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Q: What is "bad faith" in performing a contract, and what are its implications?

A: Business owners and commercial vendors are sometimes unsure what constitutes bad faith performance of an agreement, and believe it synonymous with breach of contract. The two are separate legal claims, and alternative causes of action. A contract is breached when one party fails to perform express obligations. New Jersey courts have created the implied covenant of good faith and fair dealing, commonly referred to as "bad faith." The covenant imposes a legal duty upon any person who signs a contract to impliedly warrant they will perform all obligations of the contract in good faith to maximize the benefits for the other party. Failure to do so is deemed "bad faith" since the breaching party did not do all that it could have to maximize the benefit of the bargain. The implied covenant is an evolution from the antiquated "best efforts" contractual clauses. It provides a remedy where there is no per se breach of contract, but yet one party has been damaged, through loss of revenue or profits, by the bad faith performance.

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