

The Limits of 'Sole Discretion' in Contracts

September 6, 2017 Mark Erickson, David Clark

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Companies often enter into contractual relationships that give them “sole” or “absolute” discretion to make strategic business decisions. But in many states a covenant of good faith and fair dealing is implied in every contract, and that prevents one party from engaging in conduct that would deny the other party the benefits of the contract.

Because a possible breach of the implied covenant turns on whether a party acted in good faith, whether a breach occurred is ordinarily a question of fact. The implied covenant cannot be extended to create obligations not contemplated in the contract. It is limited to assuring compliance with the express terms of the contract.

That is particularly important when a company is granted “sole” or “absolute” discretion to act under a contract. Courts have held in such instances that the implied covenant cannot be used to trump a grant of discretionary power if the express purpose of a contract is to grant unfettered discretion, and if the grant of that unfettered discretion does not render the contract illusory.

Writing in [Today's General Counsel](#), the authors use examples from lawsuits to illustrate their points, and conclude by stating that two steps should be taken to ensure that a contractual grant of “sole” or “absolute” discretion is effective. The grant of discretion should be clear and unencumbered by ambiguous or conflicting rights, and separate and guaranteed consideration should be provided to avoid assertions that the grant of discretion makes the contract illusory.

To read the full article in *Today's General Counsel*, please click [here](#).