

BUSINESS ALERT NO. 2: Coronavirus - Implied Covenant of Good Faith and Fair Dealing in Contracts

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As the COVID-19 ("Coronavirus") National Emergency and Pandemic continues to impact all residents and businesses, there is an area of contract law that will become increasingly important when facing alleged breaches and defaults of contract obligations, and that is New Jersey's "Implied Covenant of Good Faith and Fair Dealing." In all contracts, there is an implied covenant of good faith and fair dealing. *See Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396 (1997), which requires that each party to a contract act in good faith and deal fairly with the other party.

As we all know by now, there are Governmental Orders that have been and will continue to be issued, together with resulting changes to how we as residents and businesses interact and conduct business on a day to day basis during the Pandemic, which are all materially affecting time frames and performance under contractual obligations. Consequently, each party to an existing contract should be made aware of, and reminded, that there is this existing implied covenant of good faith and fair dealing, so that when unprecedented circumstances arise, parties should be acting in good faith and deal fairly with each other to address the issue at hand. For example, in real estate contracts, a seller is obligated to obtain a municipal inspection of the property for smoke detector, fire extinguisher and carbon monoxide compliance prior to closing. Since most municipalities have either closed or reduced their hours, a seller may find it more difficult to schedule the inspection or may not be able to do so at all for a lengthy period of time past the contract closing date. A buyer that has an expiring mortgage approval may claim that Seller is in breach for not obtaining the municipal certificate before the anticipated closing date, and then seek damages resulting from the lapse in mortgage approval and failure to close by the closing date. In this example under the current Coronavirus Pandemic, both buyer and seller should recognize that there are factors beyond the reasonable control of either party and honor the implied covenant of good faith and fair dealing, by granting leniency in time frames for performance and compliance towards achieving and effectuating the purchase and sale transaction.

There are countless other examples that can be thought of, but the underlying issue is the delay or prevention of a party to timely perform in light of ever changing Governmental Orders and/or voluntary measures being implemented by either businesses or municipalities to protect against the spread of the Coronavirus. As previously discussed in a prior Blog, some contracts have a Force Majeure provision, which would give a party to a contract some protections against events outside the control of a party. However, many of those Force Majeure provisions would not allow relief from voluntarily measures taken by either businesses or municipalities that materially affect a party's performance of contractual obligations. In that case, a party to a contract may be able to rely on the implied covenant of good faith and fair dealing to plea with the other contract party for additional time to comply, or perhaps forgiveness from the contract obligation all together. All business that is still being conducted today is in an environment that we have never really experienced before, and there are countless scenarios where a party to a contract may technically be in breach or default due to circumstances that were either unforeseeable or are outside the party's control. On a case by case review of surrounding circumstances, the implied covenant of good faith and fair dealing is another tool to be used in New Jersey to argue for additional time to perform or forgiveness from any alleged breach or default.