

The Sounds Of Silence In The Franchise Agreement

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Franchisors and franchisees alike suffer frequently from sleepless nights, not because of what a franchise agreement states, but because of what it does not say. Their greatest concern stems from the landmark opinion of a now-retired Florida district court judge in the case of *Scheck v. Burger King Corporation*. (1) In that case, Burger King had allowed the conversion of an existing Howard Johnson's restaurant just two miles away from Scheck's restaurant in Lee, Massachusetts. The new Burger King was located between Scheck's and the major source of its clientele, Route 93. Just before the case settled, the court held that the express disavowal of an exclusive territory to Scheck did not necessarily create a new right on Burger King's behalf--the right to open additional units at will regardless of their effect on Scheck's operations. (2) The court specifically held that if Burger King had wanted to place a competing unit at a location of its choice, it must clearly so state and expressly reserve the right to place a competing unit nearby. Until recently, franchisee advocates proudly displayed their coat of arms---the implied covenant of good faith and fair dealing, symbolized by the *Scheck* decision.

The Eleventh Circuit, in the hotel encroachment case of *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, referred to *Scheck* as "the seminal case in this line," but acknowledged that courts had distinguished, criticized, and ignored the decision in subsequent opinions. (3) In *Camp Creek*, the Eleventh Circuit attempted to decipher the code by sorting the implied covenant encroachment cases into two groups:

when the parties include contract language on the issue of competing franchises, the implied covenant will not defeat those terms; and

when there is no such language, the franchisor may not capitalize upon the franchisee's business in bad faith. (4)

That division mirrors the oft-quoted *Scheck* philosophy that "denial of an exclusive territorial interest to [the franchisee] does not necessarily imply a wholly different right to [the franchisor]---the right to open other proximate franchises at will regardless of their effect on the Plaintiff's operation." (5) Despite its resemblance to *Scheck*, franchisor advocates point out that *Camp Creek* was decided under Massachusetts law and more importantly, the parties in that case had deleted the language in the franchise agreement referring to Sheraton's right to engage in unlimited intrabrand competition. (6)

Just eleven months later, a different panel in the Eleventh Circuit, led by a visiting senior circuit judge from the District of Columbia Circuit, prescribed a sedative for franchisor attorneys, *Burger King Corporation v. Weaver*. (7) In *Weaver*, there were two forms of franchise agreements, one with a clause addressing territorial rights and the other (earlier agreement) without the clause, and thus, silent on the issue. (8) Under those agreements, Weaver had developed and operated two restaurants in Montana, both close to Malmstrom Air Force Base. In October 1989, Burger King opened a restaurant on the base itself, in direct competition with Weaver's two Burger King restaurants. The opening of that restaurant had a severe negative impact on both of Weaver's restaurants. With the groundwork of *Camp Creek* in place, one might have guessed that the franchise agreement with the territorial rights clause would be slotted into the first group, with the one lacking such a clause plugged into the second group. To the surprise of franchisor advocates and franchisee advocates alike, the *Weaver* panel made no mention of *Camp Creek*, but instead brushed aside the philosophical truisms of *Scheck*, dissected its reference to state law, and decided that Florida law (9) upholds the written word and only the written word. The court upheld the denial of an encroachment claim under either agreement.

Is *Scheck* Seminal or Not?

Is *Scheck* the seminal case or not? Why did the Eleventh Circuit Court ignore its own *Camp Creek* decision in *Weaver*, rather than distinguishing its holding? Does *Weaver* mean that franchisors are safe in assuming that anything they intentionally or inadvertently leave out of the franchise agreement stays out? Based on *Weaver*, much depends on which judge or panel of judges rules on the issue and, possibly, what state law governs the contract. When franchise agreements are silent, are such weighty franchise issues as encroachment and alternative distribution methods, transfer, and expansion approval really driven by the nuances of each state's contract laws, or does the philosophy of the franchise relationship and its attendant disclosure requirements (10) control? This article focuses on the disparate perspective of both the franchisee and franchisors when there is an ambiguity by silence.

Most federal court practitioners are reminded that there is no federal common law (11) on contracts in diversity cases (as are most franchise cases). Instead, the Court's task is an *Erie* (12)---like guess at what the supreme court of the particular state would do with the case. (13) That basic proposition was lost somewhere in the melee of district and circuit court cases on encroachment and the implied covenant of good faith and fair dealing. In every year since the decision, *Scheck* has been cited approvingly, distinguished, or criticized. Before *Weaver*, but not for a few exceptions, the Southern District of Florida (from whence *Scheck* came), other Florida district courts and the Florida state appellate courts generally approved and followed *Scheck*. (14) Other district courts referred to *Scheck* as Florida law on the implied covenant. (15)

Circuits Split on *Scheck*

The federal appellate courts are split at least in terms of recognizing *Scheck*---with the Ninth Circuit's *In re Vylene* (16) and the Eleventh Circuit's *Camp Creek* on one side---and an unpublished Fourth Circuit opinion (pre-*Scheck* on encroachment) in *Fickling v. Burger King* (17) and the Eleventh Circuit's *Weaver* on the other. Even the Ninth Circuit appears to have split on this issue in the unpublished opinion of *Chang v. McDonald's Corp.*, (18) although it ultimately claims to have reconciled *Vylene's* encroachment claim (without mentioning the opinion) by acknowledging, initially, that *Scheck's* reasoning is compelling, but then explaining that it is not consistent with Illinois law.

The Second, Third, Seventh, and Eighth Circuits have all issued rulings appearing to espouse the philosophical under-pinning of *Scheck*, (19) thereby leaving room for a sequel---perhaps *Scheck's* reincarnation.

It is virtually impossible to reconcile these cases. A quote from Justice Holmes explains why there is no black letter rule:

You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all times and where the decision can do no more than embody the preference of a given body in a given time and place. (20)

The battlegrounds are proliferating. The truce is typically declared by start-up franchisors eager to please with balanced franchise agreements and evergreen renewals. Most of the mature systems are out of the first generation franchise agreements and are now encountering the dilemma of what to leave out of their second generation agreements. (21) *Weaver* suggests that less is more for the franchisor, but there are substantial gaps in the law on silence and the implied covenant. A basic principle remains---"a clear document can be rendered unclear---by the way in which it connects, or fails to connect, with the activities that it regulates." (22) "Discrepancy between the word and the world is a common source of interpretive problems everywhere." (23)

In contrast to recent opinions, the academics who first wrote on the implied covenant agreed that only the terms conferring contractual discretion must appear in the express language of the franchise agreement. (24)

The *Weaver* court's ruling that there must be a concomitant express breach when asserting an implied covenant claim is clearly an attempt at a bright line rule. Simply stated, silence implies nothing. The weakness in the *Weaver* opinion, however, is the lack of any comprehensive analysis of state appellate decisions that might support such a bright line rule. In fact, recent decisions of the Florida appellate courts actually cite to *Scheck* as Florida law, creating even more uncertainty for the next diversity case in federal court. (25) Eight weeks prior to the *Weaver* decision, a Florida appellate court confronted with a contract that was silent on the rights disputed by the parties, set forth what it believed to be the law of the implied covenant and included a cite to *Scheck*. (26) That same court posed the question as to whether a party may contract out of the implied covenant of good faith and fair dealing, but left the answer for another day. (27)

Silence in a contract is not a new concept, but many of the states' highest courts have not addressed the issue of the implied covenant in the context of a silent term. One explanation for the increase in cases dealing with silence and gaps in contracts is the maturity of certain franchisors and the perceived improvements in their franchise agreements. Those improvements typically remove specific obligations owing to the franchisee, leaving intact only the protection of the trademark. Franchisees may then suggest that the franchise agreement is ambiguous as to the specific obligations of the franchisor and attempt to identify an industry standard that would fill this gap. Uncertainty abounds given the scarcity of specific state court cases dealing with silence in the franchise context or in any other long-term contractual relationship. Those that have addressed the issue do not necessarily support the bright line rule espoused by the *Weaver* court.

The highest court in New Hampshire, through its former justice and now Supreme Court Justice Souter, explained the implied duty as follows:

[U]nder an agreement that appears by word or silence to invest in one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting. (28)

It is not a matter of "discretion" if the franchise agreement directly addresses an issue and details what may be expected, i.e., "competing franchises and company stores may be developed in our market area and could cause a substantial decline in your sales." Instead, major franchisors reduce the perceived threat of intrabrand competition by stating it in the negative---"your territory is not protected." The increased attention to the implied covenant is a result of the economic necessity of drafting a saleable franchise agreement. From a practical standpoint, the question of how explicit the franchise agreement must be in detailing franchisees' rights and obligations is probably best answered by the demand for the particular system. Yet, even the franchise systems with excess demand find that they must be commercially reasonable to steer clear of the implied covenant.

Silence May Not Be Golden

Practitioners facing messy choice-of-law questions, franchise statutes, and multiunit operators with a variety of form agreements should not assume that silence is golden. Justice Scalia once rejected the characterization of the implied covenant as dependent upon the whims of state law. (29) Scalia's well-known conservative views (30) about statutory interpretation are balanced by his belief that "sole discretion" by one party "is not necessarily the equivalent of 'for any reason whatsoever, no matter how arbitrary or unreasonable.'" (31) This view turns the effect of silence in *Weaver* on its head, i.e., the franchise agreement does not expressly state "for any reason whatsoever, no matter how arbitrary or unreasonable." Therefore, it may not be implied that "sole discretion" means unbridled discretion.

Notably, the *Weaver* court references a *Cumberland Law Review* article (32) that boldly states, "[e]ven when ostensibly applying state law, federal courts sometimes appear to use their own view of the meaning of good faith." (33) The *Weaver* court's reference to this article is a telling prelude to its attack on *Scheck*.

How Do the States Treat Contract Omissions?

Some states equate silence with ambiguity, taking the opposite of the bright line approach presented in *Weaver*. (34) In this category, Arkansas finds its way around the parol evidence rule by allowing extrinsic evidence that tends to "prove an independent, collateral fact about which the written contract is silent." (35) California takes a similar approach. (36) Other states have addressed only the simplest form of silent ambiguity, such as time of performance, adopting a bright line rule of ambiguity in that context. (37)

Other states appear to condition a finding of ambiguity by silence on the materiality of the omitted term. That is, a "latent" ambiguity exists in Florida "[i]f a contract fails to specify the rights or duties of the parties under certain conditions or in certain situations," which reveal "an insufficiency in the contract not apparent from the face of the documents." (38) In the encroachment context, the condition is intrabrand competition. When a contract "contains no provision on a given point," the conduct of the parties may reveal their intent. (39) For example, in the first *Weaver* district court opinion, Burger King's extensive encroachment policies arguably revealed such intent. (40) In South Carolina, "the nature and character of the transaction" dictate whether the silent matter creates ambiguity. (41) A basic, legal definition of "implied obligations" is those that "are raised by the implication or reference of the law from the nature of the transaction." (42) Illinois follows this approach, but its application was somewhat limited in the Seventh Circuit. (43) Colorado's supreme court, in a recent en banc decision, presents a relatively balanced view of ambiguity by silence---it is only ambiguity when the silent "matter [is] naturally within the scope of the contract." (44) This year, the Tenth Circuit agreed and suggested that it believes, as an *Erie*-guess, that Wyoming will find its sister state's position persuasive. (45) The perplexing question then becomes what "matter" in the franchise relationship does not fall naturally within the scope of the franchise agreement?

A Wisconsin appellate court finds ambiguity by silence only when the silent matter "is an essential part of the agreement." (46) This is close to the ruling in *Weaver* and, under the right circumstances it is likely that even the *Weaver* panel would agree with this distinction.

Finally, some states appear to side with the *Weaver* court's bright line rule. New York's highest court is one of the first to have directly addressed the issue, ruling that "an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful." (47) Idaho's supreme court reached a similar conclusion decades ago. (48) Pennsylvania's supreme court reached the same decision in the same decade, but last year granted review of a case where the appellate court had felt "constrained to affirm." (49) An appellate court in Texas confined ambiguity to express language "susceptible of more than one meaning, not when a contract is silent on a matter." (50) A Missouri appellate court agreed. (51) Kansas has yet to take a position. (52)

What Factors Influence a Bright Line Ruling?

In the final analysis, the states with a bright line rule for or against ambiguity by silence often reach that result based on the clear-cut facts of the case. Before his illness, the first district court judge in *Weaver* adopted the reasoning of *Scheck* and found both versions of the franchise agreement to be ambiguous with regard to territorial protection. The second district court judge in *Weaver*, who was appointed to the Eleventh Circuit prior to the *Weaver* appeal ruling, found neither franchise agreement to be ambiguous. The difference is that one judge imposed a certain degree of commercial reasonableness on the parties, while the other judge compared the relationship to the at-will employment relationship. Both opinions would have been improved had they quoted Justice Holmes and admitted to their philosophical differences about the franchise relationship. Now that Burger King expressly warns of intrabrand competition, it will not be subject to whims of state law or differing judicial philosophies. Indeed, as the Eleventh Circuit suggested in *Camp Creek*, a franchisor need only include---or refrain from limiting and deleying---the franchise agreement's clear language that reserves the franchisor's right to compete against its franchisees. (53)

As franchise agreements expand and as franchisors compete more aggressively for franchise dollars, the abstract implied covenant will find its way in a practical framework of opportunity cost and economic efficiency as the ultimate objective of the contract. (54a) Until then, battlegrounds will flourish and the aura of *Scheck* will live on.

Endnotes

1 *Scheck v. Burger King Corp.* 756 F.Supp. 543 (S.D. Fla. 1991) (*Scheck I*); *on reconsideration*, 798 F.Supp. 692 (S.D. Fla. 1992) (*Scheck*). Robert Zarco represented Mr. Scheck in the district court proceedings.

2 *Scheck I*, 756 F. Supp. at 548.

3 *Camp Creek Hospitality Inns v. Sheraton Franchise Corp.*, 139 F.3d 1396 (11th Cir. 1998)(citing *Barnes v. Burger King Corp.*, 932 F.Supp. 1420 (S.D. Fla. 1996)).

4 *Id.* at 1403.

5 *Scheck I*, 756 F. Supp. at 549.

6 *Camp Creek*, 139 F.3d at 1404. *Contra* *Dunkin' Donuts, Inc. v. Panagakos, Bus. Franchise Guide (CCH) ¶ 11,474* (D. Mass. 1998)(franchisor reserved sole discretion to operate or franchise other shops on terms the franchisor deemed acceptable, license agreements were "nonexclusive" and conferred a license to operate at "one location only").

7 *Burger King Corp. v. Weaver*, 169 F.3d 1310 (11th Cir. 1999), *reh'g denied* ___F.3d___ (June 1, 1999), *aff'g* *Burger King Corp. v. Weaver*, *Bus Franchise Guide (CCH) ¶ 10,762* (S.D. Fla. Sept. 18, 1995). Zarco & Pardo, P.A., represented Mr. Weaver in the Pretrial and appellate proceedings.

8 "[T]he [earlier] franchise agreement---contains no language specifically directed at the territorial or geographical parameters of the agreement. That is, the agreement makes no specific mention of either party's 'territorial rights'---The [latter] franchise agreement--- {u}nder the heading 'Franchise Grant: Terms and Locations,' ___provides that {t}his franchise is for the specified locations only and does not in any way grant or imply an area, market or territorial rights to franchisee." *Weaver*, 798 F.Supp. 684, 687 (S.D. Fla. 1992).

9 The court pointed out that the "Florida Supreme Court has not directly addressed the issue." *Weaver*, 169 F.3d at 1316.

10 16 C.F.R. § 436.1, *et seq.*

11 *But see* *Jarvis v. United States*, 1999 WL 323421, *4 (Fed. Cl. May 19, 1999)("The implied duty of good faith and fair dealing does not form the basis for wholly new contract terms, particularly terms which would be inconsistent with the express terms of the agreement. In substance, what that obligation means is that each party will cooperate in performance of the contract and will do nothing to hinder the other party's performance or expectations.")

12 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

13 *Cf.* *AM Int'l, Inc. v. Graphic Management Assocs., Inc.* 44 F3d 572, 576 (7th Cir. 1995)("[W]hen one speaks in a diversity case of rules of contract law such as the parol evidence or 'four corners' rules that erect *procedural* obstacles to a party's efforts to avoid being bound by the words of his contract, questions can arise concerning the seam between the doctrine of *Erie...*, and the dictates of the Seventh Amendment"); *cf.* *BCBSO v. BCBSA*, 110 F.3d 318, 328 (6th Cir. 1997)("[T]he Seventh Circuit's treatment of this issue has apparently not swept the Prairie State.")

14 *See e.g.*, *Burger King Corp., v. Austin*, 805 F.Supp. 1007, 1019 (S.D. Fla. 1992); *Davis v. Southern Bell Tel. & Tel. Co.*, 1994 WL 912242 (S.D. Fla. 1994); *Anthony Distrib., Inc. v. Miller Brewing Co.*, 882 F.Supp. 1024, 1031 (M.D. Fla. 1995); *Hall v. Burger King Corp.*, 912 F.Supp 1509, 1534 (S.D. Fla. 1995); *Tampa Pipeline Transp. Co. v. Chase Manhattan Serv. Corp.*, 928 F. Supp. 1568, 1575 (M.D. Fla. 1995); *Barnes V. Burger King Corp.*, 932 F.Supp. 1420, 1437-40 (S.D. Fla. 1996); *Loehr v. Hot 'n Now*, *Bus Franchise Guide (CCH) ¶ 11,352* (S.D. Fla. 1998); *see also footnotes 25 and 26.*

15 *Zuckerman v. McDonald's Corp.*, 35 F. Supp.2d 135, 143 (D. Mass. 1999); *Trionic Assoc., Inc. v. Harris Corp.*, 27 F. Supp.2d 175, 181-82 (E.D. N.Y. 1998); *Clark v. America's Favorite Chicken Co.*, 916 F.Supp. 586, 591 (E.D. La. 1996), *aff'd* 110 F.3d 295 (5th Cir. 1997); *Cook v. Little Caesar Enter., Inc.* 972 F. Supp. 400, 409 E. D. Mich. 1997); *Payne v. McDonald's Corp.*, 957 F. Supp. 749, 759 (D. Md. 1997); *Cohn v. Taco Bell Corp.*, 1994 WL 13769, *6 (N.D., Ill. 1994).

16 *In re Vylene*, 90 F.3d 1472, 1477 (9th Cir. 1996).

17 *Fickling v. Burger King Corp.*, 843 F.2d 1386 (4th Cir. 1988) (Table), 1988 WL 30675 (4th Cir. (N.C.)).

18 *Chang v. McDonald's Corp.*, 105 F.3d 664 (Table), 1996 WL 742455, *2 (9th Cir. 1996) *aff'g* *Chang v. McDonald's Corp., Bus. Franchise Guide (CCH) ¶ 10,677b* (N.D. Cal. 1995).

19 *Carvel Corp., v. diversified Management Group, Inc.*, 930 F.2d 228,230-31 (2d Cir. 1991); *Sterling Nat'l Mortgage Co., Inc. v. Mortgage Corner, Inc.*, 97 F.3d 39, 43-44 (3d Cir. 1996); *Photovest v. Fotomat*, 606 F.2d 704 (7th Cir. 1979); *Conoco, Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 908 (8th Cir. 1985).

20 *Oliver Wendell Holmes, The Path of the Law*, 10 Harv. L. Rev. 457, 466 (1897); also in *Oliver Wendell Holmes, Collected Legal Papers*, 167, 181 (1920).

21 *See, e.g.*, *Carvel Corp., v. Baker*, *Bus. Franchise Guide (CCH) ¶ 11,208* (D. Conn. 1997)(the parties respective rights differed as to alternative distribution channels, depending upon whether the parties executed either the 1984 or 1992 form franchise agreement).

22 *AM Int'l, Inc. v. Graphic Management Assocs., Inc.*, 44 F.3d 572, 577 (7th Cir. 1995).

23 *Id.*

24 *See, e.g.*, *Steven J. Burton, More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 Iowa L. Rev. 497, 498-501 (1984).

25 Florida's Fourth District Court of Appeal has cited approvingly to *Scheck*. See *Greenfield v. Manor Care, Inc.*, 705 So. 2d 926 Fla. 4th Dist. Ct. App. 1997) (citing to *Scheck II* after citing to *Kies v. Hollub*, 450 So. 2d 251, 255 (Fla. 3rd Dist. Ct. App.), *review denied*, 453 So. 2d 1364 (Fla. 12984), for the proposition that "a requirement for commercial reasonableness will be read into any contract where possible, language to the contrary notwithstanding."). Six weeks later, the same Fourth District Court of Appeal issued its opinion in *Hospital Corp. of America v. Florida Medical Ctr., Inc.*, 1998 WL 39290 (Fla. 4th Dist. Ct. App. Feb. 4, 1998). In *Hospital Corp.*, the Fourth District ruled that the "duty of good faith must relate to the performance of an express term of the contract" and that FMC could not pursue such a claim "where no enforceable executory contractual obligation on HCA's part remained." The court's synopsis of the law on the implied covenant is noteworthy; it included *Weaver I*, *Scheck I*, and *Scheck II*, followed by the explanation that those cases involved a "franchise agreement where [the] contractual relationship was ongoing." The court also cited to *Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1544 (S.D. Fla. 1995); and *Bernstein v. True*, 636 So. 2d 1364 (Fla. 4th Dist Ct. App. 1994) ("covenant of good faith not actionable where contract not enforceable"). *Id.* at *2. Consistent with its prior opinion in *Greenfield*, the Fourth District ignored *Weaver II* and its limited progeny. In *Bernstein*, the contract had already expired and, thus, could not support a claim for breach of express terms or a breach of the implied covenant of good faith and fair dealing. (Opinion at 9, citing *Bernstein* at 1366). Finally (but first in the *Weaver* opinion at 1315), in the case of *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1997), although admittedly out of context, the Florida Supreme Court impliedly recognizes an independent cause of action for breach of the implied covenant where an owner "do[es] anything to hinder or obstruct performance by the other person" to a construction contract. *Id.* at 1051.

26 *Cox v. CSX Intermodal, Inc.*, 1999 WL 9764, *5 (Fla. 1st Dist. Ct. App. Jan. 13, 1999). In *Cox*, the Florida appellate court encounters gaps and ambiguity in a contract where truck owners were competing with each other for loads to be received from their common freight forwarder:

[T]he instant contracts contain no express grant of absolute unlimited discretion to CSXI to assign loads in any manner or for any reason it sees fit. Substantial discretion, of course, is implied from the provisions of paragraph 4 of the contracts which disclaims any right to appellants to any specific amount of freight or number of loads. Under the facts of this case, it is not necessary for us to address whether an express grant of absolute discretion may constitute a waiver or disavowal of the implied covenant of good faith and fair dealing. [Collection of cases omitted]. *Id.* at *5, n.2 (printed at *7).

27 *Id.* at *5.

28 *Cenrronics v. Genicom Corp.*, 562 A.2d 187, 193 (N.H. 1989)(emphasis added).

29 *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984); see also *AM Int'l, Inc.*, 44 F.3d at 576 (suggests adopting a rule of federal common law in diversity breach of contract suits "that the judge must be satisfied that extrinsic evidence creates a genuine ambiguity before he can submit the dispute over the contract's meaning to the jury").

30 The first academic to sit on the Supreme Court since Felix Frankfurter, Justice Scalia has been described as "the most conservative member of the modern Court, with a penchant for clear rules over flexible standards." Rodney A. Smolia, *Antonin Scalia, in The Supreme Court Justices: A Biographical Dictionary* 397-402 (1994). Justice Scalia's *Tymshare* opinion is an example of his characteristic intellectual independence.

31 *Tymshare*, 727 F.2d at 1154.

32 *The Good Faith in Franchise Agreements: Does Your Implied Covenant Trump My Express Term?*. 28 *Cumb. L. Rev.* 473 (1998) (cited in *Weaver*, 169 F.3d at 1315).

33 *Id.* at 475.

34 *Vigilant Ins. Co. v. Burnell*, 844 F.Supp. 9, 12 (D. Me. 1994); *Becker v. Nahm & Turner, Inc.*, 435 S.W. 2d 750, 752 (Ky. Ct. App. 1968)

35 *Lane v. Pfeifer*, 568 S.W. 2d 212, 215 (Ark. 1978).

36 *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968).

37 *Gray v. Reynolds*, 553 So.2d 79, 81 (Ala. 1989); *Deer Creek Constr. Co., v. Peterson*, 412 So. 2d 1169, 1172 (Miss. 1982).

38 *Hunt v. First Nat'l Bank of Tampa*, 381 So. 2d 1194, 1197 (Fla. Dist. Ct. App. 1980).

39 *Shouse v. Doane*, 21 So. 807, 810 (Fla. 1897).

40 *Burger King Corp., v. Weaver*, 798 F. Supp. 684, 689 (S.D. Fla. 1992).

41 *Lindsay v. Lindsay*, 491 S.E.2d 583, 591 (S.C. Ct. App. 1997).

42 *Black's Law Dictionary* 969 (5th ed. 1979).

- 43 Consolidated Bearings Co. v. Ehret-Krohn Corp., 913 F.2d 1224, 1233 (7th Cir. 1990).
- 44 Cheyenne Mountain School Dist. v. Thompson, 861 P.2d 711, 715 (Color. 1993).
- 45 Moncrief v. Williston Basin Interstate Pipeline Co., 1999 WL 22817, *16-17 (10th Cir. 1999).
- 46 Institute of Paper Science & Technology, Inc., v. Mosinee Paper Corp., 516 N.W.2d 21 (Wis. Ct. App. 1994).
- 47 Trustees of Southampton v. Jessup, 65 N.E. 949 (N.Y. 1903).
- 48 Utah Constr. Co., v. McLiwee, 266 P. 1094, 1098 (Id. 1928).
- 49 Banks Eng'g Co. v. Polons, 697 A.2d 1020, 1021-4 (Pa. Super. Ct. 1997), *appeal granted*, 706 A.2d 1210 (Pas. 1998)([W]hen a contract does not provide for a contingency, it is not ambiguous; rather it is silent," *id. at* 310)).
- 50 Embrey v. Royal Indemnity Co., 986 S.W.2d 729 (Tex. App. 1999)(citing America's Favorite Chicken Co. v. Samara, 929 S.W. 2d 617, 628 (Tex. App. 1996)).
- 51 Nation-wide Check Corp., v. Robinson, 479 S.W. 2d 192 (Mo. Ct. App. 1972).
- 52 Kansas v. Woodling, 957 P.2d 398 (Kan. 1998)(question of whether a plea agreement may be deemed ambiguous if it is silent, not an issue of statewide importance).
- 53 Camp Creek Hospitality Inns v. Sheraton Franchise Corp., 139 F.3d 1396, 1405 n.12 (11th Cir. 1998).
- 54 Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980)(citing over four hundred "good faith" cases and proposing an economic theory of the implied covenant based on the parties' expectation interest); *see also* Burton, *supra* note 24.