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Robert S. Adler

Richard A. Mann

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## GOOD FAITH: A NEW LOOK AT AN OLD DOCTRINE

by

ROBERT S. ADLER\*  
RICHARD A. MANN\*\*

The importance and ubiquity of contracts cannot be overstated. It is indeed the rare individual who does not enter into or perform contracts on a *daily* basis. Moreover, every business enterprise unavoidably must enter into contracts with its employees, its suppliers of goods and services, and its customers in order to conduct its business operations.

Given the innumerable contractual transactions, it is inevitable that disputes would arise from contracts. The law's approach to policing the contractual relationship has been starkly dichotomous: those contracting parties who are considered to deal at arm's length receive a substantially lower level of protection than those who, because of a special relationship (fiduciary or confidential) between them, are not deemed to deal at arm's length. It is our view that many contracting parties enter into relationships (strategic alliances) that do *not* fall at these poles but rather fall somewhere in between. We endorse the law's dichotomous treatment as a reasonably effective, general set of default provisions for contracting parties, but we observe that, as *default* provisions, they may be modified to meet the particular needs of specific alliances. In short, we conclude that there are numerous alliances that, while not fully fiduciary nor fully confidential, are really not fully arm's length.<sup>1</sup> In addition, there are many alliances in which one or both of the parties would prefer that their contract not be treated as arm's length, but rather as one requiring some higher standard of conduct.<sup>2</sup> Nonetheless, for the most part, these alliances are governed by the default provisions applicable to arm's length transactions because the parties have not turned to contractual provisions imposing higher standards.

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\* Associate Professor of Legal Studies, Kenan-Flagler Business School, University of North Carolina-Chapel Hill; A.B., University of Pennsylvania, 1966; J.D., University of Michigan, 1969.

\*\* Professor of Legal Studies, Kenan-Flagler Business School, University of North Carolina-Chapel Hill; B.S., University of North Carolina, 1964; J.D., Yale University, 1973.

1. For example, this category may include some of the following types of contracts: output and requirements contracts, exclusive dealing contracts, and credit transactions.

2. For example, a higher standard of conduct might be desired where one of the parties has considerably less bargaining power or is at a severe disadvantage regarding access to material information about the transaction.

It is our contention that many of these alliances would be well served by the parties' opting out of the automatic provisions of arm's length transactions by agreeing to higher standards. In other words, strategic alliances should consider the benefits of "shortening the arm's-lengthedness" of their contractual relationship. Moreover, we consider the doctrine of good faith to be well suited to serve as the mechanism to accomplish this objective.

In this article we sketch the basic contours of the contractual policing devices that apply to special relationships and to arm's length transactions. We then explicate in greater detail the duty of good faith under general contract law and the Uniform Commercial Code. Finally, we explore some strategies for shortening arm's length transactions through consensual extensions of the duty of good faith.

### TRADITIONAL CONTRACT LAW PROTECTIONS

As mentioned, contractual dealings give rise to the possibility that disputes will occur. Many contract disputes are brought about by misconduct of one or both of the parties. Contractual misconduct typically fits into two patterns: (1) conduct precluding the voluntary or knowing assent of a party to the contract or (2) the unreliability of the other party to the contract. Examples of the first include duress and fraud. Unreliability ranges from lack of diligence to willful breach. In addition, contractual disputes may arise from the unpredictability of the future. Unpredictability includes unforeseen events that change the economics of performance.

The law provides a number of "policing devices" to protect parties to a contract from misconduct. The level of protection and which devices are available depend upon three factors (in order of importance): the legal relationship between the parties, the stage of the contract in which the misconduct occurs, and the applicable law.

Contracts are primarily governed by state common law, except for sales of goods if the Uniform Commercial Code (UCC or Code) has specifically displaced the common law.<sup>3</sup> But where general contract law has not been specifically modified by the Code, the common law of contracts continues to apply to sales of goods transactions.<sup>4</sup> Except for unconscionability and good faith, the Code has no specific provisions directly bearing on the policing devices we consider in this article.<sup>5</sup> Accordingly, the predominant determi-

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3. U.C.C. § 1-103 (1990).

4. *Id.* Comment 1 of § 1-103 provides in part: "[T]his section indicates the continued applicability to commercial transactions of all supplemental bodies except insofar as they are explicitly displaced by this Act, . . ." *Id.* at cmt.1.

5. Section 1-103 states in relevant part: "Unless displaced by the particular provisions of

nants of what protection is available to contracting parties are the relationship between the parties and the stage of the contract.<sup>6</sup>

### *Special Relationships Between Parties*

The parties to a contract are deemed not at arm's length when they have a special relationship, either confidential or fiduciary. In such relationships the law imposes additional duties beyond those required in an arm's length transaction upon one of the parties resulting in "heightened" protection for the other party. In these relationships the law establishes a duty of full disclosure, utmost good faith, and fair dealing.<sup>7</sup>

#### Confidential Relationship

A confidential relationship involves a dependent party who justifiably trusts the dominant party, relies on his judgment, and assumes that the dominant party will act in the dependent party's best interest.<sup>8</sup> Confidential relationships include guardian-ward, trustee-beneficiary, agent-principal, spouses, parent-child, attorney-client, physician-patient, and clergy-parishioner.<sup>9</sup> In addition, some types of contracts create in themselves a confidential relation requiring the utmost good faith and full disclosure. Examples include some suretyship and guaranty contracts,<sup>10</sup> and insurance contracts.<sup>11</sup>

Where there is a confidential relationship, the law also forbids undue

this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, *fraud, misrepresentation, duress, coercion, mistake*, bankruptcy, or other validation or invalidating cause shall supplement its provisions." *Id.* (emphasis added).

6. The legal protections discussed in this section of the article principally apply to the formation of contracts. Nevertheless, most of them can also apply to the performance and enforcement stage, although this occurs less frequently. As will be discussed later, good faith does not apply to the formation stage of arm's length transactions. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c. See *infra* note 103 and accompanying text.

7. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106, at 738 (5th ed. 1984) [hereinafter KEETON]. See DAN B. DOBBS, REMEDIES § 10.4 (1973) (for discussion on the abuse of confidential relationships).

8. DOBBS, *supra* note 7, § 10.3, at 676-78; RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (1979).

9. DOBBS, *supra* note 7, § 10.3 at 677; RESTATEMENT (SECOND) OF CONTRACTS § 177, cmt. a (1979); JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 9-10, at 353 (3d ed. 1987).

10. RESTATEMENT (SECOND) OF CONTRACTS § 169 cmt. c (1979); LAURENCE P. SIMPSON, SURETYSHIP 86-93 (1950); CALAMARI & PERILLO, *supra* note 9, § 9-20, at 369; KEETON, *supra* note 7, § 106, at 739.

11. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 5.8 (1988).

influence which is the unfair persuasion of a person by a party in a dominant position based upon a confidential relationship.<sup>12</sup> The law carefully scrutinizes contracts between those in a relationship of trust and confidence that is likely to permit one party to take unfair advantage of the dependent party.<sup>13</sup> Factors taken into account by the courts include the unfairness of the resulting contract, the unavailability of independent advice, and the vulnerability of the victim.<sup>14</sup> A transaction induced by undue influence is voidable by the dependent party.<sup>15</sup>

### Fiduciary Relationship

A fiduciary relationship is a relationship of trust and confidence in which one of the parties (the fiduciary) owes to the other party (the beneficiary) a duty of utmost loyalty and good faith.<sup>16</sup> The fiduciary duty is even more stringent than the duty owed in confidential relations.<sup>17</sup> The fiduciary duty is owed by an agent to his principal and by an employee to his employer.<sup>18</sup> It is also owed by a trustee to a beneficiary of a trust,<sup>19</sup> by an officer or director of a corporation to the corporation and its shareholders,<sup>20</sup> a partner to the partnership,<sup>21</sup> by joint venturers,<sup>22</sup> and by a lawyer to his clients.<sup>23</sup>

A fiduciary may not deal at arm's length. A fiduciary owes a duty to make full disclosure of all relevant facts that the fiduciary knows or should

12. CALAMARI & PERILLO, *supra* note 9, §§ 9-10 & 9-11; RESTATEMENT (SECOND) OF CONTRACTS § 177 (1979).

13. CALAMARI & PERILLO, *supra* note 9, § 9-10.

14. RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. b (1979).

15. CALAMARI & PERILLO, *supra* note 9, § 9-12; RESTATEMENT (SECOND) OF CONTRACTS § 177(2) (1979).

16. *See* DOBBS, *supra* note 7, § 10.4, at 680-81.

17. RESTATEMENT (SECOND) OF CONTRACTS § 173 cmt. a (1979). Note that all fiduciary relationships are also confidential relationships but that not all confidential relationships are fiduciary relationships.

18. *See* HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, AGENCY AND PARTNERSHIP § 4 (2d ed. 1990); *See also* WARREN A. SEAVEY, LAW OF AGENCY § 3 (1964); W. EDWARD SELL, AGENCY, § 131 (1975); RESTATEMENT (SECOND) OF AGENCY §§ 2 & 13 (1957).

19. *See* GEORGE G. BOGERT, TRUSTS § 95 (6th ed. 1987) (for a general discussion on the fiduciary duty of a trustee).

20. *See* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 235 (3d ed. 1983) (for general discussion on fiduciary duties).

21. U.P.A. § 21 (1914); REUSCHLEIN & GREGORY, *supra* note 18, § 188.

22. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); REUSCHLEIN & GREGORY, *supra* note 18, § 266.

23. DOBBS, *supra* note 7, § 10.4, at 681.

know when entering into a transaction with the beneficiary.<sup>24</sup> Moreover, the beneficiary must understand fully his or her legal rights.<sup>25</sup> A fiduciary must deal fairly and in good faith with the beneficiary. As Judge (later Justice) Cardozo said “[m]any forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. A trustee [fiduciary] is held to something stricter than the morals of the market place.”<sup>26</sup>

Moreover, a fiduciary must act solely in the interest of the beneficiary, not in his or her own interest or in the interest of a third party.<sup>27</sup> The fiduciary’s loyalty must be undivided, and his or her actions must be devoted exclusively to represent and promote the interests of the beneficiary.<sup>28</sup> A fiduciary cannot compete with the beneficiary or act on behalf of a competitor.<sup>29</sup> A fiduciary may not use or disclose confidential information obtained in the course of the relationship for his or her own benefit or contrary to the interest of the beneficiary.<sup>30</sup> A fiduciary may not profit secretly from the relationship with the beneficiary.<sup>31</sup>

### *Arm’s Length Transactions*

An arm’s length transaction is one in which the parties owe each other no special duties and each is acting in his or her own self interest.<sup>32</sup> Where the parties deal at arm’s length, they are subject to the ordinary legal protections against misconduct. In most business or market transactions, the parties deal at arm’s length and are thus subject only to “the morals of the market place.”

Misconduct prohibited in arm’s length transactions includes duress, fraud, misrepresentation, unilateral mistake, and unconscionability. In contrast to transactions between parties in a special relationship, in an arm’s length transaction an affirmative duty of disclosure is *not* imposed<sup>33</sup> and fairness is policed only at the margin.

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24. KEETON, *supra* note 7, § 106, at 739; BOGERT, *supra* note 19, §§ 87 & 96; RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); RESTATEMENT (SECOND) OF CONTRACTS § 173 (1979); RESTATEMENT (SECOND) OF TORTS § 551(2)(a)(1981).

25. BOGERT, *supra* note 19, § 96; RESTATEMENT (SECOND) OF CONTRACTS § 173(b)(1979).

26. Meinhard v. Salmon, 164 N.E. at 546.

27. DOBBS, *supra* note 7, § 10.4, at 681; BOGERT, *supra* note 19, § 95.

28. BOGERT, *supra* note 19, § 95.

29. See DOBBS, *supra* note 7, § 10.4 (noting duties of fiduciaries).

30. *Id.*

31. *Id.*; BOGERT, *supra* note 19, § 95.

32. DOBBS, *supra* note 7, § 10.4 at 680.

33. *Id.* See CALAMARI & PERILLO, *supra* note 9, § 9-20 at 367. See also KEETON, *supra* note 7, § 106, at 737.

## Duress

“Duress is a form of coercion.”<sup>34</sup> Because a person should not be held to an agreement into which he has not entered voluntarily, the law will not enforce any contract induced by duress.<sup>35</sup> In general, duress is any wrongful act or threat that overcomes the free will of a party.<sup>36</sup> But the misconduct must go beyond hard bargaining to constitute duress;<sup>37</sup> there must be the use of improper threats or acts, including economic and social coercion, to compel a person to enter into a contract.<sup>38</sup> The threat may be explicit or may be inferred from words or conduct,<sup>39</sup> but in either case it must leave the victim with no reasonable alternative.<sup>40</sup> Duress makes the contract voidable at the option of the coerced party.<sup>41</sup>

## Fraud

Whereas duress prevents assent to a contract from being voluntarily given, fraud prevents assent from being knowingly given. Fraud, also called deceit, is an intentional misrepresentation of material fact by one party to the other party, who consents to enter into a contract in justifiable reliance on the misrepresentation.<sup>42</sup> Fraud renders the contract voidable by the defrauded party,<sup>43</sup> who also has the alternate remedy of affirming the contract and recovering damages.<sup>44</sup> The requisite elements of fraud are: (1) a false representa-

34. DOBBS, *supra* note 7, § 10.2 at 655.

35. *Id.* at 656; RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979); CALAMARI & PERILLO, *supra* note 9, § 9-8, at 349.

36. *See* DOBBS, *supra* note 7, § 10.2, at 655-58; CALAMARI & PERILLO, *supra* note 9, § 9-2, at 337.

37. CALAMARI & PERILLO, *supra* note 9, § 9-3, at 341; RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. f (1979).

38. CALAMARI & PERILLO, *supra* note 9, §§ 9-2, 9-3 & 9-7; RESTATEMENT (SECOND) OF CONTRACTS § 176 (1979); *See* DOBBS, *supra* note 7, § 10.2, at 660-70 (necessity of wrongful act for duress to be established).

39. RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. a (1979); DOBBS, *supra* note 7, § 10.2, at 660.

40. RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (1979); DOBBS, *supra* note 7, § 10.2, at 658.

41. CALAMARI & PERILLO, *supra* note 9, § 9-8, at 349; DOBBS, *supra* note 7, § 10.2, at 656; RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979).

42. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1979); RESTATEMENT (SECOND) OF TORTS § 525 (1981).

43. CALAMARI & PERILLO, *supra* note 9, §§ 9-13 & 9-23; RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1979).

44. KEETON, *supra* note 7, § 110; CALAMARI & PERILLO, *supra* note 9, § 9-23, at 373-77; RESTATEMENT (SECOND) OF TORTS § 525 1981.

tion (2) of a fact (3) that is material and (4) made with knowledge of its falsity and the intention to deceive and (5) which representation is justifiably relied on.<sup>45</sup>

A false representation "is an assertion that is not in accord with the facts."<sup>46</sup> A misrepresentation may be made through a positive statement, through conduct that misleads, or by concealment of a fact the other party would otherwise have learned.<sup>47</sup> Moreover, a statement of misleading half-truth is considered the equivalent of a false representation.<sup>48</sup>

As a general rule, silence or nondisclosure alone does not amount to fraud when the parties deal at arm's length.<sup>49</sup> In most business or market transactions, the parties deal at arm's length and generally have no obligation to tell the other party everything they know about the subject of the contract. Thus, it is not fraud when a buyer possesses advantageous information about the seller's property, information of which the buyer knows the seller to be ignorant, yet does not disclose such information to the seller.<sup>50</sup>

Although nondisclosure usually does not constitute misrepresentation, in certain situations it does.<sup>51</sup> For example, a person may have a duty of disclosure because of prior representations innocently made before entering into the contract, which the person subsequently discovers to be untrue.<sup>52</sup> In addition, the federal securities statutes,<sup>53</sup> as well as a number of other statutes,<sup>54</sup> impose an affirmative obligation to disclose information in certain types of transactions. Another instance of a duty to disclose arises when

45. KEETON, *supra* note 7, §§ 107-09.

46. RESTATEMENT (SECOND) OF CONTRACTS § 159 (1979).

47. KEETON, *supra* note 7, § 106, at 737; CALAMARI & PERILLO, *supra* note 9, § 9-20, at 367; RESTATEMENT (SECOND) OF TORTS § 550 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 160 (1979).

48. KEETON, *supra* note 7, § 106, at 738; CALAMARI & PERILLO, *supra* note 9, § 9-20, at 367-68; RESTATEMENT (SECOND) OF TORTS § 529 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. b (1979).

49. DOBBS, *supra* note 7, § 10.4, at 680; CALAMARI & PERILLO, *supra* note 9, § 9-20, at 367.

50. DOBBS, *supra* note 7, § 10.4, at 680.

51. CALAMARI & PERILLO, *supra* note 9, § 9-20, at 367-70; RESTATEMENT (SECOND) OF CONTRACTS § 161 (1979).

52. KEETON, *supra* note 7, § 106, at 738; RESTATEMENT (SECOND) OF TORTS § 551(2)(c) (1981); RESTATEMENT (SECOND) OF CONTRACTS § 161(a) cmt. c (1979).

53. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77aa (1988)); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1988)). See generally THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION (2d ed. 1990).

54. See, e.g., Truth-in-Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1665 (1982)); Interstate Land Sales Full Disclosure Act



(1) a person fails to disclose a fact known to him; (2) “he knows that the disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract”; and (3) “non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.”<sup>55</sup>

Another basic element of fraud is that the misrepresentation concern a material fact.<sup>56</sup> A fact is an event that actually took place or a thing that actually exists.<sup>57</sup> Actionable fraud can rarely be based upon what is merely a statement of opinion.<sup>58</sup> A representation is one of opinion if it expresses only the uncertain, non-expert belief of the representer as to the existence of a fact or his judgment as to quality, value, authenticity, or other matters of judgment.<sup>59</sup>

Also to be distinguished from a representation of fact is a prediction of the future. Predictions are similar to opinions, as no one can know with certainty what will happen in the future, and normally predictions are not regarded as factual statements.<sup>60</sup> Likewise, promissory statements ordinarily do not constitute a basis of fraud, as a breach of promise does not necessarily indicate that the promise was fraudulently made.<sup>61</sup> However, a promise that the promisor, at the time of making, had no intention of keeping is a misrepresentation of fact.<sup>62</sup>

In addition to the requirement that a misrepresentation be one of fact, it must also be material.<sup>63</sup> A misrepresentation is material if (1) it would be likely to induce a reasonable person to manifest his assent or (2) the maker of the misrepresentation knows that it would be likely to induce the

(ILSFDA), 15 U.S.C. §§ 1701-20 (1982).

55. RESTATEMENT (SECOND) OF CONTRACTS § 161 (1979). *See also* RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1981).

56. KEETON, *supra* note 7, § 108, at 753-54.

57. *See* RESTATEMENT (SECOND) OF TORTS § 538A (1981).

58. KEETON, *supra* note 7, § 109; CALAMARI & PERILLO, *supra* note 9, § 9-17, at 361-63.

59. RESTATEMENT (SECOND) OF CONTRACTS § 168(1) (1979); RESTATEMENT (SECOND) OF TORTS § 538A & cmt. b (1981); *See* KEETON, *supra* note 7, § 109, at 755-58 (for representations based on opinion).

60. KEETON, *supra* note 7, § 109, at 762.

61. *Id.* at 762-65.

62. *Id.*; CALAMARI & PERILLO, *supra* note 9, § 9-19, at 365-66; RESTATEMENT (SECOND) OF TORTS § 530 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 171 cmt. b (1979).

63. KEETON, *supra* note 7, § 108, at 753-54; RESTATEMENT (SECOND) OF TORTS § 538(1) (1981). In contrast, the Restatement of Contracts provides that a contract justifiably induced by a misrepresentation is voidable if the misrepresentation is *either* fraudulent *or* material. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1979). Thus, under the Restatement of Contracts a fraudulent misrepresentation does not have to be material for the recipient to obtain rescission, but under the Restatement of Torts it must be material if the recipient is to

recipient to do so.<sup>64</sup>

For a misrepresentation to be fraudulent it must have been known by the one making it to be false<sup>65</sup> and must have been made with an intent to deceive.<sup>66</sup> This element of fraud is known as *scienter*.<sup>67</sup> Knowledge of falsity can consist of (a) actual knowledge,<sup>68</sup> (b) lack of belief in the statement's truthfulness,<sup>69</sup> or (c) reckless indifference as to its truthfulness.<sup>70</sup>

A person is not entitled to relief unless he has justifiably relied on the misrepresentation.<sup>71</sup> If the complaining party's decision was in no way influenced by the misrepresentation, he or she has not been deceived because he or she did not rely. Justifiable reliance requires that the misrepresentation contribute substantially to the misled party's decision to enter into the contract.<sup>72</sup> Thus, if the complaining party knew (or it was obvious) that the representation of the defendant was untrue, but the party nevertheless entered into the contract, he has not justifiably relied.<sup>73</sup>

### Nonfraudulent Misrepresentation

Nonfraudulent misrepresentation — which includes both negligent and innocent misrepresentation — is a material, false statement that induces another to rely justifiably but is made without *scienter*. Negligent misrepresentation is a false statement that is made without due care in ascertaining its truthfulness.<sup>74</sup> Innocent misrepresentation is a false representation made

recover damages. RESTATEMENT (SECOND) OF TORTS § 538 (1981).

64. KEETON, *supra* note 7, § 108, at 753-54; RESTATEMENT (SECOND) OF TORTS § 538(2) (1981); RESTATEMENT (SECOND) OF CONTRACTS § 162(2) cmt. c (1979).

65. KEETON, *supra* note 7, § 107, at 741.

66. *Id.*

67. *Id.* at 741-45; DOBBS, *supra* note 7, § 9.2, at 608; RESTATEMENT (SECOND) OF CONTRACTS § 162 cmt. b (1979).

68. KEETON, *supra* note 7, § 107, at 741; RESTATEMENT (SECOND) OF TORTS § 526 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (1979).

69. KEETON, *supra* note 7, § 107, at 741-42; RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (1979).

70. KEETON, *supra* note 7, § 107, at 741-42.

71. KEETON, *supra* note 7, § 108, at 749-53; RESTATEMENT (SECOND) OF TORTS § 537 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979).

72. RESTATEMENT (SECOND) OF CONTRACTS § 167 (1979).

73. KEETON, *supra* note 7, § 108, at 750; RESTATEMENT (SECOND) OF TORTS § 541 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 172 cmt. b (1979).

74. KEETON, *supra* note 7, § 107, at 745-48. *See also* RESTATEMENT (SECOND) OF TORTS §§ 528 & 552 (1981).

without knowledge of its falsity but with due care.<sup>75</sup> To obtain relief for nonfraudulent misrepresentation, all of the other elements of fraud must be present including materiality.<sup>76</sup> The remedies that may be available for nonfraudulent misrepresentation are rescission or damages.<sup>77</sup>

### Unilateral Mistake

A mistake is a belief that is not in accord with the facts.<sup>78</sup> Unilateral mistake occurs when only one of the parties is mistaken.<sup>79</sup> Courts have been hesitant to grant relief for unilateral mistake even though it relates to a basic assumption on which the party entered into the contract and has a material effect on the agreed exchange.<sup>80</sup> Nevertheless, relief will be granted where the nonmistaken party knows, or reasonably should know, that such a material mistake has been made or where the mistake was caused by the fault of the nonmistaken party.<sup>81</sup>

### Unconscionability

The Uniform Commercial Code provides that every contract for the sale of goods may be scrutinized by the court to determine whether in its commercial setting, purpose, and effect it is unconscionable.<sup>82</sup> The court may refuse to enforce an unconscionable contract or any part of the contract it finds to have been unconscionable at the time it was made.<sup>83</sup> The Restatement has a similar provision.<sup>84</sup> Neither the Code nor the Restatement defines the word unconscionable.<sup>85</sup>

75. KEETON, *supra* note 7, § 107, at 748-49. *See generally* RESTATEMENT (SECOND) OF TORTS § 552C (1981) (noting the liability of innocent misrepresentations in commercial contexts).

76. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979).

77. KEETON, *supra* note 7, §§ 107 & 110; CALAMARI & PERILLO, *supra* note 9, § 9-23, at 373; DOBBS, *supra* note 7, § 9.2, at 608-10; RESTATEMENT (SECOND) OF TORTS §§ 552, 552B & 552C (1981).

78. DOBBS, *supra* note 7, § 11.2, at 718.

79. *Id.* § 11.4, at 736-37.

80. CALAMARI & PERILLO, *supra* note 9, § 9-27; DOBBS, *supra* note 7, § 11.4, at 637.

81. CALAMARI & PERILLO, *supra* note 9, § 9-27; DOBBS, *supra* note 7, § 11.4.

82. U.C.C. § 2-302 (1992). Article 2A of the U.C.C., which applies to leases of goods, has a comparable provision. U.C.C. § 2A-108 (1992).

83. U.C.C. § 2-302 (1992); 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4-3, at 201-02 (3d ed. 1988).

84. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

85. 1 WHITE & SUMMERS, *supra* note 83, § 4-3, at 203; CALAMARI & PERILLO, *supra* note 9, § 9-38, at 402.

The doctrine of unconscionability attempts to prevent oppression and unfair surprise, but not to relieve a party from a bad bargain.<sup>86</sup> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.<sup>87</sup>

The doctrine of unconscionability has evolved through its application by the courts to include both procedural and substantive unconscionability.<sup>88</sup> In most cases in which relief for unconscionability has been granted, however, elements of both types of unconscionability have been present.<sup>89</sup> Procedural unconscionability concerns how a term became a part of the contract and looks for the presence of “bargaining naughtiness.”<sup>90</sup> In other words, was unconscionable conduct used to induce the contract?<sup>91</sup> Substantive unconscionability deals with the actual terms of a contract and excludes oppressive or grossly unfair provisions such as exorbitant prices, unfair exclusions or limitations of contractual remedies, or provisions which deprive one party of the benefits of the agreement.<sup>92</sup>

### GOOD FAITH

As discussed in the preceding section, parties dealing at arm’s length must refrain from duress, fraud, misrepresentation, and unconscionability, and must not exploit a unilateral mistake by the other party. Unlike special relationships, in arm’s length transactions full disclosure, good faith, and fair dealing are not imposed by the ordinary policing devices. To be sure, *gross* unfairness does invoke the protection of the doctrine of unconscionability but this doctrine does not address less-than-extreme forms of unfairness. There is, however, a duty that to some extent deals with honesty and fairness in arm’s length contracts — the obligation of good faith.

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86. U.C.C. § 2-302 cmt. 1 (1992).

87. *Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1979).

88. ARTHUR A. LEFF, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487-88 (1967); CALAMARI & PERILLO, *supra* note 9, §§ 9-37, 9-40; DOBBS, *supra* note 7, § 10.7, at 710-11.

89. CALAMARI & PERILLO, *supra* note 9, § 9-40; 1 WHITE & SUMMERS, *supra* note 83, § 4-7; RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1979).

90. LEFF, *supra* note 88, at 487; *See* 1 WHITE & SUMMERS, *supra* note 83, § 4-3 (discussing procedural unconscionability). The Code’s article dealing with leases of goods explicitly recognizes procedural unconscionability in the case of consumer leases. U.C.C. § 2A-108(2) (1992).

91. *Cf.* U.C.C. § 2A-108(2) (1992).

92. LEFF, *supra* note 88, at 509-12; 1 WHITE & SUMMERS, *supra* note 83, §§ 4-4 to 4-6.

*Duty of Good Faith*

Good faith can be traced back to Roman law<sup>93</sup> and a number of civil law countries require good faith in contracts.<sup>94</sup> During the nineteenth century, the American common law was reluctant to recognize explicitly any “generalized duty to act in good faith.”<sup>95</sup> American law now imposes a duty of good faith across a broad spectrum of commercial transactions.<sup>96</sup> For example, it applies to commercial paper and other negotiable instruments, bank deposits and collections, electronic funds transfers (wire transfers), letters of credit, bulk transfers, documents of title, investment securities, and secured transactions.<sup>97</sup> In this article we are concerned with the doctrine’s application to contracts including sales and leases of goods.

The Uniform Commercial Code,<sup>98</sup> the Restatement of Contracts,<sup>99</sup> and a majority of the states<sup>100</sup> recognize the duty to perform a contract in good faith. The Uniform Commercial Code states that “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”<sup>101</sup> The Restatement provides “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”<sup>102</sup> Neither the Code nor the Restatement provisions deal with good faith in the negotiation and formation of a contract.<sup>103</sup> Rather, they apply to the performance and enforcement of contracts.

The duty of good faith may not be disclaimed by the parties.<sup>104</sup> They may, however, by agreement determine the standards by which the perfor-

93. E. ALLAN FARNSWORTH, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 669-70 (1963).

94. B. J. REITER, *Good Faith in Contracts*, 17 VAL. U. L. REV. 705, 708 (1983).

95. ERIC M. HOLMES, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 384 (1978).

96. FARNSWORTH, *supra* note 93, at 667; RUSSELL A. EISENBERG, *Good Faith Under the Uniform Commercial Code — A New Look at an Old Problem*, 54 MARQ. L. REV. 1, 1 n.1 (1971).

97. *E.g.*, U.C.C. §§ 3-302, 4-406, 4A-105, 5-114, 6-107, 7-206, 8-406 & 9-504 (1992).

98. U.C.C. § 1-203 (1992).

99. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

100. STEVEN J. BURTON, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369 & n.1 (1980).

101. U.C.C. § 1-203 (1992).

102. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

103. ROBERT S. SUMMERS, *The General Duty of Good Faith. It’s Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 824 n. 61 (1982). “This Section, like Uniform Commercial Code § 1-203, does not deal with good faith in the formation of a contract.” RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1979).

104. U.C.C. § 1-102 (1992).

mance of this obligation is to be measured if the standards are not manifestly unreasonable.<sup>105</sup>

### Definition

The UCC defines good faith generally to be “honesty in fact in the conduct or transaction concerned.”<sup>106</sup> This definition applies a subjective standard: the reasonableness of a person’s belief is irrelevant to good faith.<sup>107</sup> Thus, under the subjective test if a person has a “pure heart and an empty head,” she is acting in good faith.<sup>108</sup>

In the case of sales or leases of goods by a merchant (a person or entity that deals in goods of the kind involved in the contract<sup>109</sup>) a more rigorous standard of good faith applies. Good faith in these transactions means not only honesty in fact but also the observance of reasonable commercial standards of fair dealing in the trade.<sup>110</sup> This definition includes both the subjective and the objective tests.<sup>111</sup>

The Restatement goes beyond the Code by imposing a duty of good faith and fair dealing — which includes both the subjective and objective tests — on all parties not just merchants.<sup>112</sup> When the test of good faith involves the objective standard of fair dealing the courts can police against subterfuges and evasions even though the party engaging in the challenged conduct believed it to be proper.<sup>113</sup>

In applying the obligation of good faith courts have recognized that the concept of good faith is broad, nebulous, and variable.<sup>114</sup> As the comments to the Restatement observe, good faith is used in a variety of contexts and its meaning varies somewhat with the context.<sup>115</sup> The comments further explain that good faith performance or enforcement of a contract emphasizes faithful-

105. *Id.*

106. U.C.C. § 1-201(19) (1992).

107. CALAMARI & PERILLO, *supra* note 9, § 11-38, at 509-10; 1 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 1-201:84 (3d ed. rev. 1992).

108. CALAMARI & PERILLO, *supra* note 9, § 11-38, at 509-10; ANDERSON, *supra* note 107, § 1-201:96.

109. U.C.C. § 2-104 (1992).

110. U.C.C. § 2-103(1)(b) (1992).

111. CALAMARI & PERILLO, *supra* note 9, § 11-38, at 510; ANDERSON, *supra* note 107, § 1-201:85.

112. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). *See* SUMMERS, *supra* note 103, at 824-25.

113. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1979).

114. EISENBERG, *supra* note 96, at 3-4.

115. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979).

ness to an agreed common purpose and consistency with the justified expectations of the other party.<sup>116</sup> Moreover, bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.<sup>117</sup>

In an extremely influential article, Professor Summers concluded that good faith is an “excluder.”<sup>118</sup> He maintained that “[i]t is a phrase without general meaning (or meanings) of its own and serves instead to exclude a wide range of heterogeneous forms of bad faith.”<sup>119</sup> The Restatement has endorsed this approach,<sup>120</sup> stating that good faith excludes a variety of conduct characterized as “bad faith” because they violate community standards of decency, fairness, or reasonableness.<sup>121</sup>

Thus, the obligation of good faith and fair dealing has amorphous proportions and varies from context to context.<sup>122</sup> Accordingly, we will examine this duty in the context of the most commonly occurring situations that arise in the performance and enforcement of contracts.

### *Good Faith in Contract Performance*

In applying the obligation of good faith to the performance of contracts, the courts have identified a set of behaviors as bad faith, including evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.<sup>123</sup>

116. *Id.*

117. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1979).

118. ROBERT S. SUMMERS, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 262 (1968).

119. *Id.* at 201-02

120. STEVEN J. BURTON, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 498-99 (1984).

121. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979).

122. CALAMARI & PERILLO, *supra* note 9, § 11-38, at 511; EISENBERG, *supra* note 96, at 1. Professor Kunz has observed that the UCC provisions on good faith serve one or more of the following functions:

- (1) restrict the exercise of one-sided power in a contract, in order to avoid unfair or unexpected results;
- (2) restrict the range of possible responses to defective performance or to an unexpected event, in order to salvage the contractual relationship or preserve the parties’ negotiating positions;
- (3) impose a duty to mitigate losses, in order to avoid giving the aggrieved party a windfall beyond the expectations of the contract; and
- (4) protect the innocent third party buyer or purchaser against claims of the original owner and other claimants.

CHRISTINA L. KUNZ, *Frontispiece on Good Faith: A Functional Approach Within the UCC*, 16 WM. MITCHELL L. REV. 1105, 1110 (1990).

123. SUMMERS, *supra* note 118, at 232-42; RESTATEMENT (SECOND) OF CONTRACTS § 205,

### *Good Faith in Contract Enforcement*

Most states apply good faith requirements to contract enforcement. As described in the Restatement of Contracts, “[t]he obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses.”<sup>124</sup> The Restatement offers a number of examples where the courts have found bad faith in the enforcement of contractual enforcement terms: conjuring up a pretended dispute; asserting an interpretation contrary to one’s own understanding; falsification of facts; harassing demands for assurances of performance; rejection of performance for unstated reasons; willful failure to mitigate damages; and abuse of a power to determine compliance or to terminate the contract.<sup>125</sup>

#### SHORTENING ARM’S LENGTH TRANSACTIONS

Having examined the law’s dichotomized approach to dealing with contracting parties we can reach a number of summarizing observations. First, the degree of protection accorded the parties is determined principally by whether the parties are in a special relationship or at arm’s length. Second, the stage of the contract is the second most significant determinant of contract protections. Figures 1 and 2 (see Appendix) illustrate the effect of these two variables. In Figure 1, one can see that the protections provided parties in a special relationship extend throughout the contract relationship including its formation. In contrast, as Figure 2 shows, in arm’s length transactions there are fewer protections,<sup>126</sup> the protections are less extensive,<sup>127</sup> and some do not extend into the formation stage.<sup>128</sup>

Figure 3 (see Appendix) depicts the relationship between what conduct is required and the relationship of the contracting parties. ( In this figure the required conduct is cumulative: each set of required conduct also includes all of the sets below it.) It also shows the relative degree of protection these contractual relationships receive. One should note that there is a considerable

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cmt. d (1979).

124. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (1979).

125. *Id.*; See SUMMERS, *supra* note 118, at 243-52 (discussing many forms of bad faith contracting).

126. There is usually no requirement of full disclosure in arm’s length transactions. See DOBBS, *supra* note 7.

127. In confidential relationships the utmost good faith is required whereas in arm’s length transactions only ordinary (either subjective or both subjective and objective) good faith is required.

128. In arm’s length transactions the duty of good faith does not apply to the formation of a contract. See *supra* note 103 and accompanying text.



gap between the protection at the arm's length level and the protection at the special relationship level. We suggest that a number of strategic alliances fall in this region, but under the law's dichotomized approach are subject only to the duties of arm's length transactions.<sup>129</sup>

Contracting parties, however, have the option of choosing to be governed by higher duties through contractual provisions of their own devising. In this section we explore some strategies by which the parties may do so. Most of these suggestions make use of either or both of the following: (1) expanding the duty of good faith or (2) specifying the applicable good faith standards.

### *Disclaimers*

Before suggesting strategies we would voice several words of caution. First, because the notion of good faith defies precise definition, parties who build it into contracts to police the terms of an agreement create a certain degree of uncertainty in their relations. Instead of the parties' knowing where they stand with respect to their rights and responsibilities, they face less clarity if they have to turn to good faith concepts to resolve contract disputes.<sup>130</sup> Although we see the potential problems associated with relying on good faith in contracts, we suspect that parties who place great weight on good faith relationships are probably predisposed to work out problems rather than to litigate in the first place. Moreover, we do not advocate enhancing the role of good faith to the point where it constitutes the exclusive policing mechanism in any contract. To the contrary, parties to a contract should always seek, to the extent possible, to draw precise lines and allocate risks of loss carefully as a way of avoiding the necessity of turning to good faith concepts to resolve conflicts. We suggest the use of good faith in order to create an atmosphere charged with trust and mutual support rather than one in which the parties

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129. Or as Cardozo said: "the morals of the marketplace." *Meinard v. Salman*, 164 N.E. 545, 546 (N.Y. 1928).

130. Professor Kunz concludes that this uncertainty may not have a stimulating effect on the amount of litigation:

[T]he uncertainty in the good faith concept may well be having the opposite effect in the vast bulk of potential commercial disputes. Except in the tiny percentage of commercial cases that end up in the court system, parties may well be motivated to act within the bounds of good faith, in order to avoid having to pay the costs associated with litigating good faith definitions and applications. As in other portions of the UCC, uncertainty probably "depolarizes" the disputing parties and brings them back to the middle—to the negotiating table.

KUNZ, *supra* note 122, at 1110.

address disputes by dashing to the written contract and reading every provision in a way that most permits them to take advantage of each other.

Second, and closely related to the first point, where the parties cannot resolve a matter by themselves under the principles of good faith and turn to the judiciary, they may find the outcome unappealing to either party. A third party's sense of what constitutes "good faith" may not comport with their own sense.

Third, the party who proposes including expanded good faith language in a contract must always be concerned about the "hoist with your own petard" effect of such language. In seeking to guarantee fair dealing in a contract, a party may focus exclusively on fears of misdealing by the other party and ignore the possibility that a court might not view the party's dealings as benignly as he does.

### *Suggested Strategies*

Having considered these and other possible pitfalls in using an enhanced or specified duty of good faith in contracts, we remain convinced that, used carefully and realistically, it can play an important role. In particular, a party facing the following situations should consider including good faith language in his contract dealings: (1) the other party has substantially greater economic leverage; (2) the other party's trustworthiness is not easily ascertainable; (3) it is desirable to set a trusting tone in a long-term contractual relationship with the other party; (4) it is not possible to spell out important contingencies and to allocate risks of loss because, for example, of the open-endedness of the contract or the exigencies of time; or (5) the contract is drafted by the other party.

In these and other instances where it seems appropriate, we suggest the following approaches be considered:

#### Agree to Negotiate in Good Faith

Although neither the Code nor the Restatement explicitly requires the parties to negotiate in good faith, nothing bars them, at the outset of a negotiation, from agreeing explicitly to negotiate in good faith. At a minimum, this should mean that both parties intend to reach an agreement, if possible.

Does this mean that both parties agree not to withhold relevant material facts from one another during the negotiation? It could, but need not. They should decide explicitly whether good faith will or will not include the disclosure of material facts not otherwise required to be disclosed under existing law. In some situations, the parties might decide that the "one-shot" nature

of the deal should not require disclosure beyond what the law currently requires. In others, especially where a long-term relationship is contemplated, the parties might decide that it would make sense to agree to make relatively full disclosure.

#### Ask For Or Offer a Warranty of Full Disclosure

An alternative (or supplement) to agreeing to negotiate in good faith is for one or both parties to warrant that full disclosure of all material facts has been made during the negotiations. This would seem particularly useful in a situation where one party remains puzzled or skeptical about the other party's motives in entering into the contract. For example, where one party appears overly eager to buy another party's land, this provision would guarantee that no hidden value known by the buyer, but not revealed to the seller, prompts the buyer's interest in the property. Conversely, where one of the parties appears skeptical about the other party's candor and forthrightness, the doubted party might suggest including a warranty of full disclosure as a way of driving home the bargain.

#### Specify that Good Faith Includes "Fair Dealing" As Well As "Honesty"

For contracts that are covered only by the general provision of the Code that limits the meaning of "good faith" to "honesty in fact in the conduct or transaction concerned," the parties can agree that they intend in their contract that a broader definition of the term good faith should apply. This could be either the Code's objective test or the Restatement's, thus imposing a duty of "fair dealing" on their contract.

#### Spell Out the Standards of Good Faith That Apply to a Contract

As noted,<sup>131</sup> neither the Code nor the Restatement permits the parties to disclaim good faith. On the other hand, as noted previously, the parties to a contract are free to spell out the standards by which good faith is to be judged so long as the standards are not manifestly unreasonable.<sup>132</sup> Among the standards governing good faith the parties might consider are the extent to which they wish the term to include full disclosure of all relevant material facts, the extent to which one party may request contract modifications in the event of unforeseen circumstances not caused by either party, or the extent to which the parties wish to include "brother's keepers" language that requires

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131. See *supra* note 104 and accompanying text.

132. See *supra* note 105 and accompanying text.

one to assist the other in the event of unforeseen circumstances not caused by either party. A careful definition of good faith will clarify expectations on both sides of a contract and assist any court called upon to interpret a good faith clause.

#### Spell Out Risks of Loss Not Subject to “Good Faith” Modification

One way to avoid having a court undermine a clear understanding with respect to the allocation of risks of loss in a contract is to spell them out. For example, where a contractor has undertaken an inspection to determine whether underground rocks might require extra costs to excavate and has assumed the risk of loss associated with encountering them, the parties should spell out that the contractor assumes this risk. This would alert a reviewing court that neither a general good faith clause in a contract nor general good faith requirements in the law should be invoked to permit a party to avoid his or her legitimate contractual obligations. On the other hand, if the contractor ran into an unexpected flooding problem rather than rocks, good faith might require a modification of the contract’s terms.

#### CONCLUSION

In this article, we have suggested that arm’s length contracting parties incorporate and use an invigorated duty of good faith and fair dealing as a protective device. Of course, such a provision is reciprocal and thus would apply to both parties. Although a party would especially want to use this obligation when that party has less bargaining power or has concerns about the other party’s reliability, we believe a party would also be better off using it even if that party enjoyed superior bargaining power and trusted the other party. As a general matter, a heightened good faith and fair dealing obligation in arm’s length transactions is prudent and desirable for the following reasons:

- (1) It elevates the morals of the market place.
- (2) It protects a party against the unanticipated: that party’s bargaining power may diminish or disappear, or the trustworthy contracting party may prove to be untrustworthy.
- (3) The courts are more and more inclined to impose and enforce the duty of good faith and fair dealing so a party should consider acting preemptively by making sure that the duty is expressly understood and assumed by the other party and by having the parties’ own agreed upon standards applied to the duty.

An earlier draft of the Code's general application section on good faith had defined the obligation of good faith to include both the subjective and objective standards.<sup>133</sup> Even more intriguing was the comment to this draft section: "This Act adopts the principles of those cases which see a commercial contract not as an 'arm's-length' adversary venture, but as a venture of material interest, when successful, and as involving due regard for commercial decencies when the expected favorable outcome fails."<sup>134</sup>

This comment conveys a view that a contract creates a relationship that would require each party to act with due regard for the interests of both parties. Under current law, when arm's length parties enter into a contract their obligation to each other moves somewhat closer to those owed by parties in a confidential or fiduciary relationship. (See Appendix, Figure 3.) By establishing their own standards by which to measure good faith and fair dealing, parties can determine how far towards a confidential or fiduciary relationship they want their contractual venture to go. The contemporary, globally competitive environment has made it clear that contracting parties' survival may depend upon each other's overall success. This mutuality of interest makes many contractual relationships truly strategic alliances and we commend our approach as a specific means to bring about a contractual relationship in which the parties act with due regard for their mutual interests and thereby enhance their individual success.

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133. U.C.C. § 1-203 (May 1949 Draft).

134. U.C.C. § 1-203 cmt. (May 1949 Draft), *quoted in* CLAYTON P. GILLETTE, *Limitations on the Obligation of Good Faith*, 1981 DUKE L. J. 619, 623 n.21.

APPENDIX

Figure 1.

**Contractual Policing Devices in Special Relationships**

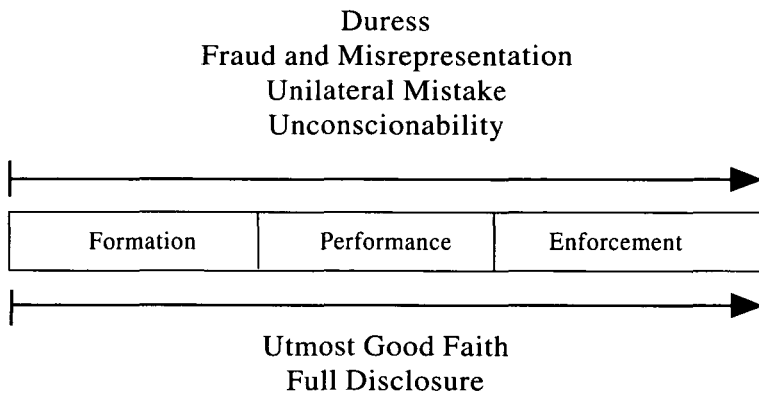


Figure 2.

**Contractual Policing Devices in Arm's Length Transactions**

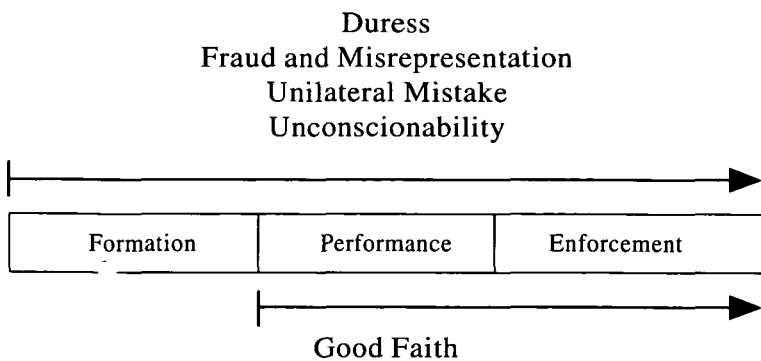


Figure 3.

**Graduated Standards of Conduct**

