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LAW ALERT
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How Much "Effort" is Enough???

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Best Efforts…Reasonable Best Efforts… Diligent Efforts….Good Faith Efforts….Commercially Reasonable Efforts….terms we have all seen in contracts and other agreements used to establish standards of performance for situations where a party has agreed to accomplish something that it may not be able to achieve. However, the meaning of each of these clauses may not always be fully appreciated and the consequences of the "effort" required may come back to haunt us if its meaning is not completely understood.

In the recent case of *Maestro West Chelsea SPE v. Pradera Realty, Inc*, the court denied the defendant's motion to dismiss a breach of contract claim, rejecting, among other things, the defendant's claim that the contract was void for vagueness. Pradera argued that its agreement with Maestro to sell to Maestro its air rights, which was contingent on Pradera using its "best efforts" to a obtain a waiver and subordination from its mortgage lender, was void for vagueness since the contract's "best efforts" clause did not contain objective criteria or guidelines which the defendant's efforts could be measured against. Recognizing that New York law concerning "efforts" standards was unclear, the court found, however, that it was clear that the measuring criteria need not be defined in the contract itself, but instead, the court must interpret "best efforts" clauses the same way it interprets other contract provisions, and determine the intent of the parties at the time of the contract.

This case would leave a prudent lawyer wondering how he should be drafting the "efforts" clause in a contract. Is there really a meaningful difference between "best efforts" and "reasonable efforts"? Does the standard intended by the parties need to be clearly defined? If so, then how? Although it is apparent that there are no set definitions or basic elements to define what is meant by the various "efforts" standards, most lawyers agree that there is a sliding scale of rigor between the different types of efforts clauses. Many view the scale of efforts standard beginning with the basic duties of good faith and fair dealing, which is implied in every contract, and ending with the "best efforts" standard, which would require the committed party to do everything up until the point of filing a lawsuit in order to achieve the action which it had obligated itself to do. The other standards may be less

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burdensome, but still, the legal distinctions are unclear.

Since many times the interpretation of the standard will be determined by the courts, it is important to try and understand New York's viewpoint on this issue. Some New York courts interpret "best efforts" as the maximum obligation, with one court regarding "best efforts" as a severely stringent standard where "difficulty of performance occasioned only by financial difficulties, even to the extent of insolvency, does not excuse performance." This contrasts with another court's point of view, holding that "best efforts" was equal to "fair dealing" – clearly not requiring performance to the point of insolvency. Another view is that best efforts should be measured against what the actual party is capable of doing or that it is measured against what a similarly situated party would do. Again, the New York courts have not been able to give us any concrete answers. These diverse interpretations lead one to wonder whether the results would be different if objective elements were attached to a "best efforts" clause. Unlike the court in Maestro, there may be some courts which would not enforce these provisions regarding "efforts" unless there are objective criteria set forth in the contract.

The difficulty with this important contract provision is that there is very little guidance. Determining whether a party has made sufficient efforts under a particular "efforts" standard will not always be clear and will often be fact dependant. It may actually be useful to set out clear guidelines which will measure performance, and introduce carveouts and exceptions to the "efforts" standard, or at least to set out specific expectations of the parties. If a party is obligated to use a certain level of "efforts" to do something post closing, spell out certain parameters such as minimum out-of-pocket expenses or required legal action. Further, the agreement should set forth standards against which efforts should be measured: should it be industry standards or specific standards tailor made for the particular obligor?

While most agree that lawyers try to minimize the "efforts" standards, by using phrases such as "reasonable efforts", "reasonable methods", "good faith efforts", "commercially reasonable efforts", and the list goes on…, there is still the challenge of establishing the criteria for these lesser standards. Our suggestion is to try to only provide our clients with a "reasonable effort" standard, since, as Kenneth Adam, author of "A Manual for Style in Contract Drafting" defines, the definition of "reasonable efforts" is "With respect to a given goal, the efforts that a reasonable person in the position of [the obligor] would use to achieve that goal as expeditiously as possible. This would be the least of all the evils and the easiest standard to interpret and comply with.