# LANDMARK LITIGATION

## WELLS FARGO CASE YIELDED RULING CONCERNING THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The Arizona Supreme Court's opinion in Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund, 201 Ariz. 474 (2002), and its progeny have substantially impacted commercial litigation by expanding the implied covenant of good faith and fair dealing ("implied covenant"). In contrast to a written, agreed upon term, Arizona law implies this covenant in every contract.

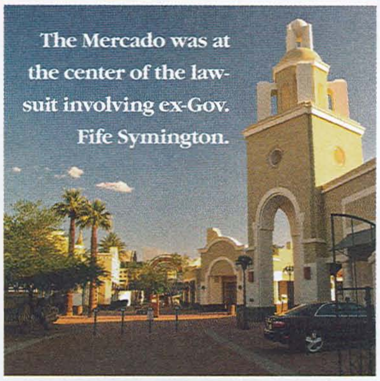
However, rather than eviscerating parties' right to negotiate and enter into contracts on express terms, as some naysayers originally prophesied, its largest impact may be more economic than substantive.

Implied covenant claims are exceedingly prevalent in commercial litigation. Indeed, they are present more often than not. Due to the expansion of the implied covenant in Wells Fargo and its progeny, these claims are less likely to be resolved by early motions — resulting in longer, and often more expensive litigation. Without question, this result has only fanned the popularity of these claims.

Wells Fargo arose from a Tri-party Agreement between the Mercado Developers (a partnership headed by Arizona's former Governor, J. Fife Symington, III) ("Symington"), First Interstate Bank (Wells Fargo's predecessor) (the "Bank"), and various union pension funds (the "Funds"). The Bank agreed to provide temporary construction financing if Symington was able to secure permanent financing from another lender. The Funds agreed to be that lender.

The Funds took out the Bank's construction loan and Symington eventually defaulted on the permanent loan. The Funds ultimately claimed, among other things, that the Bank breached the implied covenant by failing to disclose Symington's deteriorating financial condition to the Funds. Although the Bank was not expressly required to make such disclosures to the Funds, the Supreme Court found that a jury might reasonably conclude that the Bank's actions were inconsistent with the Funds' "justified expectations" under the Tri-party Agreement.

As a result of Wells Fargo and its progeny, a party may breach the implied covenant without actually breaching an express term of the contract. Courts must make a factual determination whether a party acted in a manner inconsistent with the other party's reasonable or justified expectations. However, these factual questions typically require the parties to undertake costly and time consuming discovery, and make it very challenging for either party to prevail on an implied covenant claim in the early stages of litigation. Therefore, the unintended consequence of the Wells Fargo decision is often longer, more costly litigation.



The Mercado was at the center of the lawsuit involving ex-Gov. Fife Symington.

*Peter Moolenaar is a partner at Dioguardi Flynn LLP.*

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