

## Practitioner Insights

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# A party cannot recover for both unjust enrichment and breach of the implied covenant of good faith and fair dealing

Updated: April 24, 2013



by **Simeon Brier**  
*Member, Cozen O'Connor*  
561-515-5257



## Overview

Where an express contract exists, a claim exists for breach of the implied covenant of good faith and fair dealing, but the claimant cannot also recover under a theory of unjust enrichment. Although a claimant cannot recover for both breach of the implied covenant and unjust enrichment, both claims may be pled separately and simultaneously as alternate forms of relief.

Florida law governs this issue. See [State Aspects](#).

- *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247 (Fla. 4th DCA 2009)
- *Diamond "S" Development Corp. v. Mercantile Bank*, 989 So. 2d 696 (Fla. 1st DCA 2008)
- *Ocean Communications, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007)

## Detailed Explanation

### Federal Aspects

#### **State Substantive Law Controls Actions in Federal Court for Breach of the Implied Covenant of Good Faith and Fair Dealing and Unjust Enrichment**

State substantive law controls the disposition of an action founded on an implied covenant of good faith and fair dealing in federal court. *Cibran v. BP Products N. Am., Inc.*, 375 F. Supp. 2d 1355 (S.D. Fla. 2005).

State substantive law also controls the disposition of an unjust enrichment action for breach of an implied contract in federal court. *State of Fla., Office of Atty. Gen., Dept. of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288 (S.D. Fla. 2005).

## State Aspects

### Every Contract Contains the Implied Covenant of Good Faith and Fair Dealing

Florida law recognizes the implied covenant of good faith and fair dealing in every contract. *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009). The implied covenant arises because each party to a contract promises to perform their part of the bargain in good faith and expects the other party to do the same. *White v. Syfrett*, 955 So. 2d 1110, 1114 (Fla. 1st DCA 2006). Thus, the covenant is intended to protect the contracting parties' reasonable expectations. *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791 (Fla. 2d DCA 2005).

- Appellants' Initial Brief, *Homero MERUELO and Merco Group of the Palm Beaches, Inc., Appellant, v. THE MARK ANDREW OF THE PALM BEACHES LTD.*, Appellee., 2008 WL 2623845 (Fla.App. 4 Dist.)
- Appellants'/Cross Appellees' *Homero Meruelo and Merco Group of the Palm Beaches Reply Brief and Answer Brief on Cross Appeal, Homero MERUELO and Merco Group of The Palm Beaches, Inc., Appellants / Cross Appellees, v. THE MARK ANDREW OF THE PALM BEACHES LTD.*, Appellee / Cross Appellant., 2008 WL 5011684 (Fla.App. 4 Dist.)

### UCC Implies Covenant of Good Faith and Fair Dealing in Every Contract

The Uniform Commercial Code (UCC) implies a covenant of good faith and fair dealing in every contract under the UCC and is designed to protect the contracting parties' reasonable expectations. § 671.203, Fla. Stat. Ann.; *Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1185 (Fla. 2d DCA 2000).

### Implied Covenant of Good Faith and Fair Dealing Limits Discretion Under Terms of Contract

A grant of sole discretion to make certain decisions under a contract does not permit a party to make a discretionary decision that violates the covenant of good faith. *Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1185 (Fla. 2d DCA 2000). The implied covenant of good faith and fair dealing is often raised when a question is not resolved by the explicit terms of the contract or when one party has the power to make a discretionary decision without defined standards. *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 251 (Fla. 4th DCA 2009).

### Action on Implied Covenant of Good Faith and Fair Dealing Requires Breach of Express Contract Provision

The implied covenant of good faith and fair dealing is not an independent term within the parties' contract. *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791-92 (Fla. 2d DCA 2005). Instead, the covenant operates by attaching to the performance of a specific or express contractual provision. *Three Keys, Ltd. v. Kennedy Funding, Inc.*, 28 So. 3d 894, 903 (Fla. 5th DCA 2009). Thus, there can be no cause of action for breach of the implied covenant absent an allegation that an express term of the contract has been breached. *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791-92 (Fla. 2d DCA 2005).

For example, there was no breach of the implied covenant where the buyer of a property failed to seek approval for a specific amount of sellable square footage because that provision was not an express duty under the contract but rather a voluntary provision authorizing a bonus payment to the seller. Thus, because the buyer did not breach an express term of the contract, the seller could not maintain an action for breach of the implied covenant of good faith and fair dealing. *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 251 (Fla. 4th DCA 2009).

### Valid and Enforceable Written Contract Precludes Recovery for Unjust Enrichment

A claim for unjust enrichment is an equitable claim based on a legal fiction which implies a contract as a matter of law even though the parties never indicated by deed or word that an agreement existed between them. *Sheppard v. M & R Plumbing, Inc.*, 82 So. 3d 950, 953-54 (Fla. 1st DCA 2011).

Unjust enrichment operates when there is no contract to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation. *Ocean Communications, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007).

Thus, proof of an express contract between parties defeats a claim for unjust enrichment founded on an implied contract. It, therefore, follows that where a claimant recovers for breach of the implied covenant of good faith due to the breach of an express contractual provision, the claimant cannot also recover for unjust enrichment. *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008); *Ocean Communications, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007).

### **Claimant May Plead Breach of Implied Covenant of Good Faith and Fair Dealing and Unjust Enrichment as Alternate Theories of Recovery**

Although a party cannot recover for both breach of the implied covenant of good faith and fair dealing and unjust enrichment, the two claims may be plead separately and simultaneously as alternative theories of relief. *Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So. 2d 571, 577 (Fla. 4th DCA 2006).

### **Deciding Whether and When to Seek Unjust Enrichment Claim Requires Several Strategic Considerations**

Deciding whether and when to seek (or seek to dismiss) an unjust enrichment claim based on a contract implied-in-law requires several strategic considerations. For example, a plaintiff may wish to initially plead such a claim, as an alternative theory, alongside a claim for breach of contract and breach of the implied covenant of good faith. Exposure to broader discovery and possible (un)necessary motion practice from a defendant may lead the plaintiff to stick with one theory over the other, at least initially. Indeed, a plaintiff may choose to explore the appropriateness of such a claim through the discovery process, with respect to a breach of contract claim, and later seek leave to amend if necessary.

The key to the analysis is determining the existence, and ability to establish, that there is an express contract between the parties on the relevant subject matter, which the defendant breached, causing damages to the plaintiff. If not, or if difficult to prove, a plaintiff may need to consider pursuing an unjust enrichment claim based on a contract implied-in-law.

### **Practitioners Must Consider Whether Valid Contract Exists to Determine Appropriate Avenue of Recovery**

When determining the propriety of claims raised in a lawsuit, whether as a presuit exercise by a plaintiff or as an initial assessment of the complaint by a defendant, practitioners must consider whether a valid contract exists. If so, the contract may not only describe specific remedies and procedures for possible relief, but it also may preclude certain claims from being raised. For instance, because an express contract is required to bring a claim for breach of contract and implied covenant of good faith, a plaintiff may not also recover on a theory of unjust enrichment. *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791-92 (Fla. 2d DCA 2005); *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008); *Ocean Communications, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007).

### **Practitioners Must Weigh the Value of Potential Recovery Under Both the Breach of Implied Covenant of Good Faith and Unjust Enrichment**

A claim for breach of contract and implied covenant of good faith reverts back to an analysis of the parties' express contract, seeking to protect the parties' reasonable expectations and award benefit of the bargain damages. However, an implied-in-law contract focuses upon the prevention of unjust enrichment to the defendant and seeks to provide the plaintiff with the reasonable value of the benefit provided. Depending upon the specific circumstances, one measure of recovery may be significantly more valuable than the other.

### **Plaintiff Must Ultimately Elect to Proceed on Either an Unjust Enrichment or Breach of the Implied Covenant Claim**

Eventually, the plaintiff must choose a theory under which to recover a judgment, as the two theories become mutually exclusive as the litigation moves toward final resolution. This election of remedies principle should be considered by both the plaintiff and the defendant as the case progresses and may require a judicial determination if the plaintiff fails to clearly decide which theory to advance at trial. Additionally, while often found in an express

contract, an implied contract does not have any provision providing for, or basis for seeking, the recovery of attorney's fees and costs.

**Defendant Must Understand Plaintiff's Potential Avenues of Recovery**

A defendant must understand these issues and dynamics in order to properly defend against, and assess the value of, the plaintiff's case. Doing so should avoid unnecessary motion practice and focus on the real issues requiring judicial attention.

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**Acknowledgments**

*<sup>1</sup>The author would like to thank Matthew Criscuolo for contributing to this article.*

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