



## **An overview New York state contract law: What does giving your "best efforts" mean?**

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How hard do the parties to a contract have to work to meet their obligations?

Under New York law, every contract contains an implied covenant of good faith and fair dealing that requires parties to cooperate so that neither party is deprived of the right to receive the benefits of their agreement. Typically, many contracts also include provisions requiring each party to use "best efforts" in performing their contractual obligations. New York case law has held that a "best efforts" provision demands a higher standard of performance than the implied covenant of good faith and fair dealing.

Some attorneys will refuse outright to obligate their clients to use "best efforts" because of concern that:

- \* A "best efforts" provision could be interpreted to require a client to spend its last dollar to perform under an agreement; or
- \* The client could be subject to unknown rigorous tests if a "best efforts" provision is drafted vaguely and lacks a well-defined standard of performance.

In New York, the U.S. court of appeals for the second circuit has held that a "best efforts" provision imposes obligations to act with good faith in light of one's own capabilities and to perform as well as the average prudent comparable performer.

Some New York state courts have supplied meaning to vague "best efforts" provisions. On the other hand, in order to enforce performance of a "best efforts" provision, some courts have required that the provision contain clear guidelines. Unfortunately, interpretations of generic "best efforts" provisions by New York courts have not been consistent, and New York opinions have noted that the law remains unsettled in this area.

In brief, many contracts contain a "best efforts" provision. The inclusion of such a provision is often a necessary and important bargained-for protection. To ensure that a client will, indeed, get to enjoy the benefits of a bargain, a contract should be drafted to include guidelines and criteria specifying what types of conduct or efforts will qualify as "best efforts." In the absence of such guidelines or criteria, a party may find that court decisions have dramatically expanded its contractual obligations - or significantly curtailed the benefits of the bargain - far beyond what it expected when the contract was signed.

To ensure that you are adequately protected, when you agree to a "best efforts" provision in a contract, keep these points in mind:

- \* Identify events in advance of the signing of the contract that might trigger an obligation to perform under a "best efforts" provision.
- \* Make sure that performance standards are explicit in the contract.

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