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Guest Column

When 'Best Efforts' Are Not the Best Effort

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For years, lawyers have been fighting in documents about the various standards of performance under which a party must act (i.e., "best efforts," "commercially reasonable efforts," et cetera). Is it worth the time to argue about these provisions? There seems to be a consensus that a sliding scale exists between "endeavor" and "best efforts," with the range of options including "diligent efforts," "good faith efforts," "commercially reasonable efforts," "reasonable efforts," "commercially reasonable best efforts" and similar variations. However, very little jurisprudence exists, as courts have failed to provide consistent guidance in interpreting efforts clauses and delineating between the actions that may be required of a party based on the contracted standard.

Some courts have interpreted "best efforts" to only rise to the level of "good faith," while others have concluded that "best efforts" requires a greater, more onerous and exacting obligation. Whereas most courts concede that whether a party has used its "best efforts" is a finding of fact that requires a contextual analysis and have consequently decided that the "best efforts" obligation only requires performing as well as an "average prudent comparable" party, some courts have gone as far as to suggest that "best efforts" requires the pursuit of all reasonable methods (rather than just a single reasonable approach).

Additionally, while courts have generally found it unreasonable to require a party to pursue litigation in the context of a good faith standard, to the extent "best efforts" requires more than taking just reasonable actions, litigation is not necessarily off the table. On the other end of the spectrum, a minority of courts have refused to enforce "best efforts" clauses altogether, finding that they lacked objective standards and were therefore too indefinite and vague.

Needless to say, case law remains far from clear, and as a result, while efforts clauses are ubiquitous, the lack of uniformity suggests that they are poorly understood.

Using Your Best Efforts

To avoid the unpredictability that accompanies judicial approaches to efforts clauses, lawyers should seek to clarify the actions and performance criteria that are expected of the contracting parties. While the use of efforts clauses has been developed to address contract terms that are necessarily "open," or where the precise actions required to achieve the goal cannot be determined at the time of contracting, specifying (i.e., limiting) obligations will help ensure that the contracting parties' commitments are clear, unambiguous, enforceable and not open to the subjective analysis applied by courts.

Define Terms and Specify Obligations: Despite the judicial uncertainty, attorneys have resolved that "best efforts" establishes the highest standard of performance, and there is little evidence to suggest that courts have made any significant distinctions between the other formulations of "reasonable" efforts clauses—"diligent," "good faith," "commercially reasonable" and similar variations are all treated equally.

As a result, unless the contracting party truly intends to use all means necessary to achieve a stated goal (including commencing litigation and possibly spending itself into bankruptcy), using the unadulterated form of "best efforts" is not recommended for the party that is the obligor. Rather, the parties should agree to use a formal definition that carves out any obligation to commence litigation, expend material funds or incur any material burden. Contracting parties may also agree to quantify and "close" otherwise "open" contract terms by specifically limiting

the obligor's requirements either with specific dollar standards or specific time limitations—or, if possible, by delineating other specific actions that must be taken (although such standards should be commensurate with the feasibility and importance of the desired result).

For example, under a purchase agreement, a seller may obligate itself to try to obtain tenant estoppel certificates but should limit the time within which it must pursue such estoppel certificates, limit the costs that may be incurred and clarify that it will not be required to pursue litigation in the event any estoppel certificates are not received. Similarly, a landlord may obligate itself to try to complete certain construction work by a certain date but should exclude having to pay their employees for overtime. Although this is more cumbersome than a standard catch-all efforts clause, including specific limitations and standards will force the contracting parties to express and agree upon their intent, which will help to avoid disputes in the future.

Beware of Choice of Law and Forum: The jurisprudence on efforts clauses varies wildly, making it vital to be aware of the jurisdiction governing the contract. The law in Delaware is less developed than that in New York, for instance, but the Delaware courts have been more reliable in application. The leading case in Delaware found that, while a "best efforts" clause may not require a party to "spend itself into bankruptcy" to achieve the goal, they do have to take into account the interests of the other party and pursue viable options that would allow performance to the extent that it would not cause "disastrous financial consequences." Ultimately, the Delaware court held that the obligation to use "reasonable best efforts" required the party to take all actions that were both "commercially reasonable" and "advisable to enhance the likelihood of consummating" the stated goal.

Specifying the choice of law becomes especially important where the same contract includes obligations that may apply to actions occurring in different jurisdictions. Contracting parties should also consider avoiding courts altogether and pursuing arbitration as the preferred method of dispute resolution. Arbitration would help avoid the litany of conflicting jurisprudence and allow industry experts to bring their knowledge and experience to bear in determining whether a party's actions meet the required standard of performance.

Conclusion

The law surrounding efforts clauses is a minefield, and the ways around it are not yet clearly demarcated. Lawyers should be more deliberate in drafting efforts clauses in order to ensure that the intentions and expectations of the parties will be brought to fruition and avoid the inconsistent interpretations and varied outcomes that plague the judicial landscape.

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