of oppressive breach of contract).

Other jurisdictions also give consumers special protection by applying legal theories analogous to the tortious breach of the implied covenant of good faith. Idaho’s approach is similar to Indiana’s theory of oppressive breach of contract. In Boise Dodge, Inc. v. Clark, 92 Idaho 902, 453 P.2d 551 (1969), the Idaho Supreme Court upheld a punitive damages award against an automobile dealer who turned back the odometer on a demonstrator car before selling it. The court stated that it did not matter whether the action sounded in tort or contract; punitive damages would be awarded if the dealer acted with fraud, malice, or oppression or if there was any other satisfactory reason for awarding them. See id. at 907, 453 P.2d at 556. Similarly, South Carolina has a broad definition of fraud that includes “unfair dealing.” See Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921). The South Carolina Supreme Court has used this expansive definition in upholding a punitive damages award against an insurer that fraudulently canceled an insured’s life and health policy. See Wright v. Public Sav. Life Ins. Co., 262 S.C. 285, 289, 204 S.E.2d 57, 59 (1974). See generally Note, Punitive Damages for Breach of Contract in South Carolina, 10 S.C.L.Q. 444 (1958) (analyzing liberal South Carolina rule for granting punitive damages in contract cases). Finally, in Morrow v. L.A. Goldschmidt, Assocs., Inc., 126 Ill. App. 3d 1089, 468 N.E.2d 414 (1984), in which the owners of new townhomes sued the designer, builder, and sellers after they refused to repair serious defects in plaintiffs’ new homes, an Illinois appellate court held that willful and wanton misconduct is an independent tort that will support an award of punitive damages based on a breach of contract. See id. at __, 468 N.E.2d at 419-20.

66. The facts in Seaman’s were extreme—a small company versus a corporate giant, heavy reliance by the smaller company, an unforeseeable oil shortage, and alleged dilatory tactics by the corporate giant responsible for the ruin of the smaller company. See supra notes 1-12 and accompanying text.

67. One of the earliest exceptions to the rule that punitive damages are unavailable in a contract action developed for “public service” industries, such as common carriers and public utilities. Sullivan, supra note 25, at 223-226.
ity to breaches of the implied covenant of good faith was present in Seaman's because of the importance of an orderly distribution of fuel through dealer supply contracts. Although the oil industry does not share the quasi-public-service status of the insurance business, it is permeated by government regulation embodying a strong public interest in protecting petroleum dealers against exploitation by suppliers that enjoy a superior bargaining position. Of all franchisees, petroleum dealers have received the most extensive protection from the courts. That the actions underlying the litigation in Seaman's took place during the oil crisis of the early 1970's, when the fair distribution of limited fuel supplies was a national priority, accentuates the importance of the public interest factor in this case. Nonetheless, the other two factors justifying extension of tort liability for breach of the implied covenant of good faith are inapplicable to the facts of Seaman's.

The superior negotiating position Standard enjoyed because

Courts justified this exception by reasoning that punitive damages were necessary to protect against and punish abuses of monopolistic economic power. Id. at 226.


The existence of extensive legislation designed to protect the weaker party to a contract is also a characteristic of the employment and consumer contexts, in which courts have extended tort liability to cases in which the stronger party has breached the implied covenant of good faith. See supra notes 64-65. For examples of consumer legislation, see Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693 (1982); Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1982); Consumer Product Warranty Act, 15 U.S.C. §§ 2301-2312 (1982). For a summary of legislation protecting, inter alia, employee health and safety and minimum levels of economic security for the retired and unemployed, see Note, Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816, 1827 & nn.63-67 (1980).

69. See Jordan, Unconscionability at the Gas Station, 62 MINN. L. REV. 813, 817, 826-55 (1978). In Shell v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973), cert. denied, 415 U.S. 920 (1974), the New Jersey Supreme Court, in holding that a contract term giving Shell the right to terminate the franchise on ten days' notice was void as against public policy, stressed the public interest in petroleum contracts:

That the public is affected in a direct way [by the contract between Shell and Marinello] is beyond question. We live in a motor vehicle age. Supply and distribution of motor fuels are vital to our economy. In fact, the Legislature has specifically concluded that the distribution of motor vehicle fuels within this State is affected with a public interest. N.J.S.A. 56:6-19(c).

Id. at 409, 307 A.2d at 602.

70. See authorities cited supra note 7.
of its size and reputation did not result in a contract of adhesion since the contract lacked essential elements usually identified as characteristics of adhesion contracts. Unlike the standardized provisions of adhesion contracts, which typically are contained in a printed form supplied by the dominant party to the contract, the terms of the agreement in Seaman's were set forth in a letter drafted by Standard at the special request of Seaman's. This document described the particular terms of the deal Seaman's had carefully negotiated with Standard.

71. Professor Todd D. Rakoff has identified seven characteristics of a "model" adhesion contract: (1) the document is a printed form containing many terms and is clearly a contract; (2) only one of the parties has drafted the contract; (3) the drafting party routinely engages in transactions of the type represented by the form; (4) the drafting party presents the form to the adhering party with the understanding that although a few terms, such as price, may be open to negotiation, the drafting party will contract only on its own terms; (5) after the parties have bargained over whatever terms are open to negotiation, the adhering party signs the form; (6) the adhering party enters into far fewer of such contracts than does the drafting party; and (7) the primary obligation of the adhering party is to pay money. See Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1174, 1177 (1983).

Rakoff's criteria fit both consumer contracts and at-will employment contracts. Consumer contracts typically are objectionable because they often have terms weighted heavily in favor of the stronger party buried in fine print. Meyer, Contracts of Adhesion and the Doctrine of Fundamental Breach, 50 VA. L. REV. 1178, 1187 (1964). Yet many employees lack even the protection of a written contract; employment is a "take-it-or-leave-it proposition" on the employer's terms. Comment, The Covenant of Good Faith and Fair Dealing: Common Ground for the Torts of Wrongful Discharge from Employment, 21 SANTA CLARA L. REV. 1111, 1143-44 (1981). Contra Note, Defining Public Policy Torts in At-Will Dismissals, 34 STAN. L. REV. 153, 165-67 (1981) (arguing that none of the reasons courts use to justify imposing a tort duty in the insurance context apply to the employment context).

In spite of their inequity, standardized agreements and adhesion contracts eliminate the enormous transaction costs that would result if each consumer or employment contract was negotiated individually. Comment, supra, at 1144. Courts are, therefore, reluctant to disturb them but will intervene if the terms define the rights of the weaker party and the obligations of the stronger party more narrowly than the weaker party reasonably could have expected. Id. Rakoff, however, would make any term in an adhesion contract presumptively, but not conclusively, unenforceable. See Rakoff, supra, at 1176. Moreover, contrary to most commentators, he would apply adhesion contract principles to some commercial contracts, see id. at 1253-55, and two of the three cases he cites to support this position involve service station dealers, see id. at 1253 n.252. Some courts analogize the inferior bargaining power of petroleum dealers to that of consumers, but the analogy is weak. See Jordan, supra note 69, at 826, 856 (noting that competent dealers are highly sought after, have ample bargaining power, and, unlike consumers, are "well-organized and politically active").

72. See Rakoff, supra note 71, at 1177.

73. Seaman's, 36 Cal. 3d at __, 686 P.2d at 1160, 206 Cal. Rptr. at 356.
rather than outlining a routine transaction. Moreover, even though Seaman's was a small company, it bargained extensively for these terms with several oil companies before signing the contract with Standard.\footnote{Three of the factors Rakoff identifies as characteristics of adhesion contracts, however, were present in Seaman's. \textit{See} Rakoff, \textit{supra} note 71, at 1177. Seaman's signed the letter drafted by Standard, Standard had more experience in making dealership contracts, and the primary obligation of Seaman's was to pay money for its oil purchases. \textit{See} Seaman's, 36 Cal. 3d at --, 686 P.2d at 1160-61, 206 Cal. Rptr. at 356-57. Yet these three elements seem far less essential to the existence of an adhesion contract than do the use of a printed form, drafting done with the input of only the dominant party, the routine nature of the transaction, and the absence of negotiation over contract terms.} Consequently, although Seaman's may have been in the weaker bargaining position, this inequality did not result in the creation of an adhesion contract.

Furthermore, no fiduciary relationship existed between Seaman's and Standard. When a fiduciary relationship exists, courts do not permit the stronger party to abuse its power by promoting its own interests at the expense of the weaker party.\footnote{See First Bank of Wakeeny v. Moden, 235 Kan. 260, --, 681 P.2d 11, 13 (1984). Traditionally, fiduciary duties are imposed on trustees, guardians, executors, attorneys, agents, partners, corporate directors, and corporate officers. D. Dobbs, \textit{Remedies} § 10.4, at 681 (1973).} Although not subject to precise definition,\footnote{See Sullivan, \textit{supra} note 25, at 229 n.119 ("Phrases such as fiduciary relationship, relationship of trust, and confidential relationship are used interchangeably by the courts; the definition of these terms is also vague, haphazard, and fragmentary.") (citation omitted); Comment, \textit{supra} note 71, at 1147-48 (criticizing the term "fiduciary" as a conclusory expression of the decision that the law will protect a plaintiff by imposing a higher than usual duty of good faith). Courts tend to identify fiduciary duties on a case-by-case basis, leading one commentator to suggest that there is no general definition of a fiduciary relationship. \textit{See} Sealy, \textit{Fiduciary Relationships}, 1962\textit{Cambridge L.J.} 69, 72-73.} the label "fiduciary" is frequently used by courts when they identify par-

\footnote{The most useful procedure in analyzing a potential fiduciary relationship is to focus on the particular characteristics that inspire courts to label a particular relationship "fiduciary." In the insurance context, for example, courts often find that a fiduciary relationship exists when an insurer defends its insured in an action brought by a third party. \textit{See} Baxter v. Royal Indemnity Co., 285 So. 2d 652, 656 (Fla. Ct. App. 1973), \textit{cert. denied}, 317 So. 2d 725 (Fla. 1975). The insurer typically controls all aspects of the litigation, which can be complex and lengthy. In addition, the insurer has the opportunity to abuse its position by unreasonably refusing to settle within the insured's policy limit if it believes that it has any chance of winning the suit. \textit{See}, \textit{e.g.}, Dumas v. State Farm Mut. Auto. Ins. Co., 111 N.H. 43, 46, 274 A.2d 781, 783 (1971). Because these characteristics are missing in a first-party action, in which the insured seeks benefits directly from the insurer, some courts have refused to apply the theory of tortious breach of contract to such cases. \textit{See} Lawton v. Great S.W. Fire Ins. Co., 118 N.H. 607, 614, 392 A.2d 576, 580-81 (1978).}
ticular characteristics in a relationship that justify forcing one party to show a concern for the other party's interests that goes beyond the duty of good faith. Key features of the deal between Seaman's and Standard, however, negate the existence of a fiduciary relationship that would require Standard to be particularly concerned about the welfare of Seaman's. Even though Seaman's depended heavily on its oil supply contract with Standard in order to obtain the lease in the new marina and Standard had more experience with dealership transactions, Standard possessed no extraordinary knowledge giving it an unfair advantage over Seaman's in the contract negotiations. Moreover, Standard did not dominate the operations of Seaman's; Seaman's was independently owned, and its marine fuel dealership was only one facet of its chandlery business. Most important, Standard did not purport to act for the benefit of Seaman's. Seaman's and Standard entered contract negotiations hoping to reach a mutually beneficial agreement, but it was clear from the start that each party was promoting and

77. Fiduciary qualities include: whether one party acts on behalf of another, Bacon v. Soule, 19 Cal. App. 428, 434, 126 P. 384, 386 (1912); whether one party dominates another, First Bank of Wakeeney v. Moden, 235 Kan. 260, __, 681 P.2d 11, 13 (1984); whether one party depends heavily on the other, id.; whether one party has superior business intelligence or knowledge of special facts giving it an advantage over the other party, id.; and whether the relationship between the parties centers on a complex transaction, Littau v. Midwest Commodities, Inc., 316 N.W.2d 639, 644 (S.D. 1982).

78. Courts that attempt to distinguish the implied covenant of good faith from a fiduciary duty usually describe the latter as one of "utmost good faith." See, e.g., Jones v. Nickell, 297 Ky. 81, 85, 179 S.W.2d 195, 197 (1944). Other courts merely speak of a fiduciary duty to act in good faith and with due regard to the interests of the one reposing the confidence. See, e.g., Rees v. Briscoe, 315 P.2d 758, 762 (Okla. 1957).

Some courts inaccurately have merged the concepts of fiduciary duty and implied covenant of good faith. See Nelson v. Abraham, 29 Cal. 2d 745, 751, 177 P.2d 931, 934 (1947) (defining a fiduciary duty as one requiring that "neither party...do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"); Stevens v. Marco, 147 Cal. App. 2d 357, 372, 305 P.2d 669, 678 (1955) (noting that a fiduciary duty exists when "the parties are so...associated in a business transaction that one party must rely on the good faith and integrity of the other"); Arnott v. American Oil Co., 609 F.2d 873, 884 (8th Cir. 1979) (applying South Dakota law to find that "Amoco breached its 'fiduciary' duty of good faith and fair dealing with Arnott in terminating its lease agreement with Arnott without good cause"), cert. denied, 446 U.S. 918 (1979). But see Bain v. Champlin Petroleum Co., 692 F.2d 43, 48 (8th Cir. 1982) (commenting that it was unnecessary for the court in Arnott to use the "fiduciary" label in order to find a breach of the duty of good faith and fair dealing).

79. Seaman's, 36 Cal. 3d at __, 686 P.2d at 1160, 206 Cal. Rptr. at 356.

80. Id.
protecting its own interests. Standard therefore owed Seaman's no duty of fiduciary responsibility.

Thus, despite the particularly egregious facts underlying Seaman's, the absence of an adhesion contract and the lack of any fiduciary relationship should have precluded the application of tort liability to the case. Indeed, although a few courts have extended tort liability to the banking and franchise contexts for behavior tantamount to breach of the implied cove-

81. See id. at __, 686 P.2d at 1160-61, 206 Cal. Rptr. at 356-57.
82. See supra notes 1-12 and accompanying text.
83. In First Nat'l Bank in Libby v. Twombly, ___ Mont. ___, 689 P.2d 1226 (1984), the Montana Supreme Court held that a bank committed a tortious breach of the implied covenant of good faith by unjustifiably accelerating the maturity date of a promissory note. The court stated that the plaintiffs, a married couple that had signed the note to finance a small restaurant, could recover punitive damages if they demonstrated that the bank acted with malice, fraud, or oppression. See id. at __, 689 P.2d at 1230. In Commercial Cotton Co. v. United Calif. Bank, 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985), a California appellate court held that the bank was liable for tortious breach of the implied covenant of good faith for negligently debiting the company's account on a check that contained unauthorized signatures. The court upheld an award of $4,000 in actual damages and $100,000 in punitive damages for breach of the implied covenant. See id. at __, 209 Cal. Rptr. at 552-54.
84. In Golf West of Ky. v. Life Investors Co., No-C-138,745 (L.A., Calif. Super. Ct. July 10, 1980), noted in 30 DEF. L.J. 23 (1981), the defendant terminated without cause an exclusive distributorship contract for a top line of golf equipment after the plaintiff spent two and one-half years and a substantial amount of money to establish and staff pro shops and retail outlets. The jury awarded compensatory damages of $2,524,387 and punitive damages of $6,510,000 for tortious breach of the implied covenant of good faith. See id. at 23.

In Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1979), a federal court extended to the franchise context Indiana's tort of oppressive breach of contract, which is similar to tortious breach of the implied covenant of good faith. See supra note 65. The court upheld an award of punitive damages against the defendant franchisor that had tried to ruin the franchisee's business in order to force it to resell its franchise to the franchisor at a reduced rate. See Photovest, 606 F.2d at 727-30. The court in Photovest, however, may have been mistaken in extending Indiana law to this sort of arms-length business relationship. In Standard Land Corp. v. Bogardus, 154 Ind. App. 283, 289 N.E.2d 803 (1972), Standard and Macke Homes were part of a joint venture in which Standard was to build a golf course and Macke was to build homes for a residential development. The trial court found that Standard's efforts to coerce Macke into buying the golf course indicated "a spirit of wanton disregard for the rights of Macke." Id. at 313, 289 N.E.2d at 820 (quoting the trial court). But the appellate court, noting the absence of any finding of fraud, reversed the trial court's award of punitive damages. See id.; see also Note, supra note 59, at 683 (arguing that Standard was correctly decided on appeal since the case was not a "typical consumer oppression case" but rather "a rough and tumble businessman situation in which... the court should be slow to punish").
nament of good faith, the policy reasons supporting tort liability for breach of this implied covenant in the insurance context do not apply to these contexts either.\(^8\) Nevertheless, the relatively paltry amount of contract damages awarded in \textit{Seaman's}\(^6\) indicates that it may be necessary to modify traditional theories of contract damages to prevent undercompensation in

\(^8\) The results in banking and franchise cases, like that in \textit{Seaman's}, have initial appeal. The public interest factor in the banking industry and franchise contracts is evident from the degree of statutory regulation of these areas. See, e.g., 12 U.S.C. §§ 1-3805 (1982) (title setting forth federal banking laws); H. Brown, \textit{supra} note 68, § 9.08, at 42 (summarizing state statutes protecting franchisees from termination without cause). If one uses a broad definition of adhesion contract, see Raskoff, \textit{supra} note 71, at 1253-55; some contracts used by banks and franchisors could be classified as adhesion contracts. Nonetheless, the relationship between a bank and its customers or a franchisor and its franchisees lacks fiduciary characteristics. Unless a bank acts as a trustee, a traditional fiduciary relationship, courts generally have held that it does not owe a customer a fiduciary duty. See, e.g., Aaron Ferer & Sons v. Chase Manhattan Bank, 731 F.2d 112, 122 (2nd Cir. 1984); First Bank of Wakeeny v. Moden, 235 Kan. 260, _, 681 P.2d 11, 13 (1984). Nor does a franchisor owe a franchisee a fiduciary duty. See, e.g., Picture Lake Campground v. Holiday Inns, Inc., 497 F. Supp. 858, 869 (E.D. Va. 1980) (although franchisor owed a duty of good faith to franchisee, it did not owe a fiduciary duty); Chmielewski v. City Prods. Corp., 660 S.W.2d 275, 294-95 (Mo. Ct. App. 1983) (existence of a franchisor-franchisee relationship does not give rise to a fiduciary relationship). But see Brown, \textit{Franchising—A Fiduciary Relationship}, 49 TEx. L. Rev. 650, 664-65 (1971) (arguing that many fiduciary qualities exist in the franchisor-franchisee relationship). Even though the bank-customer and franchisor-franchisee relationships are characterized by trust and reliance on the stronger party, in both contexts the parties, like those in \textit{Seaman's}, are seeking their own profits; the stronger party does not purport to act in the interest of the weaker party. See Bain v. Champlin Petroleum Co., 692 F.2d 43, 47 (8th Cir. 1982) ("[A]lthough the existence of trust and confidence in another is inherent in all fiduciary relationships, its mere presence does not suffice to automatically make either party to a business relationship... a fiduciary in every aspect of that relationship."); Arnott v. American Oil Co., 609 F.2d 873, 891 (8th Cir. 1979) (Bright, J., dissenting) ("The parties in this case entered into a business relationship, not a fiduciary relationship. Each party served the interests of the other, but each also quite properly sought its own interests."); cert. denied, 446 U.S. 918 (1980).

One court has called the banker-customer relationship "quasi-fiduciary" because of the customer's heavy dependence on and trust in the bank. See Commercial Cotton Co. v. United Calif. Bank, 163 Cal. App. 3d 511, _, 209 Cal. Rptr. 551, 554 (1985). One might also call the franchisor-franchisee relationship quasi-fiduciary because of the presence of a similar degree of dependence and trust. Yet the concept of a special quasi-fiduciary duty is unnecessary. The law already implies a covenant of good faith and fair dealing to remedy situations in which one contracting party is injured because the other contracting party, on whom it has depended to secure the benefits of the contract, refuses to cooperate. See Farnsworth, \textit{supra} note 21, at 672.

\(^6\) The jury awarded Seaman's only $397,050 for breach of contract. \textit{Seaman's}, 36 Cal. 3d at _, 686 P.2d at 1162, 206 Cal. Rptr. at 358.
certain cases involving bad faith breaches of commercial contracts.

III. A FUNCTIONAL APPROACH TO REMEDIES FOR BAD FAITH BREACH OF CONTRACT

The California Supreme Court's decision in Seaman's to create a new tort for bad faith denial of contract may in part reflect the court's belief that traditional contract damages provide inadequate compensation in many situations involving breach of the implied covenant of good faith. Seaman's, for example, would have been undercompensated had its recovery been limited to ordinary contract damages because of the high cost of litigation and the difficulty of proving lost profits of a new business. The availability of punitive damages under a tort theory of recovery, in Seaman's totaling roughly twenty-eight times the actual damages for breach of contract, more than makes up for these problems. However, three of the four traditional rationales for granting punitive damages—encouraging litigation by "private attorneys general," deterring malicious, fraudulent, and oppressive acts, and punishing defendants that have committed such acts—do not apply in the commercial context. The one rationale that is relevant to a case like Seaman's, the need to offset expenses like attorney's fees that are not otherwise recoverable, is better addressed by functional modifications of the traditional rules of contract damages than by extension of tort remedies.

The "bounty," or private attorney general, rationale for granting punitive damages reflects the desire to encourage potential plaintiffs to sue defendants who have harmed many people but who are not likely to be sued because the relatively meager compensatory damages available do not justify the time and expense of litigation. Although this rationale is particularly applicable in such traditional areas of public interest as in-

87. The jury awarded $11,058,810 in punitive damages for tortious breach of the implied covenant of good faith. Id.
88. See D. Dobbs, supra note 75, § 3.9, at 205; K. Redden, Punitive Damages § 7.6(D), at 629-30 (1980). In Chodos v. Insurance Co. of N. Am., 126 Cal. App. 3d 81, 178 Cal. Rptr. 829 (1981), the court noted that the insurer's practice of using a photograph to appraise the damage to the insured's car and paying only the amount of that appraisal affected all of its insureds. See id. at 104, 178 Cal. Rptr. at 841. The plaintiff in Chodos, who received $200,000 in punitive damages but only $146.71 in compensatory damages, id. at 90, 178 Cal. Rptr. at 833, probably would not have sued without the attraction of punitive damages.
urance, consumer, and employment contracts, it does not carry the same force in the commercial context because commercial entities typically do not need an additional financial incentive to litigate. Businesses already sue each other frequently, and the sums involved generally create a sufficient incentive to litigate. In Seanan's, for example, the plaintiff was unlikely simply to ignore a $400,000 breach of contract claim even if punitive damages were unavailable.

Deterrence of future misbehavior also is a less persuasive rationale for granting punitive damages in the commercial context than it is in other areas because the societal cost of that deterrence may be greater than its value. If defendants like Standard are forced to pay punitive damages for tortiously denying the existence of a contract, they probably will treat the punitive damage award as just another cost of doing business. Although such companies might suffer a decrease in profits, some of the cost will be passed on to consumers in the form of higher prices as long as the companies can remain competitive. Additional consumer costs may be justifiable in areas such as products liability and insurance, employment, and consumer contracts, in which public policy favors extra protection against health and safety hazards or the dangers of exploitation. Deterring bad faith breaches of commercial contracts, however, may not be worth the same substantial investment of society's resources.

The rationale of punishing immoral or harmful behavior

89. See Chodos v. Insurance Co. of N. Am., 126 Cal. App. 3d 81, 104, 178 Cal. Rptr. 829, 841 (1981); D. Dobbs, supra note 75, § 3.9, at 205.
91. See K. Redden, supra note 88, § 7.6(B), at 628. Ordinary contract damages may not deter breach because even if found liable, the defendant would have to pay only the amount it owed the plaintiff under the terms of the contract. See Diamond, supra note 30, at 440; cf. Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 9 (1982) (questioning the deterrent value of punitive damages in tort cases).
92. See Peters, Punitive Damages in Oregon, 18 Williamette L. Rev. 369, 420-21 (1982). Because the oil business is highly sensitive to price changes, Standard could not raise its oil price significantly to compensate for a punitive damages award, but in a less volatile industry price increases would be a probable consequence of large punitive damages awards.
93. See Hibschman Pontiac, Inc. v. Batchelor, 340 N.E.2d 377, 380 (Ind. Ct. App. 1978) (noting that "in the case of outrageous tortious conduct, the use of punitive damages to deter such conduct in the future may be justified to further society's interest in the public health and safety," but refusing to extend the availability of punitive damages to contract actions).
94. See K. Redden, supra note 88, § 7.6(A), at 625-27.
similarly fails to support awarding punitive damages for bad faith breach of contract in the commercial context. A business promise broken maliciously may be ethically offensive, but it traditionally has not been the kind of behavior that society punishes. Moreover, punishing behavior that has not clearly been labeled illicit reduces the predictability of risks, an essential element of smooth commercial transactions. For example, since the Seaman's decision, Standard Oil can no longer be certain how strenuously it may deny the existence of a contract without suffering an award of punitive damages. It can only guess what behavior a jury would find amounts to malice, fraud, or oppression. This ad hoc determination of "guilt" is fraught with potential uncertainty and unfairness, and it undermines the predictability of commercial risks during contract

95. Indeed, some state statutes protect the breaching party by prohibiting punitive damages. See, e.g., CALIF. CIV. CODE § 3294 (West 1979); MONT. CODE ANN. § 27-1-221 (1983); N.D. CENT. CODE § 32-03-07 (1976); see also Brown-Marx Assocs., Ltd. v. Emigrant Sav. Bank, 527 F. Supp. 277, 282-83 (N.D. Ala. 1981) (noting the strong public interest in insurance industry regulation in refusing to extend the bad faith tort from insurance contracts to consumer contracts). The court in Hibschman Pontiac, Inc. v. Batchelor, 340 N.E.2d 377 (Ind. Ct. App. 1976), explained its decision not to extend punitive damages to a commercial context:

We do not agree that "...[a] breach of contract is a wrong as much as a tort." Even in cases of unjustified intentional breach of contract unaccompanied by tortious conduct, we do not believe that the 'wrong' involved is a wrong warranting the intrusion of punitive damages into a private transaction. The threat of punitive damages should not be allowed to chill the assertion of a valid contract dispute or to foreclose a contracting party from breaching a contract he no longer desires to consummate. Id. at 380 (citation omitted). This hesitancy to punish the breaching party is also embodied in the traditional rule prohibiting liquidated damages that are disguised penalties for breach. See Goetz & Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 COLUM. L. REV. 554, 555 (1977).

96. See Hibschman Pontiac, Inc. v. Batchelor, 340 N.E.2d 377, 380 (Ind. Ct. App. 1976) ("Although society has an interest in the smooth operation of commercial transactions, we do not believe that this interest should be furthered by subjecting the private parties to the uncertainty of punitive damages."); cf. Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages, 56 S. CAL. L. REV. 133, 134 n.6 (1982) (noting the great bargaining power that even a weak punitive damages claim gives a negotiator in settlement talks).

97. See supra note 28 and accompanying text (discussing the standard for an award of punitive damages). Although a judge has the power to reduce an outrageous punitive damages award, the jury generally has great latitude in determining whether to award punitive damages at all. See Ellis, supra note 91, at 39.
and settlement negotiations.98

The only rationale for punitive damages that retains its force in the commercial context is the need to alleviate the undercompensation that results from limits on other available remedies. This argument traditionally has been framed in the context of the need to provide reimbursement for litigation expenses in order to make the plaintiff whole,99 indeed, a plaintiff that incurs substantial legal fees in enforcing its rights under a contract but recovers only ordinary contract damages is not put in the same position it would have been in had the contract been performed.100 Punitive damages also may prevent undercompensation from other restrictive aspects of traditional contract remedies, such as the requirements of certainty of damages and foreseeability of loss.101 That traditional contract remedies may undercompensate plaintiffs like Seaman's, however, does not justify the creation of a new tort in order to provide additional compensation through punitive damages. Rather, courts should address the undercompensation issue directly to determine what modifications of traditional contract remedies are appropriate in light of the facts of each case of breach of the implied covenant of good faith.102

Determining what modifications in traditional contract remedies are justified in the context of a bad faith breach of a commercial contract requires an examination of the types of be-

98. This is especially apparent when one considers the power a punitive damages claim gives the plaintiff in settlement negotiations. Because the possibility and extent of punishment is uncertain, the defendant faced with even a weak punitive damages claim may agree to an unfavorable settlement. See Schwartz, supra note 96, at 134 n.6.

99. See D. Dobbs, supra note 75, § 3.9, at 221; K. Redden, supra note 88, § 7.6(C), at 628-29.

100. See Hibschman Pontiac, Inc. v. Batchelor, 340 N.E.2d 377, 380 (Ind. Ct. App. 1976) (observing that "[w]ith the exception of recovery of attorney fees, the aggrieved party has an adequate remedy in the recovery of compensatory damages" for oppressive breach of contract).

101. See supra notes 23-24 and accompanying text.

102. See Marschall, Willfulness: A Crucial Factor In Choosing Remedies for Breach of Contract, 24 ARIZ. L. REV. 733, 759 n. 126 (1982) ("Those who conclude that this embryonic tort [of bad faith breach of contract] should be aborted may decide that developing remedial principles for breach of contract which more fully protect plaintiffs' expectancy interests would decrease efforts by plaintiff's attorneys to transform contract breaches into torts."); cf. Schwartz, supra note 96 at 139-140 ("If it is true that existing damage rules fail to comprehend significant elements of harm that torts are likely to produce, the proper strategy entails reforming or revising those damage rules directly, rather than striving for a surrogate result through reliance on punitive damages.").
behavior encompassed by the label "bad faith." Admittedly, it would be virtually impossible, as well as undesirable, to catalogue the multifarious varieties of bad faith in commercial dealings. Nevertheless, there seems to be a common theme in cases involving a breach of the implied covenant of good faith that finds expression in Restatement (Second) of Contracts:

"Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party . . . ." In almost all instances of bad faith, the defendant has taken advantage of the technicalities of contract law by adhering to the letter, but not the spirit, of the contract. In determining what conduct constitutes bad faith, courts typically take a functional approach in that they look to the purpose of the
contract and measure "bad faith" according to the parties' reasonable expectations.107

This functional approach is just as applicable to the determination of an appropriate remedy as it is to the determination of what constitutes bad faith; if the defendant's act violates the spirit of the contract, courts should look to that spirit in shaping a remedy. Although it may be inappropriate to punish a defendant that breaches in bad faith,108 the defendant should not be allowed to benefit from technical limitations on contract remedies at the plaintiff's expense. Thus, when a defendant breaches the implied covenant of good faith, courts should depart from the traditional limitations on contract damages whenever necessary to protect the spirit of the contract as reflected in the plaintiff's reasonable expectations.109 Of course, a different "package" of damages would be required depending on the facts of the particular case and any statutory limitations on damages in force in the particular jurisdiction.110 This func-

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107. For an example of this functional approach in identifying bad faith breaches of insurance contracts, see supra note 47.

108. See supra notes 94-98 and accompanying text.

109. See Farnsworth, supra note 53, at 1209 (suggesting willfulness of breach as one factor in deciding whether to relax foreseeability rule); Summers, supra note 21, at 253, 256 (arguing that the traditional foreseeability rules should be relaxed and tort damages permitted in cases involving a bad faith breach of contract). Professor Daniel A. Farber argues that "supercompensatory" damages are appropriate for bad faith breach of contract. See Farber, Reassessing the Economic Efficiency of Compensatory Damages for Breaches of Contract, 66 VA. L. REV. 1443, 1445-47 (1980). Farber defines "supercompensatory" damages as the amount of damages awarded in excess of the amount necessary to put the plaintiff in the same position he or she would have been in had the contract been performed. Supercompensatory damages, although they have a penalty element, are not the same as punitive damages. See id. at 1445 n.14. Farber contends that supercompensatory damages may be more economically efficient than ordinary contract damages since supercompensatory damages provide an optimal level of deterrence and compensation. See id. at 1445.

110. California, for example, has a procedural rule providing that, unless
tional approach to bad faith breach of contract and its remedies can be illustrated using the facts of Seaman's.

The litigation expenses Seaman's incurred should have been recoverable because of Standard's bad faith in repudiating the contract. By using the indefiniteness of the contract terms to deny that any contract existed, an argument that the California Supreme Court rejected summarily, Standard attempted to deprive Seaman's of its opportunity to collect adequate compensation for breach of contract, one of the basic expectations of any contract. Because Seaman's could not have anticipated the need to initiate litigation to prove the existence of a contract, its "package" of damages should have included an award of attorney's fees and litigations costs. Indeed, some jurisdictions already provide for fee shifting when an opponent's legal action is unjustified, and even jurisdictions with statutory restrictions on awards of attorney's fees often provide provided by statute, payment of attorney's fees is left to the agreement of the parties. See Cal. Civ. Proc. Code § 1021 (West 1980). The California Supreme Court, however, recently upheld an award of attorney's fees resulting from a bad faith breach of an insurance contract, reasoning that attorney's fees incurred to obtain the benefits due under an insurance contract were damages proximately caused by the insurer's tortious conduct. See Brandt v. Standard Ins. Co., 37 Cal. 3d 813, 693 P.2d 796, 799, 210 Cal. Rptr. 211, 213 (1985). Similar reasoning would seem to apply to Seaman's. If Standard denied the existence of the contract in bad faith, the attorney's fees incurred by Seaman's to litigate the existence of the contract should be recoverable. If, as the Brandt court suggests, attorney's fees are recoverable as "damages," it should not matter, under California law, whether the damages are tort damages or contract damages. See Brandt, 37 Cal. 3d at ___, 693 P.2d at 803 n.1, 210 Cal. Rptr. at 218 n.1 (1985) (Lucas, J., dissenting).

111. See Seaman's, 36 Cal. 3d 752, 686 P.2d at 1162-63, 206 Cal. Rptr. at 358-59.

112. See supra notes 53-54 and accompanying text.

113. The justification for shifting attorney's fees is particularly strong when the "bad faith" aspect of a defendant's conduct consists of threatening or dragging out baseless litigation, such as when a defendant frivolously denies the existence of a contract. See Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651, 658-59, 661; see also W. Keeton, supra note 31, § 120, at 893 (suggesting that although defendants cannot be liable for malicious prosecution for proceedings they did not initiate, "[a] bad faith defense . . . may subject the defendant to liability for attorneys' fees even when no statute so provides and this may serve to accomplish most of the purposes of a malicious prosecution action"). The threat of an award of attorney's fees may deter the defendant from presenting any defense it wishes, but it is not as likely to violate the policy of unfettered access to the courts as is the threat of a large, unpredictable punitive damages award.

114. See, e.g., Ga. Code Ann. § 13-6-11 (Supp. 1984) (permitting shifting of fees in cases involving bad faith breach of contract); Idaho R. Civ. P. 54(e)(1) (authorizing fee shifting if case is "brought, pursued or defended frivolously, unreasonably or without foundation"); Ill. Ann. Stat. ch. 110, § 2-611 (Smith-
a common law exception to assess fees against a "vexatious litigant."  

Similarly, the rules requiring reasonably certain proof of contract damages should be relaxed in cases like *Seaman's*. The court’s use of traditional certainty requirements allowed Standard to benefit from the difficulties of proof it had created for *Seaman’s* because Standard’s repudiation prevented Seaman’s from opening its expanded business and thus made it difficult to prove the amount of lost profits. One way courts could relax the certainty requirement in bad faith cases is to permit the plaintiff to prove its future profits through modern forecasting methods. For instance, the court could have awarded damages representing an earnings estimate, reflecting an average of several possible outcomes, discounted to present value. Finally, an award of prejudgment interest on that portion of the lost profits accrued as of the date of judgment would have been appropriate to compensate Seaman’s for the lost time value of money it suffered because of the delay occasioned by Standard’s bad faith breach.

Hurd Supp. 1983) (allowing fee shifting when allegations and denials are made “without reasonable cause and found to be untrue”).

115. See, e.g., County of Inyo v. City of Los Angeles, 78 Cal. App. 3d 82, 92, 144 Cal. Rptr 71, 77-78 (1978) (recognizing the existence of the “vexatious litigant” exception in California but refusing to apply it to the facts at hand).

The federal courts have carved out their own bad faith exception, permitting fee shifting when a party refuses to admit a valid legal claim or engages in other conduct in litigation amounting to bad faith. See Alyeska Pipeline Co. v. Wilderness Soc’y, 421 U.S. 240, 258-59 (1975) (observing that “a court may assess... attorneys' fees... when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons....'”) (citations omitted); Note, *Attorney’s Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 323-30 (1977).

116. See supra note 24 and accompanying text.

117. For discussions of the difficulty of proving lost profits of a new business, see Aldon Indus., Inc. v. Don Myers & Assoc., Inc., 517 F.2d 188, 191 (5th Cir. 1975); Note, supra note 24, at 512-18.

118. See Schiro, *Prospecting for Lost Profits in the Uniform Commercial Code: The Buyer's Dilemmas*, 52 S. CAL. L. REV. 1727, 1759 (1979); see also id. at 1753 (noting that courts often shift the burden of proof as to uncertainty to the defendant).


120. The complexity of the rules on prejudgment interest are beyond the
If the transaction in Seaman’s had not been governed by article 2 of the UCC, the common law rule limiting consequential damages to those foreseeable by the parties at the time of contracting might have barred recovery of lost profits from the planned venture between Seaman’s and the city of Eureka. Standard knew when it contracted with Seaman’s that


Courts also are developing other weapons to combat the undercompensation produced by ordinary contract damages, and the justifications for these “extra” damages are even stronger when the breach of contract is in bad faith. See Gerard v. Almouli, 746 F.2d 936, 939 (2d Cir. 1984) (awarding injunctive relief for breach of the implied covenant of good faith); Goetz & Scott, supra note 95, at 557-58 (noting increasing approval of liquidated damage clauses); Schwartz, The Case for Specific Performance, 89 YALE L.J. 271, 271 (1979) (arguing that specific performance should be available routinely).

121. See Seaman’s, 36 Cal. 3d at __, 686 P.2d at 1163, 206 Cal. Rptr. at 359 (stating that the contract contemplated a sale of goods governed by the U.C.C.). Under § 2-715 of the Code, the risk of an unforeseeable inability to cover falls on the breaching seller. Section 2-715 provides in part:

(2) Consequential damages resulting from the seller’s breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . .


122. Unlike U.C.C. § 2-715, the common law rule of foreseeability seems to place the risk of an unforeseeable inability either to “cover” or to replace the breaching party’s services on the nonbreaching party. The common law rule is explained in the Restatement:

If several circumstances have contributed to cause a loss, the party in breach is not liable for it unless he had reason to foresee all of them. Sometimes a loss would not have occurred if the injured party had been able to . . . “cover” . . . . If the inability of the injured party to make such arrangements was foreseeable by the party in breach at the time he made the contract, the resulting loss was foreseeable.

RESTATEMENT (SECOND) OF CONTRACTS § 351 comment d (1981). The implication of this rule is that if the inability to “cover” was unforeseeable at the time of contracting, the resulting losses also were unforeseeable and the breaching party is not liable for them. Even in jurisdictions applying the UCC foreseeability rule for the sale of goods, this common law rule might preclude a plaintiff from recovering consequential damages from the defendant if, for example, the defendant breached a service contract but could not replace the defendant’s services due to an unforeseeable shortage of workers.
Seaman's needed an oil supply contract to obtain a lease, but it probably did not foresee that Seaman's would be unable to obtain another long-term supply contract if Standard breached. Standard did know at the time it breached, however, that Seaman's would be unable to cover; Standard itself had adopted a "no new business policy" in the wake of the oil crisis. If a court denies consequential damages flowing from a bad faith breach of contract in a situation like this simply because they were not foreseeable by the parties at the time of contracting, it rewards the breaching party for becoming oppressive at the opportune moment and undercompensates the nonbreaching party. Courts could escape this danger and still avoid runaway liability by limiting damages to those that the breaching party reasonably could have foreseen at the time of the bad faith breach.

Although this functional approach to formulating remedies for breach of the implied covenant of good faith initially may seem to be as expansive as simply permitting tort remedies, it seems to be as expansive as simply permitting tort remedies, it

123. See Seaman's, 36 Cal. 3d at __, 686 P.2d at 1175, 206 Cal. Rptr. at 371 (Bird, C.J., concurring and dissenting); Appellant's Opening Brief, supra note 4, at 7 (one of Standard's agents testified that Standard's letter was intended to give Seaman's "something that they could present to the City").

124. Seaman's and Standard reached their agreement in 1972, before the Arab oil embargo struck the United States economy. Seaman's, 36 Cal. 3d at __, 686 P.2d 1161, 206 Cal. Rptr. at 357; see authorities cited supra note 7.

125. Seaman's, 36 Cal. 3d at __, 686 P.2d at 1161, 206 Cal. Rptr. at 357.

126. Cf. Comment, Inadequacy of Hadley v. Baxendale As a Rule for Determining Legal Cause, 26 U. PITT. L. REV. 795, 809 (1965) (arguing that the defendant who negligently breaches a contract should be liable for consequential damages foreseeable at the time of breach and the defendant who willfully breaches should be liable for all consequential damages substantially caused by the breach).

The UCC has followed this approach in moving the point at which one measures foreseeability of loss from the time of contracting to the time of breach. Although the general rule of § 2-715(2) incorporates the foreseeability doctrine of Hadley v. Baxendale, see supra notes 23 & 122, the Code in effect shifts the risk of losses resulting from the buyer's unforeseeable inability to cover to the breaching seller as long as the seller had reason to know the buyer's needs at the time of contracting. See supra note 121.

has several advantages. In an action for tortious breach of the implied covenant, the jury must carefully scrutinize the defendant's oppressive, malicious, or fraudulent conduct before awarding punitive damages. Yet under the functional approach to damages for bad faith breach of contract, the defendant's behavior would be relevant only insofar as it creates problems or doubts in measuring the plaintiff's damages. Evidence of the defendant's behavior would be admissible to establish its bad faith breach, but any inflammatory or prejudicial evidence would be excluded since the defendant's malicious behavior would be irrelevant for purposes of compensating the plaintiff.\textsuperscript{127} This limitation would help to prevent a jury from using the relaxed rules of certainty and foreseeability to grant runaway compensatory damages as a substitute for punitive damages. Similarly, evidence of the defendant's wealth, currently admissible to determine the amount of punitive damages necessary to punish the defendant,\textsuperscript{128} also would be excluded as irrelevant.\textsuperscript{129} Finally, the functional approach would promote economic efficiency by discouraging those wasteful breaches in which the breaching party has reason to know that its gains will not exceed the nonbreaching party's compensable losses.\textsuperscript{130} A party that contemplates breaching in bad faith might reconsider if it knew that it would not be permitted to benefit from the traditional limitations on contract damages.

CONCLUSION

The facts of Seaman's present a compelling case for looking beyond traditional contract damages to remedy bad faith breaches. Standard, knowing that the expansion plans of Seaman's were dependent on the fuel supply contract, denied the existence of the contract in the midst of the oil crisis.\textsuperscript{131} In doing so, it attempted to deprive Seaman's of one of the fundamental expectations of all contracting parties—compensation for breach in the form of contract damages. In light of the growing use of the tort of breach of the implied covenant of good faith and fair dealing in the insurance, consumer, and em-

\textsuperscript{127} See Fed. R. Evid. 401-403.
\textsuperscript{129} See Fed. R. Evid. 401-403.
\textsuperscript{130} See Diamond, supra note 30, at 439-46. Contrary to Diamond's thesis, it is not necessary to make a bad faith breach of contract a tort to get this effect. See Burton, supra note 104, at 372-73; Farber, supra note 109, at 1445.
\textsuperscript{131} See Seaman's, 36 Cal. 3d at __, 686 P.2d at 1161, 206 Cal. Rptr. at 357.
ployment contexts, Seaman's seemed to offer an appropriate occasion for the California Supreme Court to consider extending the tort to the commercial context. Although the court purported not to decide on the Seaman's facts whether to make this extension, its new tort of bad faith denial of contract does not stand on its own and is more accurately described as a type of breach of the implied covenant of good faith.

Characterizing a breach of the implied covenant of good faith as tortious may be justified in the insurance, and perhaps employment and consumer, contexts because of policy considerations that require the imposition of a special duty of care on the stronger party to the contract. Yet no matter how egregiously a party to a commercial contract violates the implied covenant of good faith, the breach should not be considered tor-

132. See supra notes 28-29, 46, 59 & 64-65 and accompanying text.

133. Some courts have noted that the presence of self-interest strips a first-party insurance contract of fiduciary qualities, one of the key policy factors supporting tort liability for breach of the implied covenant of good faith. See, e.g., Lawton v. Great S.W. Fire Ins. Co., 118 N.H. 607, 614, 392 A.2d 576, 580-81 (1978). The same problem exists in the employment and consumer settings, for both the employee and the consumer seek to "profit" from their dealings with the stronger party. See Note, supra note 71, at 166 ("While insureds contract to protect themselves from risk, employees, like stockholders, contract for commercial advantage."). A California appellate court has construed the concept of "profit" narrowly, however, in holding that an employee entered a contract for payments in order to secure financial stability and peace of mind, not for commercial advantage. See Wallis v. Kroehler Mfg. Co., 160 Cal. App. 3d 1109, __, 207 Cal. Rptr. 123, 129 (1984).

In a consumer class action suit alleging fraudulent, misleading, and deceptive advertising in the marketing of breakfast cereals, the California Supreme Court rejected the plaintiff's argument that "imposition of fiduciary obligations is appropriate whenever one party with a stronger bargaining position or greater knowledge has the ability to reach out and exploit the weaker party." Committee on Children's T.V. v. General Foods Corp., 35 Cal. 3d 197, 221, 673 P.2d 660, 675, 197 Cal. Rptr. 783, 798 (1983). The court held that fiduciary principles were generally inappropriate in the buyer-seller relationship but noted that there might be exceptional cases in which a buyer's heavy reliance, known to the seller, might justify imposition of a fiduciary duty. See id. at 222 n.22, 673 P.2d at 676 n.22, 197 Cal. Rptr. at 799 n.22. Perhaps the idea of "profit" can be construed narrowly, as it seemed to be in Wallis, as a pure intent to increase one's tangible wealth. One could argue, for example, that in buying a home or contracting to build a home, the consumer seeks security and peace of mind rather than financial gain. Cf. Jones v. Abriani, 169 Ind. App. 556, 350 N.E.2d 635 (1976) (seller held liable for oppressive breach of contract in selling defective mobile home to young married couple).

Nonetheless, as in commercial contracts, the fiduciary qualities of employment and consumer contracts are not as strong as those in third-party insurance cases. As a result, it is unclear whether courts outside California will permit tort liability for breach of the implied covenant of good faith in employment and consumer contracts.
tious; each party to the contract holds itself out as being sophisticated enough to be in business and knows that it cannot rely for the protection of its interests on the other contracting party. Consequently, courts should not use tort liability and punitive damages to condemn one business for putting its own interests before those of another business.

Courts can, however, ensure that the breaching party does not take advantage of the formal rules of contract remedies to avoid its obligation to pay the nonbreaching party adequate contract damages, a fundamental expectation in any business bargain. Courts apply the implied covenant of good faith in order to protect a nonbreaching party’s expectations under the contract when the breaching party obeys the express terms of the agreement but fails to cooperate in achieving the benefits for which both parties bargained. Breach of the implied covenant of good faith, however, should not lead to tort liability in the commercial setting. Instead of creating a new, confusing tort that only can lead to more litigation, the Seaman’s court should have rejected the theory of tortious breach of the implied covenant of good faith in commercial contracts and focused its creative energy on shaping traditional contract remedies to protect the expectations of plaintiffs that can prove a breach of the implied covenant of good faith. Although this Comment can only act as a compass, it proposes that courts facing bad faith breaches of commercial contracts bear in mind the functional quality of the implied covenant of good faith and fair dealing and, if necessary, sail bravely into the uncharted waters of innovative contract remedies.

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