Contractual Review: "Best Efforts" Provisions

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It's not uncommon for commercial contracts (of all types) to contain clauses requiring one or both of the parties to exercise their "***best efforts***" to ensure that a condition is met or that a contractual promise is upheld. Sometimes these obligations are instead couched in terms which demand "all commercially reasonable efforts" or just "reasonable efforts" from the parties. These standards can be heavily negotiated and may have meaningful consequences down the road. What do these similar but varying phrases really mean? How are they legally different? More importantly, how do they affect your business?

While some have argued that "best efforts" is a more exacting and rigorous standard than "all commercially reasonable efforts," most scholars and courts across the country appear to have reached a general consensus. The test for "best efforts" is simply one of ***reasonableness***. In fact, some courts have even stated that the difference between "best efforts" and "reasonable efforts" is nothing more than a matter of semantics.

In other words, a contractual promise to engage your best efforts doesn't necessarily mean that you must be outright successful in the performance of a promise (although certainly a good faith effort is required). Nor does a "best efforts" clause impose an obligation that you put the interests of the other party ahead of your own. For example, if one party agrees to use its best efforts to promote and maintain a high volume of sales for another party's brand, the promoting party does not need to spend itself into bankruptcy to promote sales. In the case of financial difficulty, the promoting party can take a profit-centered approach so long as that approach does not result in a severe decrease in product sales.

The phrase "best efforts" does not mean perfection and, therefore, the other side's expectations are only justified if they are reasonable. However, as is almost always the case, what is considered reasonable depends on the unique facts and circumstances of each individual case. Courts will typically consider a party's experience, expertise, sophistication, financial status, and other abilities in determining what is reasonable under a particular contract.

Whether you are drafting an LLC operating agreement, dealing with a contentious partner dispute, or negotiating a contract with an employer/employee, it's important to understand these types of contractual provisions and the duties that they create.

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