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'Best Efforts'=Bad Drafting

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In contract drafting, efforts clauses are ubiquitous but poorly understood. In settlement agreements for distressed transactions, lawyers frequently use "best efforts" or "reasonable efforts" clauses to establish standards of performance for situations where a party must attempt to accomplish something it may not be able to achieve. Lawyers mostly agree that there is a sliding scale of rigor between the different types of efforts clauses. Where they fit on that scale is a different story.

To drive this point home, try this simple experiment: Rank the following phrases from most demanding to least: reasonable efforts, reasonable best efforts, diligent efforts, good faith efforts, best efforts and commercially reasonable efforts. No single efforts clause precisely defines a global standard for performance. Drafters carefully articulate efforts clauses so that standards for performance are legally and semantically justifiable.

Many practitioners view the scale of efforts standards as beginning with the basic duties of good faith and fair dealing, which is implied in every contract. Some believe the "best efforts" standard requires the obligor to do everything up to the point of litigation and/or bankruptcy towards the party's intended outcome. Perhaps that is why "best efforts" is commonly regarded among practitioners to be the most burdensome of efforts clauses. The other clauses listed above are seemingly less rigorous. While semantic distinctions among these phrases may be justifiable, their legal distinctions are unclear. The manner in which "best efforts" clauses have been handled by the courts eviscerates the possibility of setting an indubitable standard.

Some courts have held that "best efforts" is not a higher standard than the implicit duty of good faith and fair dealing, while others assert a pledge of "best efforts" as an endeavor to pursue all reasonable means to accomplish an objective, even to insolvency.

Because New York is the governing law for many agreements in distressed transactions, practitioners should understand the state's diverging viewpoints on this issue. Some New York courts interpret "best efforts" as a modifier maximizing obligations, requiring the obligated party to "pursue all reasonable methods." One court stated, regarding "best efforts," "difficulty of performance occasioned only by financial difficulties, even to the extent of insolvency, does not excuse performance."

That language contrasts with yet another holding that deemed "best efforts" tantamount to "fair dealing." Other courts interpreting New York law have viewed "best efforts" as imposing a moderate obligation—not requiring performance to the point of insolvency, but some ephemeral standard above and beyond the duty of fair dealing.

These ambiguous interpretations beg the question: if objective criteria were attached to a "best efforts" clause, would there be different results? Some courts have refused to enforce provisions requiring "best efforts" because the contracts lacked objective performance requirements, while others have enforced "best efforts" clauses without them. There is no general rule against enforcing a "best efforts" clause without express objective criteria; however, such specification might enable courts to better determine benchmarks for performance.

A great number of formulas attempt to narrow the definition of the "best efforts" obligation. They stipulate terms such as "due diligence," "all reasonable methods," "reasonable efforts," "good faith business judgment" and "genuine effort." The challenge of establishing the conduct required by these clauses is their range of settings to determine the required performance, which varies.

If a drafter wants to use one of the conventional efforts clauses, he must be careful. He should use a formal definition, such as that offered by Kenneth A. Adams, author of *A Manual for Style for Contract Drafting*. Adams suggests using the standard of "reasonable efforts," due to its semantic clarity and neutrality: "'Reasonable efforts' means, with respect to a given goal, the efforts that a reasonable person in the position of [the promisor] would use so as to achieve that goal as expeditiously as possible."

If a carve-out is used, it should be clear, with specific limitations on matters like: expenditure of funds; potential attorney's fees; paying employees overtime; duties to make governmental filings; or activities that would result in increased taxes. Drafters should be deliberate in composing efforts clauses; the law is a minefield and the ways around it are not yet paved clearly. ■

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