Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality

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COMPARING THE GENERAL GOOD FAITH PROVISIONS OF THE PECL AND THE UCC: APPEARANCE AND REALITY

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(1) Each party must act in accordance with good faith and fair dealing.
(2) The parties may not exclude or limit this duty.
– Article 1:201 of the Principles of European Contract Law.

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.
– Section 1-203 of the Uniform Commercial Code.

. . . [T]he obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
– Section 1-102(3) of the Uniform Commercial Code.

I. INTRODUCTION

Both the *Principles of European Contract Law* ("PECL"), recently issued in revised and more complete form by the Commission of European Contract Law (chaired by Professor Ole Lando),[1] and the Uniform Commercial Code ("UCC"), a compendium of commercial laws widely adopted by U.S. states and territories,[2] impose upon parties to contracts a general obligation of good faith.[3] The UCC good faith obligation has been an important – at any rate, oft cited[4] – element of the Code's jurispru-

[1] THE COMMISSION OF EUROPEAN CONTRACT LAW [hereinafter "the Commission" or "the Lando Commission"], PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I AND II COMBINED AND REVISED [hereinafter PECL] (Ole Lando & Hugh Beale eds. 2000).

[2] References to the UCC in this article will be to the 2000 official version.

[3] *See* PECL, *supra* note 1, art. 1:201, and UCC §§ 1-203 & 1-102(3), quoted in the headnote to this article. Both the PECL and the UCC impose other specific good faith obligations in connection with particular rights, obligations or rules. *See, e.g.*, PECL art. 4:109(2) (permitting a court to adapt an unconscionable contract "to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed"; UCC § 2-305(2) (specifying that in output and requirement contracts the quantity of goods tendered or demanded must be "such actual output or requirements as may occur in good faith.") To keep the present article within reasonable bounds, my observations are limited to the general good faith provisions of the PECL (art. 1:201) and the UCC (§ 1-203), except where otherwise specifically indicated.

[4] The *Uniform Commercial Code Case Digest* includes over 200 pages of digest entries covering cases citing the general good faith provision of the UCC. *See* UCC REP.-DIG. (2000 REVISION) (Pike & Fischer, eds.) 426-629.

dence. The good faith obligation imposed by the PECL is also, undoubtedly, a key doctrine under that contract law. The purpose of this article is to compare the two.

There are general differences between the two good faith obligations arising from the nature of the works of which they are part. The PECL and its good faith provisions are the product of a committee without law-making authority, and are designed as a statement of derivative general legal norms rather than a description of any existing body of law. Thus, the PECL lacks formal legal authority, although the drafters envision such authority arising through adoption or use of the Principles by legislatures, judges, arbitrators, and contracting parties.[5] In contrast, the UCC (including its provisions on good faith) has been adopted as law throughout the U.S.[6]

The good faith obligations imposed by the PECL and the UCC also differ in scope. The PECL contains general contractual principles applicable to all varieties of contracts, regardless of subject matter. In contrast, only certain specified varieties of contracts fall under the UCC. For example, contracts for the sale of goods are governed by Article 2 of the UCC,[7] whereas contracts for the sale of real property are beyond the scope of the UCC and its good faith provisions.[8] Contracts which are not

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[5] *See* PECL, *supra* note 1, at xxiii-xxiv (*Introduction*).

[6] Forty-nine states, the District of Columbia, and the Virgin Islands have adopted the UCC more or less *in toto*. *See* 1 U.L.A. 1-2 ("Uniform Commercial Code: Table of Jurisdictions Wherein Code has been Adopted") (Master ed. 1989 & Supp. 2001). Louisiana has not adopted Articles 2 (sales) or 2A (leases) of the UCC, but it has adopted other parts of the Code, including Article 1 which contains the UCC's general good faith provisions. *See id.* at 2 n. 3. Individual jurisdictions have sometimes enacted provisions that vary from the official text of the UCC, although no jurisdiction has varied the text of § 1-203 on good faith. *See id.*, "Explanation" at IV (explaining that variations by individual jurisdictions from the official text of particular UCC provisions are described in sections entitled "Action in Adopting Jurisdictions" in the text discussing each provision) and text at 109-18 (omitting section on "Action in Adopting Jurisdictions" from discussion of UCC § 1-203 on good faith).

[7] UCC § 2-102 ("Unless the context otherwise requires, this Article applies to transactions in goods").

[8] The subjects covered by the UCC are as follows: Article 1, general provisions; Article 2, sales of goods; Article 2A, leases of goods; Article 3, negotiable instruments; Article 4, bank deposits and collections; Article 4A, funds transfers; Article 5, letters of credit; Article 6, bulk sales; Article 7, documents of title; Article 8, investment securities; Article 9, secured transactions. Articles 10 and 11 contain technical provisions governing effective dates, repeal of prior laws and transi-

covered by the UCC are governed by the general law of contracts, which in most U.S. jurisdictions also imposes an obligation of good faith on contracting parties.[9] The good faith

tion rules. Note that significant parts of the UCC focus not on the law governing parties to a contract, but on the law governing the rights and duties of third parties. Much of UCC Article 9, for example, deals with the rights of a debtor's creditors and other claimants to collateral that is subject to a security agreement between the debtor and a secured creditor.

[9] While the law is not always clear, the following states appear to imply an obligation of good faith in every contract: Alaska (*see* McConnell v. State, Dept. of Health and Social Services, Div. of Medical Assistance, 991 P.2d 178, 184 (Alaska 1999) ("in every contract . . . there is an implied covenant of good faith and fair dealing . . ." quoting Guin v. Ha, 591 P.2d 1281, 1291 (Alaska, 1979) and Arco Alaska, Inc. v. Akers, 753 P.2d 1150 (Alaska 1988)); Delaware (*see* Blish v. Thompson Automatic Arms Corp., 64 A.2d 581 (De. Sup. Ct. 1948) and Shuster v. Derocili, 2001 WL 682105 (Del. Super. Ct. 2001)); Idaho (*see* Luzar v. Western Sur. Co., 692 P.2d 337 (Idaho 1984) and Raedlien v. Boise Cascade Corp., 931 P.2d 621 (Idaho 1996)); Massachusetts (*see* Anthony's Pier Four, Inc. v. HBC Associates, 583 N.E.2d 806 (Mass. 1991) and Fortune v. NCR, 364 N.E.2d 1251 (Mass. 1977)); Missouri (*see* Slone v. Purina Mills, Inc., 927 S.W.2d 358 (Mo. App. 1996) and Morton v. Hearst Corp., 779 S.W.2d 268, 273 (Mo. App. 1989) ("Missouri law implies a covenant of good faith and fair dealing in every contract")); Montana (*see* Story v. City of Bozeman, 791 P.2d 767 (Mont. 1990) and Kittelson v. Archie Cochrane Motors, 813 P.2d 424 (Mont. 1991)); New Hampshire (*see* Seaward Constr. Co. v. City of Rochester, 383 A.2d 707 (N.H. 1978) and Harper v. Healthsource NH, 674 A.2d 692 (N.H. 1996)); New Jersey (*see* Palisades Properties, Inc. v. Brunetti, 207 A.2d 522 (N.J. 1965) and Bonczek v. Carter-Wallace, Inc., 701 A.2d 742 (N.J. Super. 1997)); South Carolina (*see* Commercial Credit Corp. v. Nelson Motors, Inc., 147 S.E.2d 481 (S.C. 1966) and Williams v. Reidman, 529 S.E.2d 28 (S.C. App. 2000)); and Tennessee (Wallace v. National Bank of Commerce, 938 S.W.2d 684 (Tenn. 1996) and Williams v. Maremont, Inc., 776 S.W.2d 78 (Tenn. App. 1988)).

The following states recognize a good faith obligation except in employment-at-will contracts: California (*see* Nelson v. Abraham, 177 P.2d 931 (Cal. 1947) and Guz v. Bechtel Nat'l, Inc., 100 Cal. Rptr. 2d 352 (Cal. 2000)); Colorado (*see* Amoco Oil Co. v. Ervin, 908 P.2d 493 (Colo. 1995) and Pittman v. Larson Distrib. Co., 724 P.2d 1379 (Colo. App. 1986)); Connecticut (*see* Commerce Intern. Co. v. United States, 338 F.2d 81 (Ct. Cl. 1964) and Carbone v. Atlantic Richfield Co., 528 A.2d 1137, 1142 (Conn. 1987) ("Where an employment contract is clearly terminable at will, however, a party cannot ordinarily be deemed to lack good faith in exercising this right. Thus, absent a showing that the discharge involves an impropriety which contravenes some important public policy, an employee may not challenge a dismissal based upon an implied covenant of good faith and fair dealing"); Florida (*see* Sheck v. Burger King, 798 F. Supp. 692 (S.D. Fla 1992) and Crawford v. David Shapiro & Co., 490 So. 2d 993 (Fla. App. 1986)); Hawaii (*see* Best Place, Inc. v. Penn America Ins. Co., 920 P.2d 334 (Haw. 1996) and Parnar v. Americana Hotels, Inc. 652 P.2d 625 (Haw. 1982)); Illinois (*see* Martindell v. Lake Shore Nat'l Bank, 154 N.E.2d 683 (Ill. 1958) and Harrison v. Sears, Roebuck, and Co., 546 N.E.2d 248 (Ill. App. 1989)); Iowa (*see* Midwest Management Corp. v. Stephens, 291 N.W.2d 896 (Iowa 1980) and Phipps v. IASD Health Serv. Corp., 558 N.W.2d 198 (Iowa 1977)); Kansas (*see* Moriss v. Coleman Co., 738 P.2d 841, 851 (Kan. 1987)

obligation imposed by the common or general law of contracts,

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("the principle of law stated in Restatement (Second) of Contracts § 205, that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement, is overly broad and should not be applicable to employment-at-will contracts")); Louisiana (*see* Bond v. Allemand, 632 So.2d 326 (La. App. 1993) and Stanton v. Tulane Univ., 777 So. 2d 1242 (La. App. 2001)); Michigan (*see* Hubbard Chevrolet Co. v. GMC, 873 F.2d 873 (3d Cir. 1989) and Hammond v. United of Oakland, Inc., 483 N.W.2d 652 (Mich. App. 1992)); Minnesota (*see* In re Hennepin County 1986 Recycling Bond Litigation, 540 N.W.2d 494 (Minn. 1995) and Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853 (Minn. 1986)); Mississippi (*see* UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746 (Miss. 1987) and Hartle v. Packard Elec., a Div. of General Motors Corp. 626 So.2d 106 (Miss.,1993)); Nebraska (*see* Cimino v. FirsTier Bank, N.A., 530 N.W.2d 606 (Neb. 1995) and Stratton v. Chevrolet Motor Div., General Motors Corp., 428 N.W.2d 910 (Neb. 1988)); Nevada (*see* Hilton Hotels Corp. v. Butch Lewis Productions, Inc. 808 P.2d 919 (Nev. 1991) and Martin v. Sears, Roebouck, and Co., 899 P.2d 551 (Nev. 1995)); New Mexico (*see* Watson Truck & Supply Co. v. Males, 801 P.2d 639 (N.M. 1990) and Sanchez v. The New Mexican, 738 P.2d 1321 (N.M. 1987)); New York (*see* Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163 (N.Y. 1933) and Ingle v. Glamore, 535 N.E.2d 1311 (N.Y. 1987)); North Carolina (*see* Weyerhauser Co. v. Godwin Bldg. Supply Co., 253 S.E.2d 625 (N.C. App. 1979) and Salt v. Applied Analytical, Inc., 412 S.E.2d 97 (N.C. App. 1991)); Oklahoma (*see* First Nat. Bank and Trust Co. v. Kissee, 859 P.2d 502 (Okla. 1993) and Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989)); Oregon (*see* Perkins v. Standard Oil Co., 383 P.2d 107 (Or. 1963) and Elliot v. Tektronix Inc., 796 P.2d 361 (Or. App. 1990)); Pennsylvania (*see* Somers v. Somers, 613 A.2d 1211 (Pa. Super. 1992) and McLaughlin v. Gastrointestinal Specialists, 750 A.2d 283 (Pa. 2000)); South Dakota (*see* Garrett v. BankWest, Inc., 459 N.W.2d 833 (S.D. 1990) and Breen v. Dakota Gear and Joint Co., 433 N.W.2d 221 (S.D. 1988)); Utah (*see* Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975) and Sanderson v. First Sec. Leasing Co., 844 P.2d 203 (Utah 1993)); Vermont (*see* Shaw v. E.I. DuPont De Nemours & Co., 226 A.2d 903 (Vt. 1967) and Ross v. Times Mirror, 665 A.2d 580 (Vt. 1995)); Washington (*see* Miller v. Othello Packers, Inc., 410 P.2d 33 (Wash. 1966) and Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984)); Wisconsin (*see* Chakya v. Santini, 176 N.W.2d 561 (Wis. 1970) and Kempfer v. Automated Finishing, 564 N.W.2d 692 (Wis. 1997)); and Wyoming (*see* Roussalis v. Wyoming Medical Ctr., Inc., 4 P.3d 209 (Wyo. 2000) and VanLente v. University of Wyo. Research Corp., 975 P.2d 594 (Wyo. 1999)).

In the following states that recognize an implied obligation of good faith under their general law of contract, it is not clear if the obligation extends to employment-at-will agreements: Alabama (*see* World's Exposition Shows v. Benevolent Protective Order of Elks, 180 So. 721 (Ala. 1939)); Arizona (*see* Rawlings v. Apodaca, 726 P.2d 565 (Ariz. 1986) (insurance contracts) and Arizona's Towing Professionals, Inc. v. State, 993 P.2d 1037 (Ariz. App. 1999)); Arkansas (*see* Cantrell-Waind & Assoc., Inc. v. Guillame Motorsports, Inc., 968 S.W.2d 72 (Ark. App. 1998)); Georgia (*see* Whisenant v. Fulton Federal Savings & Loan Ass'n, 406 S.E.2d 393 (Ga. App. 1991)); Kentucky (*see* Odem Realty Co. v. Dyer, 45 S.W.2d 838 (Ky. 1932)); Maryland (*see* Food Fair Stores, Inc. v. Blumberg, 200 A.2d 166 (Md. 1964)); and Rhode Island (*see* Ide Farm & Stable, Inc. v. Cardi, 297 A.2d 643 (R.I. 1972)).

furthermore, corresponds in most respects to the good faith obligation of the UCC.[10] Nevertheless, the UCC good faith provisions which I focus upon in this article apply to a more limited group of contracts than does the good faith obligation imposed by the PECL.

Beyond these general differences in the good faith obligations, which derive from the nature of the PECL and the UCC, both documents take similar approaches in imposing a direct good faith obligation on the parties to a contract[11] and in restricting the right of the parties to contract out of this obligation. Indeed, a careful comparison of the text of the good faith

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The following states do not appear to recognize an implied covenant of good faith as part of their general law of contract: Indiana (*see* First Federal Sav. Bank v. Key Markets, Inc., 559 N.E.2d 600 (Ind. 1990)); Maine (*see* First NH Banks Granite State v. Scarborough, 615 A.2d 248 (Me. 1992)); North Dakota (*see* Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206 (N.D. 1987)); Texas (*see* English v. Fischer, 660 S.W.2d 521 (Tex. 1983)); and Virginia (*see* Ward's Equipment, Inc. v. New Holland North America, Inc., 493 S.E.2d 516 (Va. 1997)).

It is not clear whether Ohio law recognizes an implied covenant of good faith as part of its general contract law. *See* Sammarco v. Anthem Ins. Cos., 723 N.E.2d 128, 135 (Ohio App. 1998) (stating that Ohio law imposes an implied covenant of good faith in "some contracts, such as those between an insurer and an insured and to commercial contracts regulated by Ohio's Uniform Commercial Code," but failing to state whether the implied obligation extends to other contracts) (citations omitted). Courts apparently have not ruled on whether West Virginia general contract law encompasses an implied obligation of good faith.

[10] *See. e.g.*, Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 169-170 (3rd Cir. 2001) ("Good faith is defined in the Uniform Commercial Code, as adopted in New Jersey, as 'honesty in fact in the conduct or transaction concerned.' Although the UCC is inapplicable to the Emerson-Orion License Agreement, which was not a contract for the sale of goods, it is unlikely the concept of good faith would be defined differently by the New Jersey Supreme Court merely because the contract at issue is a license," quoting N.J. Stat. Ann. 12A:1-201(19)).

[11] Contrast the good faith provision of the United Nations Convention on Contracts for the Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 19 I.L.M. 668 (1980) [hereinafter CISG] art. 7(1) (entered into force on Jan. 1., 1988), *available in* 15 U.S.C.A. app. at 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. DOC. A/CONF. 97/18 (1980). Article 7(1) of the CISG does not directly impose an obligation of good faith on the parties to contracts of sale within its scope, but rather imposes an obligation on those interpreting the CISG to do so in a fashion that promotes, *inter alia*, "the observance of good faith in international trade." For a discussion of this distinction and of the CISG's good faith provision in general, see PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) Art. 7 ¶¶ 15-18 (trans. Geoffrey Thomas) (2nd ed. in translation); Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward towards Unified International Sales Laws*, 12 PACE INT'L L. REV. 79, 92-103 (2000).

provisions of the two documents, which I pursue in Part II of this Article, reveals further hidden similarities. There are, unsurprisingly, some textual differences between the two rules and, as the discussion in Part II demonstrates, these textual differences create some divergence in the good faith obligations imposed by the PECL and the UCC. On the whole, however, the approaches of the general good faith provisions of the two documents are, from a textual perspective, notably similar.

"Good faith" is a notoriously amorphous and variable concept. Thus it is the interpretation and application of the doctrine that provides the most important point of comparison for the two sets of rules. The UCC has been in force since the 1950's, and its good faith provisions have been applied in hundreds of cases. In contrast, the PECL is a new phenomenon and its good faith rules, to my knowledge, have not been applied to actual cases. The tools for a preliminary comparison of how the good faith obligation of the two documents will be applied, nevertheless, already exist. The comment to PECL Article 1:201 includes five concrete illustrations of how the drafters conceive its good faith rule will operate, as well as other suggestions concerning the application of the good faith obligation to particular situations. In Part III of this article I will explore how U.S. law, and the UCC good faith provision in particular, would apply to the factual examples adduced in the PECL comment. This discussion reveals mixed results. First, there exist some notable similarities in the operation of the good faith obligation under the PECL and the UCC. Second, there are some situations in which U.S. law would likely reach the same result as under the PECL by invoking doctrines other than good faith. Finally, there may be some important situations in which the outcome under U.S. law would probably diverge from that suggested by the comment to PECL Article 1:201. Although it is important to keep in mind the similarities in the good faith principles of the PECL and the UCC, it is also important to recognize that the divergent outcomes appear to reflect deep-seated differences in the legal cultures behind the two documents.

II. COMPARING THE TEXT OF THE GOOD FAITH PROVISIONS OF THE PECL AND THE UCC

The basic good faith provision of the PECL, Article 1:201(1), states simply that "[e]ach party must act in accordance with good faith and fair dealing." The corresponding provision of the UCC, section 1-203, provides that "[e]very contract or duty within this Act [i.e., the UCC] imposes an obligation of good faith in its performance or enforcement." There are at least two noteworthy differences in the phrasing of these provisions.

First, the PECL imposes obligations of both "good faith" and "fair dealing," whereas the UCC limits the obligation simply to "good faith." Part E of the comment to PECL Article 1:201, entitled *"Good faith and fair dealing distinguished,"* suggests that the double obligation imposed by the PECL is not mere verbiage, but carries an important distinction: "'Good faith' means honesty and fairness in mind, which are subjective concepts. . . . 'Fair dealing' means observance of fairness in fact, which is an objective test . . . ."[12] This distinction between the double-edged, subjective and objective obligation imposed by the PECL and the single obligation of "good faith" imposed by UCC section 1-203 is both reinforced and limited by the UCC definitions of "good faith."[13] The general UCC definition of "good faith" in section 1-201(19) states that the term means "honesty in fact in the conduct or transaction concerned." This definition is widely recognized as creating a subjective standard of good faith,[14] often described as the "pure heart, empty head"

[12] PECL, *supra* note 1, art. 1:201, cmt. E, at 115-116 ("Good faith and fair dealing distinguished").

[13] The PECL, which generally eschews statutory definitions of terms, does not contain a formal definition of either "good faith" or "fair dealing." The language quoted in the text from the PECL art. 1-201, cmt. E, distinguishing "good faith" and "fair dealing," however, contains de facto definitions of the terms.

[14] *See, e.g.*, First Nat. Bank of Cicero v. Lewco Securities Corp., 860 F.2d 1407, 1416 (7th Cir. 1988) (referring to "the subjective standard of good faith found in the general definitions section of the UCC"); 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 1-203:1 at art.1-218 (1998) ("Section 1-201(19) states the generally applicable subjective 'white heart and empty head' standard which concentrates on the actual state of mind of the party rather than on the state of mind a reasonable man would have had under the same circumstances. Thus, the section defines good faith as honesty in fact in the conduct or transaction concerned."); Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV 195, 207-11 (1968).

standard.[15]

Merchants involved in sale or lease transactions governed by UCC Articles 2 or 2A, as well as those dealing with negotiable instruments governed by UCC Article 3, funds transfers governed by UCC Article 4A, transfers of investment securities governed by UCC Article 8, and security interests in personal property governed by UCC Article 9, are subject to an extended definition of "good faith" – "honesty in fact and the observance of reasonable commercial standards of fair dealing."[16] This definition encompasses both a subjective obligation ("honesty in fact") and an objective obligation ("observance of reasonable commercial standards");[17] the statutory definition goes so far as to label the objective aspect an obligation of "fair dealing."[18] This, obviously, parallels the subjective/objective "good faith and fair dealing" obligation imposed by PECL Article 1:201(1). The extended definition applies only to certain transactions governed by the UCC. Thus it limits but does not totally eliminate the difference between the good faith obligations imposed by the PECL and the UCC. For example, non-merchants involved in sales or leases and those engaged in letter of credit transactions governed by UCC Article 5 are subject only to the subjective good faith obligation.[19] It has been argued, further-

[15] *See, e.g.*, First Nat. Bank of Cicero v. Lewco Securities Corp., 860 F.2d 1407, 1416 (7th Cir. 1988); First Nat. Bank of Cicero v. U.S., 664 F. Supp. 1169, 1173 (N.D. Ill.1987); Mariani v. Redman & Ranch, Inc., 358 F. Supp. 1011, 1013 (N.D. Ill. 1973); Denise R. Boklach, Comment: *Commercial Transactions: U.C.C. Section 1-201(19) Good Faith—Is Now the Time to Abandon the Pure Heart/Empty Head Test?*, 45 OKLA. L. REV. 647 (1992). *Cf.* HAWKLAND, *supra* note 14 ("white heart and empty head" standard).

[16] UCC § 2-103(1)(b), defining "[g]ood faith in the case of a merchant" for purposes of UCC Article 2. The definition of good faith for merchants in UCC § 2-103(1)(b) adds the phrase "in the trade" at the end. Pursuant to UCC § 2A-103(3), the Article 2 definition of "good faith" for merchants applies under UCC Article 2A on leasing of goods. UCC §§ 3-103(a)(4) 4A-105(a)(6), 8-102(a)(10) and 9-102(a)(43) impose the definition of "good faith" quoted in the text to UCC Articles 3, 4A, 8 and 9 respectively.

[17] For discussion recognizing the "objective" aspect of the "good faith" definition in UCC § 2-103(1)(b), see HAWKLAND, *supra* note 14, arts. 1-218 - 1-219.

[18] Indeed, some courts have rather cavalierly characterized UCC § 1-203 as creating a general duty of "good faith and fair dealing." *See* Conoco Inc. v. Inman Oil Co., Inc., 774 F.2d 895, 908 (8th Cir.1985); Omega Engineering, Inc. v. Eastman Kodak Co., 908 F. Supp. 1084, 1091 (D. Conn. 1995).

[19] The good faith obligations of non-merchants under Articles 2 and 2A would be governed by the purely subjective ("honesty in fact") definition in UCC § 1-

more, that the "objective" aspect of the good faith definition in UCC section 2-103(1)(b), applicable to merchants engaged in sales transactions, applies only if the trade involved in the transaction has developed standards of fair dealing, and only if those standards are "reasonable"; in the absence of such reasonable trade standards, it is asserted, only the subjective aspect of good faith applies.[20] In contrast, the obligation of fair dealing in PECL Article 1:201(1) is not limited to circumstances in which there are reasonable trade standards of fair dealing (although if they exist, such standards should presumably influence the interpretation of the obligation of fair dealing). This might suggest a difference in the application of the UCC and the PECL good faith obligations in circumstances where proof of reasonable trade standards is lacking.[21]

Recently, the organizations that sponsor the UCC – the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Law ("NCCUSL") – have approved amendments to Article 1 that would alter the general UCC definition of "good faith" to require both subjective "honesty in fact" and objective "observance of reasonable commercial standards of fair dealing."[22] The new definition would apply throughout the UCC except under Article 5 (letters of credit).[23] The amendments would bring the UCC good faith obligation closer to the one provided for in the PECL. This revision to the UCC definition of "good faith" was approved very recently. For this reason, the amended definition has not yet been adopted by any jurisdiction.

201(19). UCC Article 5 has explicitly adopted the purely subjective definition of good faith. *See* UCC § 5-102(a)(7) and the comment thereto.

[20] *See* Summers, *supra* note 14, at 213.

[21] In other words, absent proof of reasonable trade standards, the UCC might not impose an "objective" good faith obligation on merchants involved in sales transactions, whereas lack of such trade standards would not impact the objective duty of fair dealing under the PECL.

[22] UCC § 1-201(1)(19), *Revision of Uniform Commercial Code Article 1- General Provisions*, Approval Draft Prepared for the Annual Meeting of the National Conference of Commissioners on Uniform State Laws August 10-17, 2001, (§ 1-201(a)(19)), *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited August 31, 2001).

[23] *See* UCC § 5-102(a)(7). UCC Article 5 contains its own definition of "good faith" limited to "honesty in fact."

Another significant textual difference between the UCC and the PECL good faith provisions is that the good faith obligation imposed by UCC section 1-203 applies only if and when a contract falling within the scope of the UCC has been formed. The UCC provision states that the good faith obligation arises from a "contract or duty within this Act," and phrases the obligation in terms of "its [i.e., the contract's or duty's] performance or enforcement."[24] Thus under the UCC "[g]ood faith and fair dealing are not independent requirements; instead, they arise from, and are dependent upon, the existence of an enforceable contract."[25] While some courts have held that, in certain circumstances, the parties' preliminary negotiations and agreements have resulted in a contract to negotiate in good faith toward a final agreement,[26] U.S. law continues to adhere to the rule that there is no good faith obligation before a contract has been formed. PECL Article 1:201, in contrast, does not condition the good faith duty it imposes on the existence of a formed contract: it states, very generally, that "[e]ach party must act in accordance with good faith and fair dealing,"[27] without limiting the obligation to situations where contractual rights or duties have already arisen. This unconditional phrasing stands in contrast to an earlier version of the PECL good faith provision, which stated: "In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing."[28] The phrasing of the earlier version implied that the good faith obligation was confined to situations where a contract and its attendant rights and duties already existed. The change in the phrasing to the current version rebuts that implication.

Several other parts of the current version of the PECL confirm this conclusion. A new provision, PECL Article 2:301, explicitly extends the obligation of good faith and fair dealing to

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[24] UCC § 1-203.

[25] Omega Engineering, Inc. v. Eastman Kodak Co., 908 F. Supp. 1084, 1091 (D. Conn. 1995).

[26] *See, e.g.*, Venture Associates Corp. v. Zenith Data Systems Corp., 96 F.3d 275 (7th Cir. 1996).

[27] PECL, *supra* note 1, art. 1:201.

[28] THE COMMISSION ON EUROPEAN CONTRACT LAW, THE PRINCIPLES OF EUROPEAN CONTRACT LAW: PART 1: PERFORMANCE, NON-PERFORMANCE AND REMEDIES, art. 1-106 (Ole Lando & Hugh Beale, eds. 1995).

the negotiation stage of contract formation.[29] The comment to PECL Article 1:201 states that the *culpa in contrahendo* doctrine found in Article 2:301 is a "particular application" of the general good faith duty imposed by the PECL.[30] An illustration in the comment to the PECL's general good faith provision, furthermore, applies the good faith obligation to the pre-contract formation period.[31] Thus, it is clear from a textual comparison that the scope of the good faith obligation imposed by the PECL is broader than that under the UCC: the PECL obligation extends to the negotiation phase of the relationship between the parties, whereas the UCC good faith obligation does not. This difference is explored further in the discussion below regarding application of the doctrines.[32]

Both the PECL and the UCC expressly restrict the power of contracting parties to disclaim or limit the obligation of good faith. The PECL limitation on party autonomy in this area appears, on its face, complete; Article 1:201(2) provides simply that "[t]he parties may not exclude or limit this duty [i.e., the duty of good faith and fair dealing imposed in Article 1:201(1)]."[33] The comment to PECL Article 1:201 explains that this provision means "that the parties cannot by their agreement exclude the duty of good faith and fair dealing . . . . [n]or can they vary its effects."[34] The UCC limitation on the parties' ability to contract out of the good faith obligation, found in UCC section 1-102(3), is also by its terms virtually impregnable – "the obligations of [*inter alia*] good faith . . . . prescribed by this

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[29] PECL Article 2:301 provides:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party which has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.

(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

[30] *See* PECL, *supra* note 1, art. 1:201, cmt. A, at 113. ("Good faith and fair dealing").

[31] *See* PECL, *supra* note 1, art. 2:101, cmt. B, illus. 1, at 114 ("Not confined to specific rules").

[32] *See infra* text accompanying notes 50-82.

[33] PECL, *supra* note 1, art. 1:201(2).

[34] PECL, *supra* note 1, art. 1:201, cmt. H, at 114 ("Article 1:201 is mandatory").

Act may not be disclaimed by agreement."[35] The same UCC provision, however, allows for minimal party autonomy when it states that "the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable." The ability of parties, under the UCC, to define standards of good faith (provided such standards are not "manifestly unreasonable") may suggest a minor difference from the PECL. Comment H to PECL Article 1:201, however, hints at a similar allowance of party autonomy:

> What is good faith will, however, to some extent depend upon what was agreed upon by the parties in their contract. Thus, parties may agree that even a technical breach may entitle the aggrieved party to refuse performance, when, for instance, its agents can ascertain a technical breach but not whether it is a trifle or not.[36]

III. Comparing the PECL and the UCC Good Faith Obligations as Applied

A. *Application of the Good Faith Principle in General*

While textual comparison takes us part of the way in the quest for similarities and differences in the good faith obligations of the PECL and the UCC, a more critical tool for comparing the obligations is to understand the manner in which they will be interpreted and applied. With a concept as vague as "good faith" at their core, PECL Article 1:201 and UCC section 1-203 are subject to an extremely broad range of constructions. As the "Notes" to PECL Article 1:201 indicate, even among European States there is "a considerable difference between the legal systems as to how extensive and how powerful the penetration of the principle [of good faith and fair dealing] has been," and the various European jurisdictions "have not given it the same degree of penetration into their law of contract."[37] The PECL Notes describe a "spectrum" of applications of the good faith principle:

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[35] UCC § 1-102(3).

[36] *Id.*

[37] PECL, *supra* note 1, at 116-17.

> At the one end of the spectrum figures a system where the principle has revolutionized the contract law (and other parts of the law as well) and added a special feature to the style of that system (GERMANY). At the other end we find systems which do not recognize a general obligation of the parties to conform to good faith, but which in many cases by specific rules reach the results which the other systems have reached by the principle of good faith (ENGLAND and IRELAND). . . . The other systems in the European Union range between the two opposites.[38]

It is clear that, in general, the drafters of the PECL favor an extensive and robust application of the good faith principle along the lines of the *Treue und Glauben* concept in the German system, and they expressly reject the restrained use of the good faith concept in English law:

> There are many examples of [English and Irish] courts interpreting the terms of a contract in such a way as to prevent one party using a clause in circumstances in which it was probably not intended to apply. . . . Thus to some extent Article 1:201 [of the PECL] merely articulates trends already present in English law. But the English approach based on construction of the agreement is a weak one as it cannot prevail against clear contrary provisions in the agreement . . . . or even clear implication from the circumstances. . . . Thus Article 1:201 represents an advance on English and Irish law.[39]

The general approach under the UCC at first appears to resemble that of the PECL. Unlike English and Irish law, the UCC clearly imposes a general good faith obligation on contracting parties. The manner in which the UCC good faith provisions are interpreted and applied, however, tends to bring them closer to the English approach.

For example, the Notes to PECL Article 1:201 quoted above criticize the inability of English law to overcome express provisions of a contract by application of the good faith principle. As explained below at greater length,[40] American courts have consistently held that the UCC good faith provision cannot be used to contradict or overrule express contractual terms. The Notes to PECL Article 1:201 also reject the English approach of con-

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[38] *Id.*
[39] *Id.* at 117-18.
[40] *See infra* text accompanying notes 94-108.

fining the good faith concept to a principle of interpretation or construction of the contract. The official comment to UCC section 1-203, in contrast, makes it clear that the UCC good faith principle is strictly one of contract interpretation: "the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced . . . ."[41] This language was added to the UCC comment by the UCC Permanent Editorial Board (the "Board") in 1994, and the commentary that accompanied the amendment strenuously emphasized that the UCC good faith provision is merely an interpretative tool for discovering the reasonable expectations of the parties based on their agreement.[42]

The 1994 amendments to the official comment to UCC section 1-203 were designed to address a specific issue concerning the construction of the UCC good faith obligation, and the manner in which that issue was resolved also suggests considerable distance from the robust good faith principle of the PECL. Before the comment was amended, a question had arisen whether an alleged violation of the UCC good faith obligation that was not connected to a breach of a more specific duty imposed by the contract or the rules of the UCC would support an "independent" cause of action. Several courts had held that the UCC good faith provision was "directive" rather than "remedial" – i.e., merely alleging a breach of the duty of good faith under UCC section 1-203, as opposed to alleging a breach of a particular contract provision or duty imposed by the UCC (as interpreted in "good faith"), was not a sufficient basis for claiming a remedy.[43] Although not all courts agreed,[44] the Board came down clearly on the side of those decisions that had restricted the use of the good faith principle. The Board concluded that

[41] UCC § 1-203, cmt.

[42] *See* Permanent Editorial Board of the Uniform Commercial Code, *PEB Commentary on the Uniform Commercial Code: Commentary No. 10 (Section 1-203) Final Draft*, February 10, 1994, *reprinted in* [FINDEX and PEB Commentaries] UCC Rep. Serv. (1994).

[43] *See, e.g.*, Tanner v. Church's Fried Chicken, 582 So. 2d 449, 451-52 (Ala. 1991); Korogluyan v. Chicago Title and Trust Co., 572 N.E.2d 1154, 1161 (Ill. App. 1991); Adolph Coors Co. v. Rodriguez, 780 S.W.2d 477, 482 (Tex. App. 1989).

[44] *See, e.g.*, Rigby Corp. v. Boatmen's Bank and Trust Co., 713 S.W. 2d 517, 535-37 (Mo. App. 1986); St. Benedict's Development Co. v. St. Benedict's Hosp., 811 P.2d 194, 199-200 (Utah 1991).

"Section 1-203 does not support a cause of action where no other basis for a cause of action exists,"[45] and it added the following language to the Official Comment to that section:

> This section [1-203] does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.[46]

Thus the UCC general good faith obligation has been treated as a relatively weak background or interpretative principle lacking sufficient independence to support a cause of action for breach unless the breach can be attached to another legal rule, or a particular express or implied contract provision. This undoubtedly reflects the traditional distrust in the English common law tradition, which is the foundation for U.S. contract law, of the vagueness of the good faith concept, and the sense that a strong good faith principle would give judges a dangerous power to create contractual obligations to which the parties had not actually agreed.[47] The interpretation of the UCC general

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[45] PEB Commentary No. (Section 1-203), *supra* note 42, *reprinted in* [FINDEX and PEB Commentaries] UCC REP. Serv. at 5.

[46] UCC § 1-203, cmt. The recently-approved revisions to UCC Article 1 mentioned in the text accompanying notes 22-23 *supra* change none of this. Except for renumbering the section that provides for the UCC general good faith obligation (currently § 1-203, changed to §1-304 in revised Article 1) and changing the definition of "good faith" (as described previously), the revisions leave the UCC good faith obligation substantively untouched, and the language from the current official comment quoted in the text accompanying this note is continued *verbatim* in the revised version. *See* Approval Draft of Revision of UCC Article 1, *supra* note 22, § 1-304 and "preliminary comment" thereto.

[47] *Cf.* E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L & COMP. L. 47, 55 (1995) (noting that the CISG (*see supra* note 11) lacks an express provision imposing a good faith obligation on parties to international sales contracts because some delegates to the diplomatic conference at which the CISG was approved, "including delegates form common law countries, feared that this would be too unrestricted a mandate to judges in an international setting and therefore opposed any references to a general principle of good faith.")

good faith obligation as a limited and subsidiary interpretative principle stands in contrast to the assertive role for good faith envisioned by the drafters of the PECL.

B. *Specific Examples of the Application of the Good Faith Obligation*

The fundamental difference between the weak conception of good faith under the UCC and the robust good faith principle of the PECL can be most clearly demonstrated by comparing the application of the two good faith obligations to specific situations. The UCC material for such a comparison is readily available: courts have applied the UCC good faith provisions in hundreds of reported decisions over the decades during which the Code has been in force. To my knowledge, however, no tribunal has yet based a decision on the PECL good faith principle. Nevertheless, there already exist several descriptions of how the drafters of the PECL envisioned its good faith provision would apply to particular factual scenarios: the comment to PECL Article 1:201 contains five "illustrations" of the application of the provision, and the drafters included other comments suggesting how the good faith concept would apply to specific situations. A good preliminary indication of how the good faith principles of the UCC and the PECL compare "in action" can be obtained by comparing the results under the PECL and the UCC in the fact situations mentioned in the PECL comments. The results of this comparison fall into three categories; in some situations, the good faith principles of the PECL and the UCC yield the same result; in a second group of situations, U.S. law employs doctrines other than good faith to produce results similar to those reached under the PECL good faith principle; in a third set of situations, U.S. law appears to reach a different outcome than that produced by the PECL good faith provision.

1. *Termination for Trivial Breach*

One example of how the drafters conceived the PECL good faith provision would apply to a particular factual scenario is found in Part B of the comment to PECL Article 1:201. To illustrate the point that the good faith obligation "may take precedence over other provisions of these Principles when a strict adherence to them would lead to a manifestly unjust result,"

the comment notes that "even if the non-performance of an obligation is fundamental because strict compliance with the obligations is of the essence of the contract under Article 8:103, a party would not be permitted to terminate because of a trivial breach of the obligation."[48] The reference to PECL Article 8:103 presumably is to part (a) thereof, which permits parties to agree that any failure to perform the terms of a contract will constitute "fundamental non-performance."[49] A "fundamental non-performance," in turn, allows the aggrieved party, *inter alia*, to terminate the contract.[50] In other words, the comment indicates that, even if the contract requires "perfect" performance, a party who suffers a breach will not have the right to terminate for a trivial breach if doing so would violate its obligation of good faith under PECL Article 1:201.

The UCC good faith provisions probably yield the same result. For example, a Texas Appeals court construing a buyer's rights under the "perfect tender rule" of UCC section 2-601, which permits a buyer to reject goods if they fail "in any respect to conform to the contract," stated:

> If the evidence does establish nonconformity in some respect, the buyer is entitled to reject if he rejects in good faith. [UCC section 1-203] provides that, "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Since the rejection of goods is a matter of performance, the buyer is obligated to act in good faith when he rejects the goods. . . . Evidence of circumstances which indicate that the buyer's motivation in rejecting the goods was to escape the bargain, rather than to avoid acceptance of a tender which in some respect impairs the value of the bargain to him, would support a finding of rejection in bad faith. . . . Thus evidence of rejection of

[48] PECL, *supra* note 1, art. 1:201, cmt. B, at 113 ("Not confined to specific rules").

[49] PECL Article 8:103(a) provides that "[a] non-performance of an obligation is fundamental to the contract if: (a) strict compliance with the obligation is of the essence of the contract . . . ." As a comment to PECL Article 8:103 explains:

> Under Article 8:103(a) the relevant factor is not the actual gravity of the breach but the agreement between the parties that strict adherence to the contract is essential and that any deviation from the obligation goes to the root of the contract so as to entitle the other party to be discharged from its obligations under the contract.

PECL, *supra* note 1, art. 8:103, cmt. B, at 364 ("Compliance with contractual obligations").

[50] *See id.* art. 9:301(1).

goods on account of a minor defect in a falling market would in some instances be sufficient to support a finding that the buyer acted in bad faith when he rejected the goods.[51]

This approach was adopted by a Kansas Appeals Court in *Baker v. Ratzlaff*,[52] where a seller of popcorn invoked a contract clause, included at the seller's insistence, giving him the right to terminate the contract if the buyer failed to pay upon delivery.[53] The buyer, a commercial popcorn dealer, had received the first two deliveries under the contract.[54] The seller had not requested nor did the buyer make payment upon delivery.[55] Instead, following its normal practice, the buyer issued the seller "weight tickets" which at the end of each week would be sent to the buyer's administrative offices for payment by check.[56] Although the buyer's administrative offices were on the route the seller took in making deliveries, the seller did not stop and seek payment after making the first two deliveries.[57] When the buyer contacted the seller to inquire about future deliveries, the seller said nothing about payment for the first two deliveries.[58] Approximately a week after making the initial deliveries, after the market price of popcorn had risen sharply, the seller unexpectedly issued a notice terminating the contract because the

[51] Printing Center of Texas, Inc. v. Supermind Publishing Co., 669 S.W. 2d 779, 784 (Tex. App. 1984). As authority for its views on good faith and rejection of goods, the *Supermind* court cited Neumiller Farms, Inc. v. Cornett, 368 So. 2d 272 (Ala. 1979), which held that a buyer's rejection of potatoes was invalid because it was done in bad faith. In *Neumiller Farms*, the buyer claimed that the goods breached a clause in the contract requiring that potatoes delivered under the contract be "to buyer satisfaction." The evidence strongly suggested that the potatoes tendered by the seller were perfectly suitable, and that the buyer was searching for a pretext to escape the fixed price contract after market prices for potatoes fell steeply. Courts have long implied a good faith obligation in connection with personal satisfaction clauses such as that invoked by the buyer in *Neumiller Farms*. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 103B at 565 (3rd ed. 1990). Thus the holding in *Neumiller Farms* can be narrowly understood as an application of the traditional doctrine that personal satisfaction clauses must be used in good faith rather than as an example of a general obligation under the UCC to reject goods only in good faith. Indeed, the court never actually cited or invoked the general good faith obligation under UCC § 1-203.

[52] 564 P.2d 153 (Kan. Ct. App. 1977).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See id.* at 155-56.

[57] *See* Baker, 564 P.2d at 155.

[58] *See id.*

buyer had failed to pay for the first installments upon delivery.[59] Immediately after receiving the notice, the buyer issued checks for the first two deliveries, but the seller persisted in the termination and resold the balance of his popcorn at the higher market prices.[60] The trial court, later affirmed by the appeals court, held that the seller had violated his obligation of good faith under UCC section 1-203 "by declaring a termination of the contract upon a technical pretense,"[61] and the buyer was awarded damages.[62]

Thus, the UCC good faith principle has been construed to limit a party's right to terminate a contract because of a trivial breach, even where the law grants the party a right to terminate for any breach. In this scenario the UCC good faith doctrine operates in much the same way as the PECL good faith obligation. This convergence in result is not particularly surprising. According to the Notes to PECL Article 1:201, even English law, which does not recognize an implied general obligation of good faith in its contract law and which the PECL Notes identify as the European jurisdiction in which the good faith principle has made the least "penetration,"[63] reaches the same result.[64] Limiting a party's right to terminate a contract in bad faith for a trivial breach thus appears to be a minimal requirement of good faith, found even in jurisdictions with the least robust conception of the principle. It is to be expected that the UCC, which includes an express general obligation of good faith, should be interpreted to provide for this result, particularly when English law (in which, outside of Louisiana, U.S. contract law has its roots) does so.

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[59] *See id.*

[60] *See id.*

[61] *See id.* at 156.

[62] *See id.* at 155. U.S. courts have reached similar results without invoking the obligation of good faith. *See, e.g.*, Foundation Dev. Corp. v. Loehmann's, Inc., 788 P.2d 1189 (Ariz. 1990) (invoking the material breach doctrine in refusing to permit a lessor to terminate a commercial lease merely because the lessee was two days late in making lease payments, despite a clause in the lease providing that "time is of the essence" of the contract).

[63] *See* PECL, *supra* note 1, art. 1:201, at 116.

[64] *See id.* at 117 (asserting that English courts "have on occasion limited the right of a party who is the victim of a slight breach of contract to terminate the contract on that ground when the real motive appears to be to escape a bad bargain" [citing cases]).

2. *Good Faith in Contract Formation (PECL Illustration 1)*

The comments to PECL Article 1:201 contain five formal illustrations of how the PECL good faith obligation would apply to specific situations. Illustration 1 relates to contract formation:

> In its offer to B, A specifies that in order for B's acceptance to be effective B must send it directly to A's business headquarters where it must be received within 8 days. An employee of B overlooks this statement and sends the acceptance to A's local agent who immediately transmits it to A's headquarters where it is received 4 days later. A cannot avoid the contract.[65]

According to the PECL comment, this result illustrates a more general axiom: "The principle of good faith and fair dealing also covers situations where a party without any good reason stands on ceremony."[66]

If the situation in Illustration 1 arose under the UCC, it would almost certainly not be treated as an issue of good faith. As was discussed previously,[67] the good faith obligation provided for by UCC section 1-203 has been held to arise only when some "contract or duty" governed by the UCC already exists, and thus it does not extend into the pre-contractual period. While other principles of U.S. law that may serve to police bad faith behavior have been applied to the negotiating phase of the contracting process - perhaps most famously, the promissory estoppel doctrine in the well-known case of *Hoffman v. Red Owl Stores, Inc.*[68] - the good faith principle has not. This stands in marked contrast to most European jurisdictions, which recognize a good faith obligation (often associated with the Latin phrase "*culpa in contrahendo*") applicable to parties engaged in negotiating a contract.[69]

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65 PECL, *supra* note 1, art. 1:201, cmt., illus. 1, at 114.

66 *Id.*

67 *See supra* text accompanying notes 25-34.

68 133 N.W.2d 267 (Wis. 1965).

69 *See* PECL, *supra* note 1, art. 2:301, at 191-192 (describing the good faith obligation that arises during contract negotiations under the laws of Germany, Austria, Greece, Portugal, Italy, Spain, France, Luxembourg, Denmark and Sweden). PECL Article 2:301 expressly adopts this approach, providing specifically for liability if contract negotiations are conducted or broken off "contrary to good faith and fair dealing."

On the specific facts of Illustration 1, a different result could well be reached under the UCC. U.S. general contract law follows the maxim that "the offeror is master of the offer," with the consequence that offerors are permitted to specify the precise manner in which their offers can be accepted.[70] No contract is formed if the specified manner of acceptance is not followed.[71] Indeed, the *Restatement (Second) of Contracts* contains the following illustration of this rule, which is in effect a counter-example to PECL Illustration 1.

> A sends a letter to B stating the terms of a proposed contract. At the end he writes, "you can accept this offer only by signing on the dotted line below my own signature." A replies by telegram, "I accept your offer." There is no contract.[72]

According to this example, U.S. general contract law permits an offeror who has specified an exclusive manner of acceptance to act contrary to the comment to the PECL good faith provision: in other words, under U.S. law, a party apparently is permitted "without good reason to stand on ceremony." On the other hand, if an offeror fails to indicate a specific and exclusive manner for accepting the offer, U.S. general contract law permits the offeree to accept in any reasonable manner.[73] The *Restatement (Second) of Contracts*, furthermore, suggests a preference for construing language that specifies a manner of acceptance as not intended to be exclusive, thus permitting other reasonable methods of accepting.[74] The UCC contract formation rules follow the same line. UCC section 2-206(1) permits an offeror to specify an exclusive manner of acceptance, but only if it is done "unambiguously."[75] Otherwise, according to UCC section 2-

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[70] *See* RESTATEMENT (SECOND) OF CONTS. § 30(1) & cmt. a (1981) ("The offeror is the master of his offer. . . . [T]he offeror is entitled to insist on a particular mode of assent.").

[71] *See id.* § 60 & cmt. a.

[72] *Id.* § 30, cmt a, illus. 1 For another example to the same effect, see *id.*, § 60, cmt. a, illus. 3.

[73] *See id.* § 30(2).

[74] *See id.* § 60 & cmt. a. *See also,* § 30 cmt. b ("Insistence on a particular form of acceptance is unusual. Offerors often make no express reference to the form of acceptance; sometimes ambiguous language is used. Language referring to a particular mode of acceptance is often intended and understood as suggestion rather than limitation; the suggested mode is then authorized, but other modes are not precluded.").

[75] UCC § 2-206(1).

206(1)(a), the offeree can accept "in any manner and by any medium reasonable in the circumstances."[76]

Applying UCC section 2-206(1) to Illustration 1 may well yield a result contrary to that under the PECL. If A in that illustration has "unambiguously" indicated that B must send its acceptance directly to A's business headquarters, as the facts suggest is the case, no contract would result under the UCC even though A received the acceptance through his or her agent in a timely fashion. The situation is analogous to the illustration in the *Restatement (Second) of Contracts* where the offeror receives a telegraphic acceptance instead of the countersignature acceptance specified in the offer, and no contract arises. Of course in a situation like PECL Illustration 1, a U.S. court would likely be eager to find some ambiguity in A's offer that would permit a finding that the specified manner of acceptance was not intended to be the only way to accept. If no such ambiguity can be found, however, no contract would be formed.[77] The UCC good faith obligation, furthermore, would not change that result, because it would not even apply to the contract-formation stage of the relationship between A and B.

There are several other doctrines available under the UCC that might serve to protect B in a situation like that in PECL Illustration 1. I have already mentioned *Hoffman v. Red Owl Stores, Inc.*,[78] which invoked promissory estoppel to police misbehavior during the contract-formation stage. This case held that one who represents that a contract will be entered into, knowing such representations will be relied upon by the other party to the negotiations (and, indeed, encouraging such reliance), is liable for losses incurred by the other party when the first party later refuses to enter into the contract. Although the case was decided under general contract law rather than the UCC, its approach is available in UCC transactions as a "supplementary principle" of contract law not displaced by specific rules of the Code.[79] Unfortunately for B, the *Red Owl* doctrine requires proof both that the aggrieved party relied upon some promise or representation, and that such reliance was foresee-

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[76] UCC § 2-206(1)(a).
[77] *See* UCC § 2-206(1).
[78] 133 N.W.2d 267 (Wis. 1965).
[79] *See* UCC § 1-103.

able to the party making the promise or representation. There is no proof of either element on the facts of PECL Illustration 1.

Waiver is another doctrine that has been invoked to overcome an offeree's failure to employ an exclusive manner of acceptance. In *Empire Machinery Co. v. Litton Business Telephone Systems*,[80] Empire made a written offer to purchase certain telephone switching equipment from BTS Litton. The offer stated that it could be accepted "only upon approval, acceptance, and execution hereof by BTS at its home office," and it included a signature line for such execution.[81] BTS never signed the offer, but both parties behaved as if a contract had been entered into (e.g., representing to third parties that a contract had been formed, and submitting and cashing a down payment check). The court held that, under UCC section 2-206(1), the offer specified an exclusive manner of acceptance (BTS signing the offer sheet) that had not been followed, but that a contract had nevertheless been formed:

> [I]t is clear under such circumstances that the offeror who has the power to control the manner of acceptance may waive that requirement. It is equally clear that the offeree can rely upon that manner of acceptance specified in the contract and the offeror's "waiver" of the manner of acceptance cannot create a contract without the assent of the offeree. This assent may be sufficiently expressed by the conduct of the soliciting offeree so as to bring into being a binding contract.[82]

The court found the conduct in the case was sufficient to establish a waiver by the offeror of the exclusive manner of acceptance, and acquiescence in such waiver by the offeree, thus permitting a contract to be formed despite BTS' failure to sign the offer sheet. The *Empire* waiver doctrine, however, requires affirmative language or conduct on the part of the offeror indicating that it is not insisting upon the exclusive manner of acceptance specified in the offer. Unfortunately for B in PECL Illustration 1, there is no evidence that A waived the requirement that B transmit the acceptance directly to A.

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[80] 566 P.2d 1044 (Ariz. 1977).

[81] *Id.* at 1046.

[82] *Id.* at 1048.

In short, without additional or changed facts, the result in Illustration 1 to the PECL good faith provision would almost certainly be different under the UCC than under the PECL, and the UCC good faith doctrine would not alter that conclusion.

3. *Luring a Party into a Time-Bar (PECL Illustration 2)*

The second illustration of the application of the PECL good faith principle involves a party who dishonestly manipulates its contracting partner into refraining from pursuing a claim until the claim is time-barred:

> The contract between A and B provides that A must bring suit against B within two years from the final performance by B if A wants to make B liable for defects in B's performance. Some time before the expiration of this time limit A discovers a serious defect in B's performance and notifies B that it intends to claim damages. B uses dilatory tactics to put A off. On several occasions it assures A that A has no reason for concern. B undertakes to look into the matter, but insists that it will have to investigate it carefully.
>
> When after the expiration of the two year's time limit, A loses patience and sues B, B invokes the time limit. Not having acted in good faith, B is estopped from relying on the time limit.[83]

The same result would likely be reached if the UCC applied to the contract between A and B, although the UCC good faith provision would probably not be invoked on these facts. The doctrine likely to be used if the UCC applied in Illustration 2 is equitable estoppel.[84] Faced with a situation where one party manipulated the other into sitting on a claim until the time limit imposed by the statute of limitations in UCC section 2-725 expired, several courts have held that the breaching party was equitably estopped from pleading the time-bar. For example, in *City of Bedford v. James Leffel & Co.*,[85] a buyer of machinery delayed pursuing a claim in reliance upon the seller's assur-

[83] PECL, *supra* note 1, art. 1:201, cmt., illus. 2, at 114.

[84] Equitable estoppel is "[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." BLACK'S LAW DICTIONARY 571 (7th ed. 1999) (sub-entry for "equitable estoppel" under "estoppel").

[85] 558 F.2d 216 (4th Cir. 1977).

ances that it would find and fix problems with the machinery. When the seller later failed to correct the defects and the buyer sued, the trial court granted the seller summary judgement on the basis that the four year statute of limitations in UCC section 2-725 had expired. The Fourth Circuit Court of Appeals reversed, holding that under the equitable estoppel doctrine

> . . . one cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.[86]

Similarly, in *L.R. Foy Construction Co. v. Dakota State Cement Plant Commission*,[87] buyers who failed to receive contracted-for cement delayed bringing suit in reliance upon the seller's representations that it was fairly allocating cement to its customers. The trial court dismissed the buyers' action as barred by the statute of limitations in UCC section 2-725. The South Dakota Supreme Court reversed, holding that the doctrine of equitable estoppel prevented the seller from using the statute of limitations as a defense.[88]

In *Foy*, the court laid out the requirements of equitable estoppel as follows: First, there must be false representations or concealment of materials facts; second, the party that was misled must not have known the actual facts; third, the misrepresentations must have been made with the intention that they be acted upon;[89] fourth, the party to whom the misrepresentations were made must have relied on these statements to their detriment.[90] These elements appear to be satisfied on the facts of PECL Illustration 2. Thus, it is likely that a court applying the

[86] *Id.* at 218 (citation omitted).

[87] 399 N.W.2d 340 (S.D. 1987).

[88] *See id.* at 343. Although the UCC does not expressly provide for equitable estoppel, the court held that the doctrine is applicable to UCC transactions via UCC § 1-103, which states that "the principles of law and equity" supplement the provisions of the Code unless displaced by particular provisions of the UCC. *See id.* at 343, 345.

[89] In *Bedford v. Leffel*, the 4th Circuit emphasized that equitable estoppel doctrine does not require an intentional misrepresentation, so long as the misled party reasonably relied on inaccurate information supplied by the party to be estopped. *See* 558 F.2d at 218.

[90] *See* 399 N.W.2d at 344 (citing Taylor v. Tripp, 330 N.W.2d 542 (S.D.1983)).

UCC would reach the same result as a tribunal applying the good faith provision of the PECL.

Although facts like those in Illustration 2 are unlikely to invoke the good faith provisions of the UCC, the equitable estoppel doctrine that would apply under U.S. law is close in spirit to the good faith approach employed under the PECL. In fact, the result in the PECL illustration itself is phrased in terms of estoppel: 'Not having acted in good faith, B is estopped . . . ."[91] Thus the PECL and the UCC approaches to Illustration 2 are very similar indeed. The fact that U.S. law avoids invoking the good faith principle in this situation is, nevertheless, significant. It suggests an inclination to confine the reach of good faith doctrine, perhaps out of distrust for its potential power. On the other hand, the willingness of the PECL drafters to use good faith to resolve Illustration 2 evidences support for an expansive view of the role of the good faith doctrine.

4. *Applying Good Faith to Supersede the Parties' Agreement (PECL Illustration 3)*

Illustration 3 in the comment to the PECL good faith provision is designed to demonstrate that, "[i]n relationships that last over a period of time (*Dauerschuldverhältnisse*) such as tenancies, insurance contracts, agency and distributorship agreements, partnerships and employment relationships, the concept of good faith has particular significance as a guideline for the parties' behaviour."[92] In fact, Illustration 3 demonstrates an even more fundamental point about the PECL good faith principle: that the drafters contemplate it will be used to overrule express provisions of the parties' agreement, even absent a party's misleading behavior, reliance on false representations, or similar factors. This dimension of the PECL good faith principle is also emphasized in the Notes to Article 1:201, where the drafters criticize the good faith principle in English law as "a weak one as it cannot prevail against clear contrary provisions in the agreement."[93] By demonstrating that the good faith obligation imposed by PECL Article 1:201 can overrule express terms of the agreement, Illustration 3 reveals a profound gap between

91 PECL, *supra* note 1, art. 1:201, cmt., illus. 2, at 114.
92 *Id.* at 114.
93 *Id.* art. 1:201, at 118.

the good faith principle embodied in the PECL and the good faith doctrine in the UCC (or, indeed, in U.S. law in general). This gap would produce not just a different approach to facts like those in the illustration, but most likely a different result.

Illustration 3 states:

> In 1945 A, a car manufacturer in country Y, appoints B as its sole distributor of automobiles for country X. The contract takes effect on January 1, 1946, and runs for one year. It provides that A, though not obliged to do so, may give B a one month notice if A does not wish to renew the contract. On this condition one year contracts are issued by A and signed by B during the following years. A does not wish to renew the contract for 1999 and so informs B on November 30, 1998. Considering that a contractual relationship between the parties has lasted for 51 years, B, despite the provision on notice in the contract, is entitled to damages because in the circumstances the notice is too short.[94]

Nothing in the recited facts of Illustration 3 suggests that A has in any way represented to B that the 30-day termination provision would not be invoked, and of course B has not relied on any such representation. Thus there are no grounds to apply doctrines of waiver or estoppel. The termination provision appears to have been dutifully included in the written agreement signed by B each time the contract was renewed, and the facts do not suggest that A has anything but the most legitimate reasons for wishing to terminate the contract. The sole basis for A's liability is the fact that the contractual relationship with B has lasted 51 years, leading to the conclusion that the 30 day notice of termination is "too short." There is no indication of how long in advance it would be necessary for A to give notice of termination in order to avoid liability, nor any suggestion of how A could go about determining this matter now that the express term of the written agreement has become invalid. The conclusion that 30 days notice is too short is presented without explanation or justification. Perhaps A has entirely lost the right to terminate the contract, no matter how much advance notice is given. Could A have avoided this result by emphasizing, at the time of each annual contract renewal, that it wished to retain the right to terminate with 30 days notice, and might

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[94] *Id.* art. 1:201, cmt., illus. 3, at 114.

well choose to exercise it? Is there some other way for A to preserve its right to terminate? Did B have any obligation, at the time it signed renewal contracts that incorporated the 30-day termination provision, to inform A that B would not be bound by the provision, or to suggest to A how much advance notice would be necessary? The reader of Illustration 3 is not enlightened.

The conception of the good faith principle suggested by Illustration 3 includes the kind of peremptory judicial power to make or alter the parties' agreement that has traditionally deterred U.S. law from a whole-hearted embrace of a robust good faith concept. A comment to PECL Article 1:201 suggests that the application of the good faith principle to override an express contract term (or even a legal rule) in order to achieve a court's sense of general justice may be limited by considerations of "certainty and predictability in contractual relationships."[95] The comment, however, is left as a vague and undefined limitation on the good faith principle with no example given of the circumstances in which it might come into play. At any rate, if the UCC applied to Illustration 3, the approach and the result would likely be quite different. Cases decided under the UCC have repeatedly and clearly held that the obligation of good faith does not override a contract's express terms.

For example, in *Blalock Machinery and Equipment Co. v. Iowa Manufacturing Co.*,[96] the plaintiff had been an exclusive distributor of the defendant's heavy equipment for over 27 years.[97] The distributorship agreement between the parties contained a clause providing that either party could terminate the contract with 30 days' written notice.[98] When the defendant exercised its right of termination pursuant to this clause, the plaintiff sued, claiming that the defendant's termination was not in good faith.[99] The court held that the Iowa version of the UCC, which applied to the dispute, did not prohibit the termination even if it was arbitrary, and that the Code's good faith

[95] *Id.* art. 1:201, cmt. G, at 116.

[96] 576 F. Supp. 774 (N.D. Ga. 1983).

[97] *See id.* at 776.

[98] *See id.*

[99] *See id.* at 776-77.

obligation did not override an express term of the contract permitting such termination:

> The court recognizes that the good faith obligation of the UCC has been adopted by Iowa . . . . and is applicable to distributorship contracts, however, the parties have not cited and the court has not found any cases applying Iowa law that hold that the good faith obligation overrides the express terms of the contract. In the absence of any authority, the court . . . . is not persuaded that the section 1-203 good faith obligation can be used to override or strike express contract terms.[100]

To similar effect is *Grand Light & Supply Co., Inc. v. Honeywell, Inc.*,[101] where the plaintiff had served as a distributor for Micro Switch, a division of Honeywell, since approximately 1947.[102] In 1977 Micro Switch issued an "Authorized Distributor Policy" that, for the first time, provided Micro Switch and its distributors the right to terminate the relationship with 30 days' written notice.[103] In 1978, Micro Switch gave notice that it was terminating the distributorship agreement with the plaintiff, and the plaintiff sued.[104] The district court found that Micro Switch's termination had violated its obligation of good faith under the UCC and awarded damages,[105] but the Second Circuit reversed, holding that:

> The UCC good faith provision may not be used to override explicit contractual terms. Because the record reveals no reason for ignoring the contract's terms, we hold that where the contract expressly provides for termination on thirty days notice, no good faith requirement should be implied to override the contractual provisions. Therefore, the termination was proper within the terms of the contract.[106]

As these cases illustrate, under the UCC (and U.S. law in general) a long term relationship between the parties is not grounds for finding that the good faith obligation supersedes an

[100] *Id.* at 777. *Blalock* relied heavily on Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129 (5th Cir.), *cert. denied*, 444 U.S. 938 (1979).

[101] 771 F.2d 672 (2nd Cir. 1985).

[102] *See id.* at 674.

[103] *See id.* at 674-75.

[104] *See id.* at 675.

[105] *See id.* at 675-76.

[106] *Id.* at 679.

express contractual right to terminate.[107] Indeed, U.S. law generally holds that the express terms of a contract prevail over the good faith obligation.[108] Thus, should a situation like PECL Illustration 3 arise under U.S. law, the result would likely differ from the outcome under the PECL.

5. *Good Faith and Reliance, Including Reliance on a Bank's Mistaken Payment (PECL Illustration 4)*

Illustration 4 in the comment to the PECL general good faith provision states:

> An importer asked its bank to collect on a negotiable instrument. The bank mistakenly reported to the customer that the money had been paid, and paid the customer its value. When it was discovered that the amount had not been paid, the importer had irrevocably credited the amount to its foreign business partner. The bank is estopped from reclaiming the payment.[109]

The comment indicates that this illustration exemplifies "a general principle that a person should not be allowed to set up the invalidity of an act or another reason for its not being binding upon him when he has induced another person to alter his position on the faith of the act."[110] In other words, "[a] particular application of the principle of good faith and fair dealing is to prevent a party on whose statement or conduct the other party has reasonably acted in reliance, from adopting an inconsistent position."[111]

Under the UCC, the result in Illustration 4 would depend on facts not specified. That is because the applicable part of the UCC – Article 4 ("Bank Deposits and Collections") – deals with

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107 For other cases holding that an express contractual right to terminate is not over-ridden by the obligation of good faith, see Sons of Thunder, Inc. v. Borden, Inc., 666 A.2d 549, 560-63 (N.J. Super. Ct. 1995), *rev'd on other grounds* 690 A.2d 575 (N.J. 1997) (involving UCC good faith obligation); Triangle Mining Co. v. Stouffer Chemical Co., 753 F.2d 734 (9th Cir. 1985) (involving common law good faith obligation).

108 *See, e.g.,* General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038 (6th Cir. 1990); Cardinal Stone Co. v. Rival Mfg. Co., 669 F.2d 395 (6th Cir. 1982); Flight Concepts Ltd. Partnership v. Boeing Co., 819 F. Supp. 1535 (D. Kan. 1993); Frank Lyon Co. v. Maytag Corp., 715 F. Supp. 922 (E.D. Ark. 1989); Highway Equip. Co. v. Caterpillar, Inc., 707 F. Supp 954 (S.D. Oh. 1989).

109 PECL, *supra* note 1, art. 1:201, cmt., illus. 4, at 115.

110 *Id.* at 115.

111 *Id.* at 114.

such a situation by reference to specific rules rather than by application of a broad standard like "good faith." The outcome on the facts of Illustration 4 would likely depend on whether the "provisional" credit that the bank presumably would have given its customer (the importer) when he (the importer) deposited the negotiable instrument for collection had become "final,"[112] and whether the bank notified the importer of the non-payment within the bank's "midnight deadline" or a further "reasonable time."[113] The purposes behind these UCC rules undoubtedly include protecting a bank customer who has *reasonably* relied on a bank that is collecting a negotiable instrument - which presumably is also the purpose served by holding the bank liable under the PECL good faith provision. The significant point, however, is that U.S. law has chosen to deal with the situation not by invoking the broad principle of good faith, but instead by setting up specific rules that define the circumstances in which a bank customer can reasonably rely on payment for a negotiable instrument.

The fact that the analysis of Illustration 4 under the UCC would not implicate the good faith principle suggests a larger difference between the approach to good faith in the UCC and the PECL. U.S. lawyers tend to view the good faith principle as

[112] *See* UCC § 4-214(a) (providing that, when an "item" (which, under UCC § 4-104(a)(9), includes a negotiable instrument) is not honored, a collecting bank that has given provisional settlement to its customer has a right to "charge back" the customer's account or obtain a refund, but such rights terminate when settlement becomes final); UCC § 4-215(a) and (d) (specifying when settlements for an item become final). *See also* UCC § 4-201(a) (specifying that a bank that receives an item is presumed to be an agent for collection purposes rather than the owner of the item, and that any settlement given by the bank for an item, even if the customer makes a withdrawal based on the settlement, is presumed to be provisional until it becomes final under the rules of UCC Article 4). Comment 10 to UCC § 4-215, summarizes the situation as follows: "If previously [a bank] gave to its customer a provisional credit for the item in an account its receipt of final settlement for the item 'firms up' this provisional credit and makes it final. When the credit given by it so becomes final, in the usual case its agency status terminates and it becomes a debtor to its customer for the amount of the item."

[113] *See* UCC § 4-214(a) (stating that a collecting bank that has not received final settlement for an item and fails to return the item or give notice to its customer of the facts by its midnight deadline or a "longer reasonable time after it learns the facts" is "liable for any loss resulting from the delay"). As defined in UCC § 4-104(a)(10), a bank's "midnight deadline" for a negotiable instrument is "midnight on its next banking day following the banking day on which it receives the relevant item . . . ."

a last resort, to be invoked only when more specific and focused doctrines have failed. In other words it is preferable, under U.S. law, to avoid invoking the general and vague good faith principle. The PECL, in contrast, appears to view a resolution based on the good faith principle as preferable to other solutions, apparently seeking to expand the good faith umbrella to encompass as much as possible. Thus, as the comments to the PECL good faith provision make clear,[114] Illustration 4 is intended as a specific example of a much broader aspect of the PECL good faith concept – the protection of those who have reasonably relied on a party's words or actions. U.S. law, in contrast, tends to view reliance-oriented rules (e.g., equitable estoppel and promissory estoppel) not as a sub-category of good faith, but as distinct, independent doctrines. It is interesting that the PECL drafters express the result of applying the good faith principle to the facts of Illustration 4 in terms of estoppel ("The bank is estopped from reclaiming the payment"), an approach that a U.S. lawyer may well view as a confusing conflation of two distinct principles: the principle of protecting reasonable reliance, and the principle of good faith. Indeed, the invocation of good faith in connection with an estoppel analysis, and the idea that protecting reasonable reliance in general is an aspect of the good faith doctrine, call to mind a complaint about the civil law voiced by a prominent U.S. contracts scholar: "Civil lawyers demonstrate an unsettling tendency to use the doctrine of good faith as a cloak with which to envelop other doctrines .... In this fashion, many contract doctrines can be subsumed under a single amorphous doctrine of good faith."[115]

Interestingly, in another situation that shares elements of PECL Illustration 4, the UCC does employ the good faith principle to help protect a party who has relied on mistaken payment of a negotiable instrument. Under UCC section 3-418, a drawee who has paid an instrument by mistake may be entitled to resti-

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[114] *See* PECL, *supra* note 1, at 114-15.

[115] Farnsworth, *supra* note 47, at 60-61. Another possible example of this phenomenon involves the rule that damages for losses which the aggrieved party could have avoided by taking reasonable action are not recoverable (the mitigation of damages principle). PECL Article 9:505 provides for such a rule. The comments to Article 1:201, however, indicate the mitigation rule is a specific application of the general good faith obligation. *See* PECL *supra* note 1, art. 1:210, cmt. D, at 115.

tution from the payee.[116] UCC section 3-418(c), however, provides that the drawee cannot claim this remedy against "a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment." Thus, the UCC employs the good faith principle to determine the rights of the parties in this situation, although the UCC (in contrast to the PECL) focuses on the good faith of the party receiving payment rather than the good faith of the payor. Note, however, that UCC section 3-418(c) provides for a specific good faith obligation, rather than relying on the general good faith obligation in UCC section 1-203. This approach suggests that the drafters lacked confidence that the UCC general good faith obligation was sufficiently developed and robust to yield the desired results in situations covered by that section. This is another indication that, compared to the PECL good faith principle, the general good faith principle in the UCC lacks vigor.

6. *Good Faith and Post-Contract-Formation Contingencies (PECL Illustration 5)*

Illustration 5 in the comment to the PECL general good faith provision states:

> Constructor C, whose employees have fallen ill in great numbers, has asked Owner O for the time agreed for C's completion of O's liquor store to be extended by one month. O has refused to grant the extension. After that a licence to sell liquor which O expected to get as a routine matter is held up due to a long lasting strike among civil servants which means that O will not be able to use

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[116] If the drawee's mistake was failure to know that the instrument was subject to a stop payment order or that the drawer's signature was forged, the right to reclaim the payment is granted by UCC § 3-418(a). For other types of mistakes, the drawee's reclamation right depends on the general law of mistake and restitution. UCC § 3-418(b).

Note that the situation covered by UCC § 3-418 apparently differs from the situation in PECL Illustration 4 in that the PECL illustration appears to involve the restitutionary rights of a bank that is collecting, on behalf of its customer and as an agent of the customer, a negotiable instrument drawn on another drawee. UCC § 3-418, in contrast, deals with the restitutionary rights of one that has mistakenly paid (or accepted) an instrument – i.e., a drawee or the maker of a negotiable promissory note. Thus UCC § 3-418 would apparently not apply to the reclamation rights of a collecting bank that has credited its customer's account for an uncollected item.

the building until three months after the agreed completion time. Good faith requires that O notify C that it will not need to have the building completed on time. See also Article 1:202.[117]

A comment explains that the illustration focuses on a contracting party's obligation "to show due regard for the interests of the other party" in the "handling of contingencies which were not contemplated in their agreement or in the rules of law governing the contract."[118]

Illustration 5 is not clear on the consequences of the notice that O must give, nor on the result if the notice is not given. Presumably O must permit C the extra month to complete the building, and O will itself be in breach of the good faith obligation unless it comes forward to grant the extension. Thus, as in Illustration 3 discussed earlier, the good faith principle in Illustration 5 is used to overrule express terms of a contract. The point made in the discussion of Illustration 3 that U.S. law generally forbids using the good faith principle to overrule express contractual provisions[119] is therefore also relevant here.

There are, of course, certain U.S. doctrines that overcome express contractual provisions. One that focuses on the effect of post-contract-formation contingencies and that might be relevant in Illustration 5 is the doctrine of impracticability, which (according to the *Restatement (Second) of Contracts*) excuses a party's non-performance of contractual duties if the performance was made "impracticable" by "the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made."[120] Whether the impracticability doctrine would apply in Illustration 5 if C failed to complete the liquor store on time would depend on facts not specified, such as whether C assumed the risk of his employees' illness (which might, in turn, depend on the foreseeability at the time the con-

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117 PECL, *supra* note 1, art. 1:201, cmt., illus. 5, at 115. PECL Article 1:202, referred to at the end of Illustration 5, provides that "Each party owes to the other a duty to co-operate in order to give full effect to the contract."

Because Illustration 5 involves a building construction contract, it would be outside the scope of the UCC. For this reason my discussion of Illustration 5 under U.S. law will focus on the common law of contracts.

118 *Id.* art. 1:201, cmt. D, at 115 ("Mutual consideration").

119 *See supra* text accompanying notes 95-108.

120 RESTATEMENT (SECOND) OF CONTS. § 261 (1981). For contracts for the sale of goods, UCC § 2-615 states a very similar rule.

tract was formed that the employees would fall ill) and the ability of C to overcome the problem (e.g., overtime or hiring temporary replacements). The PECL contains doctrines with a similar thrust in Article 8:108 ("Excuse Due to an Impediment")[121] and Article 6:111 ("Change of Circumstances").[122] The fact that the PECL drafters did not raise the possibility of C claiming excuse under Article 8:108 or hardship under Article 6:111 on the facts of Illustration 5 implies that the illness of C's employees would not trigger relief under those provisions. This, in turn, suggests that excuse under U.S. law for impracticability is also unlikely.

PECL Articles 8:108 and 6:111, as well as the U.S. impracticability doctrine, would focus primarily, if not exclusively, on C's situation and the effect that the employees' illness would have on C's ability to perform. The fact that O's delay in acquiring the liquor license means that C's late performance would not harm O, does not appear relevant to the question of whether C has suffered an excusing impediment under PECL Article 8:108 or a hardship under PECL Article 6:111. That, presumably, is why the PECL drafters invoked the good faith doctrine on these facts. Thus the key fact for applying the PECL good faith principle in Illustration 5 is the lack of harm that O would suffer from C's delayed completion of the building. The fact that C's late performance would have only trivial consequences for O also does not appear relevant to the impracticability analysis under U.S. law. The focus of section 261 of the *Restatement (Second) of Contracts* and the comments to that section are on

[121] PECL Article 8:108(1) provides:

> A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract or to have avoided or overcome the impediment or its consequences.

[122] The hardship doctrine of Article 6:111 applies if "performance of the contract becomes excessively onerous because of a change of circumstances," provided that certain other specified requirements (including a requirement that the parties could not reasonably have taken the possibility of the change into account when the contract was formed) are met, PECL, *supra* note 1, art. 6:111(2). When it applies, the PECL hardship provision requires the parties to begin negotiations to "adapt" (i.e., modify) the contract to the changed circumstances. If the negotiations fail, a court can either terminate the agreement or "adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances." *Id.* at art. 6:111(3).

the difficulty that the party claiming excuse faces in performing, and the risks that such party undertook when it entered into the contract.

Assuming that, under U.S. law, the illness of its employees would not originally have permitted C to claim the impracticability excuse for non-performance, the conclusion would likely remain the same despite the further developments that rendered C's late performance harmless to O. Nor is it likely that U.S. law would permit the good faith principle to overrule an express contract provision setting the date for C to complete performance. Instead, U.S. law would probably deal with the trivial harm that C's late performance caused O through remedies rules rather than the good faith principle.

Thus, if C was late in completing the building and O sued for breach (assuming, again, that C could not claim excuse for the breach under the impracticability doctrine), C's defective performance would almost certainly be treated as an immaterial breach of contract that would not discharge O from its duties under the contract.[123] As a result, O would have to pay C at the contract rate, subject only to an offset for the damages O suffered because of C's tardiness. Since O has suffered no losses from the delay, the damages would be nominal. As a result, C would receive full payment despite its late performance. Thus, under U.S. law Illustration 5 is likely to be treated like the situation in *Jacob & Youngs, Inc. v. Kent*,[124] a celebrated U.S. contract case in which Justice Cardozo of the New York Court of

123 Several of the factors identified in § 241 of the *Restatement (Second) of Contracts* as relevant in determining if a breach is material strongly suggest that late performance by C would not be deemed a material breach. The first (and most important) consideration identified by the Restatement is "the extent to which the injured party will be deprived of the benefit which he reasonably expected," RESTATEMENT (SECOND) OF CONTS. § 241(a) (1981). Because of the delay in acquiring the liquor license, C's late completion of the building would cause O to lose very little of the benefit it expected from the contract. It also appears that O could be adequately compensated in damages for any loss it would suffer, *see id.* § 241(b), and that C (who would have performed, albeit late) would suffer a considerable forfeiture if the breach were treated as material, *see id.* § 241(c). Finally, because C's delayed performance was forced on it by its employees' illness, its behavior appears to comport with "standards of good faith and fair dealing," *see id.* at § 241(e). Note that this final factor incorporates a good faith inquiry into the analysis of Illustration 5 under U.S. law, although (unlike under the PECL) it is the good faith of C rather than O that is the issue.

124 129 N.E. 889 (N.Y. 1921).

Appeals found that a building contractor's technical breach, which caused the landowner no provable damages, did not excuse the landowner from paying the full balance due under the contract. This outcome approximates the result under the PECL of requiring O, as a matter of good faith, to waive the contract delivery date.

Of course, there are important differences between the approaches to Illustration 5 under the PECL and U.S. law. U.S. law would probably treat the situation as involving a breach for which no remedy is necessary. Under the PECL, presumably, late completion by C would not be a breach at all. Because of the remedy provisions of the PECL, this difference (breach without a remedy vs. no breach) might be significant. Influenced by the civil law tradition, specific performance is more readily available under the PECL than under U.S. law.[125] Thus under the PECL, if the original contractual completion date remained valid there is a greater chance that O could obtain a court order requiring C to complete performance by that date. Because of the operation of the PECL good faith provision, however, O presumably could not obtain specific performance since timely completion is no longer legally required. Under U.S. law it is less critical to find that the contract is modified to extend the deadline for C's performance because it is less likely that O could obtain an order requiring C to complete within the time required by the contract. O's remedy at law (damages) does not appear to be inadequate – indeed, even $0 damages appears adequate to compensate O for C's delay. Thus O fails to satisfy one of the tradition prerequisites for specific performance under

125 Whereas U.S. law treats specific performance as an exceptional remedy available only in special circumstances, PECL art. 9:102(1) makes the availability of specific performance the general rule, subject to exceptions in Article 9:102(2). The exceptions, it is true, are significant, and might prevent specific performance from being ordered in Illustration 5. For example, PECL art. 9:102(2)(b) states that specific performance is not available where "performance would cause the debtor unreasonable effort or expense," which might well apply to C's situation. Despite the important limitations on specific performance in PECL Article 9:102(2), it remains true that the remedy is probably more readily available under the PECL than under U.S. law. As the comment to the PECL specific performance provision indicates, the PECL rule was designed as "a compromise" between the treatment of the remedy in common law systems (where it is viewed as "exceptional") and in civil law systems (where the remedy is seen as an "ordinary" one). *See* PECL, *supra* note 1, art. 9:102, cmt. B, at 395. ("The principle and exceptions").

U.S. law.[126] Even if this hurdle were overcome, under U.S. law, specific performance is an equitable remedy within the discretion of the court, and the facts of Illustration 5 strongly suggest equitable reasons for a court to deny the remedy to O.[127]

There are other significant differences between the approaches of the PECL and U.S. law to Illustration 5. For example, the contract might have specified that late completion must be treated as a material breach or a "fundamental non-performance"[128] relieving O of its obligation to pay at the contract rate (i.e., a "time of the essence" clause), or, it might have included a liquidated damages clause specifying reductions in the price for each day that completion of the building is delayed. Although U.S. courts have shown themselves adept at getting around such provisions when they are convinced that delay in fact has not harmed the aggrieved party,[129] the U.S. approach of treat-

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[126] *See* RESTATEMENT (SECOND) OF CONTS. § 359 (1981).

[127] For example, according to the *Restatement (Second) of Contracts*, specific performance should be denied when "the relief would cause unreasonable hardship or loss to the party in breach . . . .," RESTATEMENT (SECOND) OF CONTS. § 364(1)(b) (1981). The comment to this provision suggests it applies to situations involving "elements of impracticability of performance or frustration of purpose that fall short of what is required for relief under those doctrines," *Id.* at cmt. a. The illustration of this principle given in the comment resembles PECL Illustration 5 in a general way:

> A, a milkman, and B, a dairy farmer, make a contract under which B is to sell and A to buy all of A's requirements of milk, but not less than 200 quarts a day, for one year. B may deliver milk from any source but expects to deliver milk from his own herd. B's herd is destroyed because of hoof and mouth disease and he fails to deliver any milk. A sues B for specific performance. Even though B's duty to deliver milk is not discharged and B is liable to A for breach of contract, specific performance may properly be refused on the ground of unfairness.

Id. at illus. 4. Like PECL Illustration 5, the *Restatement* illustration involves a perfectly valid contract that has become difficult to perform because of post-contract developments that are not sufficient to excuse performance. And like PECL Illustration 5, the "balance of hardships" between the parties to the *Restatement* illustration swings strongly against awarding specific performance.

[128] *See* PECL, *supra* note 1, arts. 8:103, 9:301 (defining "fundamental non-performance" and its consequences).

[129] *See, e.g.*, Lind Building Corp. v. Pacific Bellevue Developments, 776 P.2d 977, 982 (Wash. App. 1989) ("While there is some authority that an otherwise valid liquidated damages clause is enforceable even if there are no actual damages, the weight of authority and the better-reasoned cases hold that where there is no actual loss, an otherwise enforceable liquidated damages clause is not enforceable because to do so would violate the principle that damages should be compensatory only.").

ing C's delay as a breach and sorting out its trivial effect on O in the remedy makes it difficult to deal with such provisions. Under the PECL approach, however, these provisions would probably not come into play because, as a result of the good faith doctrine, the contract presumably does not require C to complete by the scheduled date.

Another difference between the PECL approach and that in U.S. law is that, under U.S. law, C may not become aware that acquisition of the liquor license has been delayed, and thus completion of the building on time is no longer important to O. Believing incorrectly that O would suffer significant losses from late completion (and C would become liable for significant damages), C might incur substantial additional expenses attempting to finish the building on time. The PECL approach has the advantage of mandating that O notify C that completion of the building by the scheduled date is no longer required, so that such economically-wasteful expenditures by C would be avoided. Under the U.S. approach, however, O's self-interest might well lead to a resolution that avoids wasteful expenditures by C. The delay in receiving the liquor license presents O with the opportunity to bargain with C for an extension to complete the building. O might agree to such an extension in exchange for a reduction in the price (the amount of the reduction would be determined by the parties' bargaining skills). If the parties reached such a bargain, then C would not engage in economically-wasteful steps to complete by the original contract date. Under this approach, O gets an advantage (a reduced price) compared to the situation under the PECL, where the good faith doctrine compels O to extend the completion date without receiving anything in return. It is not clear, however, that the distributional differences between the PECL approach and the U.S. approach favor one over the other. In particular, it is not clear whether it is better that C, which has been put into a difficult spot by its employees' illnesses, should receive an extension of time for "free" (note that C's difficulties in performing do not rise to a level allowing it to claim excuse from performing the contract), or whether O, who may be suffering significant losses caused by the delay in receiving the liquor license, should receive some compensation for the extension.

The major disadvantage of the PECL approach is lack of certainty. The facts of Illustration 5 permit a clear-cut application of the good faith principle because they have clarity and simplicity only possible in hypotheticals. In reality, the delay in receiving the liquor license might not totally eliminate the losses O would incur or the lost opportunities it would suffer if C completes the building late. For example, O might have entered into contracts with landscapers, fixture installers and decorators which may be lost or which may require delay payments if the building is not completed and available as scheduled. A might be able to use the "extra" time between scheduled completion of the building and receipt of the liquor license to better design and adapt the space for business purposes. How much loss and disadvantage does good faith require O to incur in granting C an extension? Trying to predict how a tribunal would react if the delayed liquor license reduced but did not completely eliminate O's losses would be extremely difficult for O, who after all is himself an innocent victim of circumstances beyond his control. Or suppose (as would likely be the case in the "real world") that it is not completely certain that the strike among civil servants will delay the license three months. How probable must the delay be before O's good faith duty to grant C an extension arises? Suppose the strike unexpectedly settles, and there is no delay (or a much shorter delay than expected) in receiving the liquor license. Does good faith demand that C now reinstate the original due date, or at least compensate O for the losses it will now suffer from delay? The PECL approach raises these very difficult questions and many more, and requires O to predict accurately how a tribunal will resolve them on pain of himself being in breach of its obligations.[130]

The flexibility needed to deal with uncertainty and mixed facts highlights the advantages of a negotiated resolution (which the U.S. approach to Illustration 5 arguably encourages) rather than an imposed solution like that posited under the PECL good faith doctrine in Illustration 5. Of course, the uncertainty that both O and C would face under the PECL ap-

[130] Comment G to the PECL good faith provision recognizes this problem when it suggests that the technique of using the good faith principle to override an express contract term may have to yield to considerations of "certainty and predictability in contractual relationships," PECL art. 1:201, *supra* note 1, cmt. G, at 116.

proach if the facts of Illustration 5 were more realistic might well impel the parties to reach a negotiated solution, but the bargaining would be made difficult by the uncertainty arising from the PECL approach. The advantages of the PECL approach over the U.S. solution, furthermore, are difficult to see if both lead to the same result.

IV. Conclusion

On the surface, the general good faith provisions of the PECL and the UCC appear similar. Each imposes a direct good faith obligation on the parties to a contract, and each does so in language that is substantially (although certainly not completely) equivalent. Examination of the good faith principle in action, as applied to specific fact scenarios, reveals a more complicated picture. Sometimes the PECL and the UCC general good faith provisions operate in substantially identical fashion, as in the case of a "pretextual" rejection of goods for minor defects.[131] Sometimes the result of applying the PECL good faith principle is reproduced under U.S. law without invoking the good faith doctrine, such as where a party is lured into neglecting a deadline for asserting legal rights[132] or where changed circumstances would cause a party's late performance to have only trivial consequences for the other side.[133] And in some cases, U.S. law reaches results that differ from those obtained under the PECL good faith principle, as in some contract formation scenarios[134] and situations that involve the continuing validity of express contract terms in long term relationships.[135] It is clear that the civil law approach to the contractual obligation of good faith has strongly influenced both the UCC and PECL Article 1:201. This influence produces some significant similarities between the good faith obligations imposed by the UCC and the PECL. However, the traditional common law distrust of the

[131] *See supra* text accompanying notes 48-64.

[132] *See supra* text accompanying notes 83-91.

[133] *See supra* text accompanying notes 31-42.

[134] *See supra* text accompanying notes 65-91.

[135] *See supra* text accompanying notes 91-108.

implied obligation of good faith and the continuing preference in U.S. legal practice for more narrowly-tailored doctrines produce substantial differences in the theory and application of the good faith principle under the PECL and the UCC.