**24.15A BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING – COMMERCIAL TRANSACTIONS**

In every contract, there is an implied promise of good faith and fair dealing. This means that each party promises not to do anything to destroy or injure the right of the other party to receive the benefits of the contract. However, the implied promise of good faith and fair dealing does not modify the express terms of the contract by adding terms to the contract or prohibiting what the contract explicitly permits.

[Defendant] breached the implied promise of good faith and fair dealing if you find that it is more likely true than not true that:

1. [Defendant] intentionally deprived [Plaintiff] of a benefit of the contract; or
2. [Defendant] deprived [Plaintiff] of a benefit of the contract by acting in a manner that a reasonable person would regard as unfair.

 **Use Note**

This instruction should be given when the plaintiff claims that the defendant breached the covenant of good faith and fair dealing in a non-employment context. For employment contracts, use Instruction 24.15B.

This instruction should be given along with Instructions 24.00A or 24.00B [Elements], Instruction 24.03 [Breach], and appropriate instructions on damages, including 24.09A (Expectation Damages], 24.09H (Reliance Damages), and/or 24.11 (Nominal Damages).

 **Comment**

The covenant of good faith and fair dealing is implied in all contracts. *Laybourn v. City of Wasilla*, 362 P.3d 447, 457 (Alaska 2015) (citing *Anchorage Chrysler Ctr. v. DaimlerChrysler Motors Corp.,* 221 P.3d 977, 992 (Alaska 2009)). “The covenant requires that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.” *Jackson v. Am. Equity Ins. Co.,* 90 P.3d 136, 142 (Alaska 2004) (quoting *Guin v. Ha,* 591 P.2d 1281,1291 (Alaska 1979)).

“The covenant’s purpose ‘is to effectuate the reasonable expectations of the parties, not to alter or add terms to the contracts,’ and ‘it will not create a duty where one does not exist.’” *Alaska Fur Gallery, Inc. v. Tok Hwang*, 394 P.3d 511 (Alaska 2017) (quoting *Witt v. State, Dep't of Corr.*, 75 P.3d 1030, 1034 (Alaska 2003)).

The covenant contains both objective and subjective components. *Hoendermis v. Advanced Physical Therapy, Inc.*, 251 P.3d 346, 356 (Alaska 2011) (citing *Charles v. Interior Reg'l Hous. Auth.*, 55 P.3d 57, 62 (Alaska 2002)). “A party must act in subjective good faith, meaning that it cannot act to deprive the other party of the explicit benefits of the contract, and in objective good faith, which consists of acting in a manner that a reasonable person would regard as fair.” *Casey v. Semco Energy, Inc.*, 92 P.3d 379, 384 (Alaska 2004). ‎“Bad faith may be overt or may consist of inaction, and fair dealing may require more ‎than honesty.” *Klondike Indus. Corp. v. Gibson*, 741 P.2d 1161, 1168 (Alaska‎ ‎1987) (quoting Restatement (Second) of Contracts § 205 comment d).

In the context of a claim that party breached the covenant of good faith and fair dealing in connection with a right of first refusal, the Alaska Supreme Court held:

Bad faith in right of first refusal transactions is not found where a party undertakes an act permitted by the contract, even if the motivations are unpleasant. Rather, it is typically found where the seller does not have a legitimate interest in the terms of the third-party offer, deliberately omits terms in relaying the offer to the right-holder, or does not deal at arms length with the third-party offeror.

*Roeland v. Trucano*, 214 P.3d 343, 351 (Alaska 2009).

The following cases are examples of the Alaska Supreme Court’s application of the covenant of good faith and fair dealing. *See Laybourn*, 362 P.3d 447 (finding no breach of ‎the implied covenant where City took reasonable affirmative steps to satisfy the ‎conditions of the agreement, and no evidence that there were other steps the ‎property owners reasonably expected); *Castle Properties, Inc. v. Wasilla Lake Church of the Nazarene*, 347 P.3d 990 ‎‎(Alaska 2015) (finding no breach of the implied covenant where Church’s actions ‎in evaluating competing offers were not objectively nor commercial ‎unreasonable); *Kimp v. Fire Lake Plaza II, LLC*, 484 P.3d 80 (Alaska 2021) (finding no breach of ‎the implied covenant where tenant did not bargain for actions complained of and ‎property owner took commercially reasonable steps in addressing tenant’s ‎complaints).‎