Be Clear When Using *Best Efforts*

By Christopher W. Hamlin*

It is not uncommon for parties entering into an agreement to include a provision requiring one or both to use their *best efforts* in performing certain duties or obligations. The underlying reasons for this vary but typically involve some degree of uncertainty that the parties are attempting to address or mitigate.

For example, where the completion of a transaction is contingent on the occurrence of certain conditions, such as securing financing, parties attempt to insure the satisfaction of these conditions by agreeing to exercise their *best efforts*.[1] In other circumstances, there may be factors beyond the control of the parties, such as regulatory approval or passage of a zoning change, affecting the likelihood of the desired outcome, in which case a party will promise to use its *best efforts* rather than risk the liability of breaching an absolute promise.[2] In some cases, the structure of the transaction may require some level of future performance by one party for the benefit of the other; for example where the relevant consideration includes an earn-out based on future sales, and the parties agree that the standard for such performance will be a party's *best efforts*.[3]

If not careful in crafting *best efforts* language, though, parties may create uncertainty in their agreement and, in some cases, make it unenforceable. The risk to each side, both promisor and promisee, is that neither may be certain what actions will be necessary to satisfy an obligation to use *best efforts* or whether the provision will be enforceable at all. Depending on the eventual interpretation of the provision, a promisor may be subject to unanticipated rigors, such as being required to take actions detrimental to its own interests,[4] or the promisee may be left without the benefit of its bargain if the clause is held to be unenforceable.[5]

Although the term *best efforts* is commonly used, if it is not clearly defined, the potential exists for different understandings by parties and varying standards applied by courts, leading to unanticipated results. In drafting agreements with *best efforts* clauses, therefore, it is important to know how such provisions are interpreted and enforced by courts and how best to craft such a clause for the maximum effect and benefit to a client.

This article explores the treatment of *best efforts* clauses in Missouri, Illinois, New York and Delaware[6], and provides general guidance on drafting such provisions in a manner that is more likely to add clarity and predictability to an agreement and increase the likelihood of fulfilling a client's expectations.

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1. *See Conley v. Dan-Webforming Int'l A/S (Ltd.)*, No. 91-401 MMS, 1992 WL 401628, 19 (D. Del. 1992).

2. *See US Airways Group, Inc. v. British Airways PLC*, 989 F. Supp. 482, 485 (S.D.N.Y. 1997); *Waterway Gas 'N Wash, Inc. v. Sandbothe*, 550 S.W.2d 617, 618 (Mo. Ct. App. 1977); *Ashokan Water Services, Inc. v. New Start, LLC*, 807 N.Y.S.2d 550, 556 (N.Y. Civ. Ct. 2006).

3. *See Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979).

4. See Edward Farrell and Jason D. Evans, *Defining Contractual 'Best Efforts'*, 239 N.Y.L.J. 11 (2008).

5. *See Pinnacle Books, Inc. v. Harlequin Enterprises Ltd.*, 519 F. Supp. 118, 121-22 (S.D.N.Y. 1981).

6. New York and Delaware are considered here because their laws are commonly used to govern corporate transactions.

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Missouri

In Missouri, early decisions indicated that courts viewed *best efforts* clauses as too indefinite and uncertain to be enforceable, similar to illusory promises to use one's influence or recommend a certain course of action.[7] Later cases, however, indicate that Missouri courts will enforce *best efforts* provisions, especially where specific objectives are enumerated in the agreement.[8] The case law in this area, however, is sparse and does not provide the practitioner much guidance, let alone a tangible rule.

In *Bay v. Bedwell*, the court examined the enforceability of a provision in an agreement for the sale of timber requiring the purchaser, as partial consideration for the timber, to use his influence to cause his employees to patronize the seller's general store.[9] In analyzing the issue, the court looked to several holdings in other states regarding similar contractual provisions, including an individual's promise to use *best efforts*.[10] In one such case, the Supreme Court of Washington rejected a party's claim that its promise to use "best endeavors" was sufficient consideration, holding that the parties "did not bind themselves to do anything" because the expected benefit was not defined in the agreement and thus lacked certainty.[11] Like the promise there to use "best endeavors," the court in *Bay v. Bedwell* held that the purchaser's promise to use his influence was incapable of measurement and was too indefinite and uncertain to be enforceable.[12]

Despite early cases where courts refused to enforce *best efforts* clauses, on at least two occasions, Missouri courts have recognized the validity of such a provision.[13] In *Waterway Gas 'N Wash, Inc. v. Sandbothe*, the court looked at a provision in an option contract whereby plaintiff (who had paid for an option to buy land) was required to use its *best efforts* to diligently seek a zoning change, and where the return of plaintiff's option money (if it did not exercise the option) was conditioned on the exercise of such efforts.[14] When plaintiff declined to exercise the option, defendants refused to return the option money. The court did not address the issue of whether *best efforts* clauses are *per se* unenforceable but, rather, stated that it was plaintiff's burden to show that it had satisfied the *best efforts* condition.[15] Because of plaintiff's "complete failure" to meet the County's procedural requirements for a zoning change, the court held that plaintiff failed to use its *best efforts*.[16]

Similarly, in *Brady & Co., Inc. v. Eno*, the court considered a promise made by a developer of insurance products to an underwriter to "devote its *best efforts* in good faith" to market such products.[17] After the product developer failed to meet certain sales goals, the parties terminated their relationship and litigation ensued, including a counterclaim by the underwriter that the product developer breached the *best efforts* provision. Without articulating any particular standard (or describing the "substantial evidence" to which it referred), the court held that the underwriter had presented sufficient evidence for a jury to find that the product developer breached its obligation to use its *best efforts*.[18]

The *Waterway* and *Brady* holdings suggest that Missouri courts generally acknowledge the validity of *best efforts* clauses and will enforce them when there is evidence that a party has performed in accordance with the applicable agreement. Because, however, Missouri courts have not articulated a specific standard for enforcing *best efforts* clauses, it is difficult to predict under Missouri law when a party has fulfilled such an obligation unless the criteria for doing so are clearly set forth in the agreement.

Illinois

Unlike Missouri, Illinois has an abundance of case law regarding *best efforts* provisions. Although some holdings in Illinois appear to be inconsistent on their face, the law may be better described as *developing* and highly dependant on the facts of each case.

7. *See Bay v. Bedwell*, 21 S.W.2d 203, 204-05 (Mo. Ct. App. 1929); *Dyer v. Union Electric Co.*, 318 S.W.2d 401 (Mo. Ct. App. 1958).

8. *See Waterway Gas 'N Wash, Inc. v. Sandbothe*, 550 S.W.2d 617 (Mo. Ct. App. 1977); *Brady & Co., Inc. v. Eno*, 922 F.2d 864 (8th Cir. 1993).

9. *Bay*, 21 S.W.2d at 204-05.

10. *Id.* at 205 (*citing Barton v. Spinning*, 36 P. 439 (Wash. 1894)).

11. *Barton*, 36 P. at 439.

12. *Bay v. Bedwell*, 21 S.W.2d at 205. *See also Dyer v. Union Electric Co.*, 318 S.W.2d 401, 403-04 (Mo. Ct. App. 1958). In *Dyer*, defendant's attorney made an oral promise to recommend to his client that the client consider certain documents, the court held that, just as a contract to use *best efforts* is not enforceable (citing *Bay*), the attorney's promise "to recommend" that the client "consider" certain items "is too vague, indefinite and uncertain to be enforceable."

13. *See Waterway Gas 'N Wash, Inc. v. Sandbothe*, 550 S.W.2d 617, 618 (Mo. Ct. App. 1977); *Brady & Co., Inc. v. Eno*, 922 F.2d 864, 866-67 (8th Cir. 1993).

14. *Waterway,* 550 S.W.2d at 618.

15. *Id.*

16. *Id.*

17. *Brady*, 922 F.2d at 866-67.

18. *Id.* at 869-70.

In general, Illinois courts have been reluctant to enforce *best efforts* clauses because they are too indefinite and uncertain.[19] On the other hand, Illinois courts have enforced *best efforts* clauses where the parties have expressed objective criteria for determining whether a party has satisfied such an obligation and have refused to enforce mere promises to use *best efforts* where no such criteria exist.[20]

In *Goodman v. Motor Products Corporation*, the court held that plaintiff's oral promise to devote his *best efforts* exclusively to the distribution of defendant's products was unenforceable because it was too vague to be "fairly intelligible" and incapable of "being reduced to certainty by judicial interpretation."[21] In attempting to discern the meaning of *best efforts* in the absence of guidance from the parties, the court found that there was no standard for determining when a party had fulfilled such an obligation.[22]

Subsequently, in *Kraftco Corp. v. Kolbus*, the court held that an oral agreement by a distributor to use his *best efforts* to sell a manufacturer's products was lacking in mutuality of obligation and unenforceable.[23] Pointing out that the distributor had no obligation other than to use his *best efforts* and that the operation of the contract was wholly dependent on the actions of the distributor, the court concluded that the "mere allegation of *best efforts* is too indefinite and uncertain to be an enforceable standard."[24]

On the other hand, in *Heritage Remediation/Engineering, Inc. v. Wendnagel*, the court held that plaintiff satisfied its obligation to use its *best efforts* to remove contaminates from a parcel of land owned by defendants.[25] There, because the specific amount of contamination on defendants' property was not known, plaintiff's duties were limited to using its *best efforts*, though the parties agreed upon specific goals and estimates regarding the amount of soil to be excavated. Ultimately, plaintiff removed more than the estimated amount of contaminated material, but defendants refused to pay, arguing that because plaintiff was only required to use its *best efforts* the agreement lacked mutuality and was unenforceable.[26] The court rejected the defendants' argument and, instead, agreed to enforce the *best efforts* clause since the relevant agreements "provided objective standards by which to measure plaintiff's promise to use *best efforts*", citing weight estimates, particle target levels and the limited performance period as factors lending certainty and clarity to the *best efforts* requirement.[27]

On similar grounds, Illinois courts have refused to enforce *best efforts* clauses where such provisions are vague and indefinite and where the relevant agreements lack details regarding the requisite efforts.[28] For example, in *Beraha v. Baxter Health Care Corp.*, the Seventh Circuit examined the enforceability of a letter indicating defendant's intent to do its "very best" in performing under a patent license agreement, which letter plaintiff interpreted as defendant's assurance that it would use its *best efforts*.[29] The court held that, even if the letter constituted part of the contract, defendant's promise was too unspecific, vague and indefinite to create an enforceable obligation.[30] Citing prior Illinois case law, including *Goodman* and *Kraftco*, the court stated that it is a question of law whether the parties have "so indefinitely expressed their intentions

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19. *See Goodman v. Motor Products Corp.*, 132 N.E.2d 356 (Ill. App. Ct. 1956); *Kraftco Corp. v. Kolbus*, 274 N.E.2d 153, 156 (Ill. App. Ct. 1971); *Penzell v. Taylor*, 579 N.E.2d 956 (Ill. App. Ct. 1991).

20. *See Heritage Remediation/Engineering, Inc. v. Wendnagel*, No. 89 C 413, 1989 WL 153373 (N.D. Ill. 1989); *Resource Dealer Group, Inc. v. Executive Services, Ltd.*, No. 97 C 4343, 1997 WL 790737 (N.D. Ill. 1997); *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436 (7th Cir. 1992); *Garbelmann v. Creditcard Keys Co.*, No. 89 C 6020, 1992 WL 73531 (N.D. Ill. 1992).

21. *Goodman*, 132 N.E.2d at 363-64.

22. *Id.*

23. *Kraftco*, 274 N.E.2d at 156.

24. *Id.*

25. *Heritage,* 1989 WL 153373 at 6.

26. *Id.* at 5.

27. *Id.* at 6. *See also Resource Dealer Group, Inc. v. Executive Services, Ltd.*, No. 97 C 4343, 1997 WL 790737, 3-4 (N.D. Ill. 1997). In *Resource*, the court held that a provision requiring plaintiff to use its *best efforts* to market its automobile maintenance program was not merely precatory language but was enforceable where such provision was set forth in a detailed, 19-page contract along with other distinct and specific obligations of the parties. Note, however, that the *Resource* court may have over-generalized when it stated that "Illinois does not have a rule against enforcing [*best efforts*] clauses" considering that the court later discussed *Kraftco* and distinguished it from the instant case based on the nature, content and details of the agreements at issue.

28. *See Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1438-39 (7th Cir. 1992); *Garbelmann v. Creditcard Keys Co.*, No. 89 C 6020, 1992 WL 73531, 1-2 (N.D. Ill. 1992); *Gates v. Johnson Worldwide Assocs., Inc.*, No. 00 C 7612, 2002 WL 663586, 1-5 (N.D. Ill. 2002).

29. *Beraha*, 956 F.2d at 1438-39.

30. *Id*. at 1440-41.

that the court cannot enforce their agreement."[31] Citing the absence in the original contract of any requirement of defendant to exercise a specific level of effort and the inadequacy of the letter, due to its vagueness, to overcome this deficiency, the court held that the letter did not obligate defendant to use its *best efforts*.[32]

Also, in *Garbelmann v. Creditcard Keys Co.*, the court rejected plaintiffs' claim that defendant breached its promise to use its *best efforts* to market and sell defendant's products, finding that such provision was unenforceable.[33] In applying the principle set forth in *Kraftco* and *Goodman* that a *best efforts* obligation is too indefinite, uncertain and vague to be enforced with certainty, and in citing the holding in *Heritage* that a promise to use *best efforts* is enforceable as long as it is accompanied by objective criteria, the court found that the agreement in the instant case contained no such criteria by which defendant's efforts could be measured and, thus, the provision was unenforceable .[34]

The decisions in *Goodman* and *Kraftco* have been cited for the broad premise that *best efforts* clauses are too indefinite and uncertain to be enforceable.[35] In subsequent cases, however, Illinois courts have been reluctant to accept these decisions as the bases for categorically rejecting *best efforts* clauses. As noted above, Illinois courts have established a standard for enforcing *best efforts* clauses, requiring objective criteria to be set forth by the parties by which performance of such an obligation may be measured.

New York

Under New York law, there appears to be a divergent line of cases addressing the enforceability of *best efforts* clauses. On one hand, courts have recognized the validity of *best efforts* clauses in the absence of articulated objective criteria by which efforts may be measured.[36] Alternatively, courts have refused to enforce *best efforts* clauses unless the relevant agreement contains clear, objective guidelines against which to measure a party's performance.[37] As one court suggests, however, these holdings may be reconciled by recognizing that there is no one particular rule in New York that precludes enforcement of a *best efforts* clause, even in the absence of objective guidelines, but that a *best efforts* clause will be enforced "where sufficient content may otherwise be read into it" providing a standard by which such efforts may be measured.[38]

In *Bloor v. Falstaff Brewing Corp.*, an early and influential case regarding the enforceability of *best efforts* clauses under New York law, the Second Circuit took up the issue, noting then that the relevant law in New York was "far from clear."[39] There, Falstaff had purchased certain assets of the former Ballantine & Sons brewery and agreed to pay royalties based on subsequent sales of Ballantine brands. Under the sale contract, Falstaff was obligated to "use its *best efforts* to promote and maintain a high volume of sales" of Ballantine,[40] but the agreement did not address how

31. *Id.*

32. *Id.* at 1441.

33. *Garbelmann*, 1992 WL 73531 at 1-2.

34. *Id.* Note that the *Garbelmann* court stated that the Seventh Circuit's decision in *Beraha* was consistent with the holdings in *Kraftco* and *Goodman* and that the "objective criteria" standard set forth in *Heritage* arguably was consistent with the holding in *Beraha* as well. *See also Gates,* 2002 WL 663586 at 1-5. In *Gates*, the court held that manufacturer's agreement to exercise its *best efforts* to develop, patent and sell inventor's electronic boat speedometer was unenforceable where the agreement lacked any objective criteria by which the requisite efforts could be measured. *But see Clever Ideas, Inc. v. Citicorp Diners Club, Inc.*, No. 02 C 5096, 2003 WL 21982141, 15-18 n.14 (N.D. Ill. 2003). In *Clever Ideas,* the court held that a discount program designer's promise to use its *best efforts* to promote and publicize its program was enforceable despite the fact that the term *best efforts* was not defined in the agreement and such agreement lacked specific criteria whereby *best efforts* could be measured. There, the court was reluctant to find the *best efforts* clause ambiguous after the parties had performed under the agreement for 12 years and where the agreement resembled an exclusive contract under which *best efforts* clauses previously had been interpreted as an expression of the implied obligation to use good faith and reasonable efforts.

35. *See Penzell v. Taylor*, 579 N.E.2d 956, 961-62 (Ill. App. Ct. 1991). In analyzing a sales manager's statement in a letter to a new account executive indicating that the sales manager would use his *best efforts* to give the account executive an opportunity to earn a certain annual gross salary, the court held that the phrase *best efforts* was too indefinite and uncertain to be enforceable (citing *Goodman* and *Kraftco*) and, thus, the sales manager did not unequivocally guarantee the account executive a certain minimum salary.

36. *See Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979); *US Airways Group, Inc. v. British Airways PLC*, 989 F. Supp. 482 (S.D.N.Y. 1997); *Kroboth v. Brent,* 625 N.Y.S.2d 748 (N.Y. App. Div. 1995); *Town of Roxbury v. Rodrigues,* 716 N.Y.S.2d 814 (N.Y. App. Div. 2000). *See also Ashokan Water Services, Inc. v. New Start, LLC,* 807 N.Y.S.2d 550 (N.Y. Civ. Ct. 2006).

37. *See Pinnacle Books, Inc. v. Harlequin Enterprises Ltd.*, 519 F. Supp. 118 (S.D.N.Y. 1981); *Strauss Paper Co., Inc. v. RSA Executive Search, Inc.,* 688 N.Y.S.2d 641 (N.Y. App. Div. 1997). *See also Ashokan*, 807 N.Y.S.2d at 553.

38. *Ashokan*, 807 N.Y.S.2d at 554.

39. *Bloor,* 601 F.2d at 613 n.7.

40. *Id.* at 610.

such efforts would be measured. When subsequent sales of Ballantine lagged and Falstaff incurred significant losses, Falstaff cut costs, reduced sales volumes and promoted its own, more profitable brands. As a result, the royalties were significantly less than anticipated, and Bloor sued Falstaff alleging that it had breached the *best efforts* clause. The court held that the provision was enforceable and that Falstaff had breached it by focusing on profitability without "fair consideration" of the effect on sales of Ballantine.[41] The court stated that Falstaff had the "right to give reasonable consideration to its own interests" but held that Falstaff was obligated to take actions beyond good faith efforts to satisfy its obligation.[42]

Following *Bloor*, courts have acknowledged the enforceability of *best efforts* clauses under New York law, notably, in the absence of criteria for measuring whether such efforts in fact have been undertaken.[43] For example, in *Kroboth v. Brent*, the court stated that determining whether a *best efforts* obligation has been fulfilled is a question of fact, and in performing such analysis the court did not rely on (or cite the absence of) measurable criteria.[44] There, defendant contracted to sell real property to plaintiffs, contingent upon subdivision approval, and plaintiffs agreed to use their *best efforts* to obtain such approval. In setting forth its standard, the court held that *best efforts* require more than good faith and that a promisor must "pursue all reasonable methods" to meet its obligation.[45] The court found that the plaintiffs failed to meet this standard because they refused to seek certain departmental approval as advised by the Planning Board.[46]

Although *Bloor* and *Kroboth* and a following line of cases have not been overturned directly or expressly set aside, there is authority in New York that an agreement containing a *best efforts* clause must include clear and objective criteria by which to judge a party's performance in order for such a clause to be enforceable.[47]

In *Pinnacle Books, Inc. v. Harlequin Enterprises Ltd.*, for example, where an author and publisher expressly agreed to use their *best efforts* to agree on the terms of new contract before parting ways, the court held that the *best efforts* clause was "unenforceable due the indefiniteness of its terms" because the contract did not contain objective standards.[48] There, the agreement did not define *best efforts* or contain any criteria for determining the satisfaction of such obligation. In its holding, the court pointed out that an agreement to use *best efforts* "must set forth in definite and certain terms every material element of the contemplated bargain."[49]

Further, in *Strauss Paper Co., Inc. v. RSA Executive Search, Inc.*, the court held that where an agreement requires a party to use its *best efforts*,

> it is essential that the agreement also contain clear guidelines against which to measure such efforts in order for such clause to be enforced.[50]

There, a corporation hired a search firm to find a candidate for a management position on the condition that the search firm would use its *best efforts* to replace the candidate in the event such person resigned or was terminated within six months of being hired. The candidate was terminated four months later and the corporation sought a refund from the search firm. Although there was no material issue of fact as to whether the search firm used its *best efforts*, the court rejected the corporation's claim for damages, holding that the *best efforts* clause was not enforceable because the agreement lacked guidelines to define the term *best efforts*.[51]

As exemplified by the foregoing cases, under New York law, courts will enforce *best efforts* clauses under varying standards. To ensure that such a provision will be enforced, parties should set forth clear, objective criteria against which a party's performance may be measured.

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41. *Id*. at 614.

42. *Id.*

43. See above at note 36.

44. *Kroboth,* 625 N.Y.S.2d at 748.

45. *Id.*

46. *Id. See also US Airways*, 989 F. Supp. at 491. In determining whether a party used its *best efforts* to obtain regulatory approval of the integration and coordination of operations of two commercial airlines, the *US Airways* court held that, "[u]nder New York law, a contract need not explicitly define '*best efforts*' for its '*best efforts*' provision to be enforceable." *See also Town of Roxbury,* 716 N.Y.S.2d at 814. The *Roxbury* court held that a *best efforts* clause was enforceable, despite the fact that such term was not specifically defined, where the obligated party pursued "all reasonable methods" to satisfy the obligation, finding that plaintiff satisfied such condition where it obtained preliminary approval by the Town Board for the sale of a gravel pit but did nothing further to obtain public support in a referendum on financing.

47. See above at note 37.

48. *Pinnacle*, 519 F. Supp. at 121-22.

49. *Id.* at 121. Note, however, that the *Pinnacle* court indicated that the standard of performance under a *best efforts* clause also may be "implied from the circumstances of the case," citing *Bloor*, where the parties have agreed to work toward a certain goal. The court concluded, however, that the necessary standard could not be implied where the parties simply agreed to use their *best efforts* to negotiate in the future.

50. *Strauss*, 688 N.Y.S.2d at 641.

51. *Id*.

Delaware

As in Missouri, there is very little case law in Delaware regarding *best efforts* clauses. In the few decisions on the subject, courts there have acknowledged the rights of parties to enter into such agreements and have enforced *best efforts* provisions where the promisor has satisfied a certain minimum standard of performance.

In *Corwin v. DeTrey*, the court rejected a claim by stockholders that they were not bound by a merger agreement where the stockholders argued that management (the acquiring party) could have allowed the contract to lapse over time since a clause requiring management to use their *best efforts* to satisfy the closing conditions was unenforceable.[52] The court pointed out that the stockholders relied on the "faulty premise" that *best efforts* clauses are illusory and unenforceable.[53] In fact, the court held that such clauses are "fairly routine" and that a party may be liable for breach of contract if it fails to satisfy a *best efforts* provision.[54] The court did not, however, set forth a standard for measuring a party's efforts or analyze the relevant actions taken in that case.

Further, in *Conley v. Dan-Webforming Int'l A/S (Ltd.)*, the court held that a requirement that several companies use their *best efforts* to fulfill their obligations under a settlement agreement imposed "an obligation beyond the express terms" of the agreement.[55] The court found that the *best efforts* clause, in order not to be redundant, meant not only that the companies had to comply with the terms of the agreement, "but they also must use their *best efforts* to do so."[56] In determining whether such efforts were exercised, the court looked at the contractual requirements and whether they were fulfilled and found that the failure to meet a specific reporting requirement without explanation amounted to a failure to use *best efforts*.[57]

The holding in *Crum & Crum Enterprises, Inc. v. NDC of California, L.P.* provides further guidance on the interpretation and application of *best efforts* clauses under Delaware law.[58] Noting that Delaware courts "do not define the precise contours of the duty of *best efforts*" but citing standards established in other jurisdictions, the court held that a consultant's contractual obligation to use her *best efforts* required her to pursue her duties "with diligence, in good faith, and with reasonable effort."[59]

The foregoing cases indicate that Delaware courts will enforce *best efforts* clauses where parties can show that they have undertaken substantive steps to meet such an obligation. Unlike some courts in Illinois and New York, the Delaware courts do not require that the parties set forth clear, objective criteria for determining whether a party has taken such steps, but inclusion of such criteria in an agreement would add certainty and predictability to any such contract.

Application

When negotiating and drafting agreements where one or more of the parties is required to exercise their *best efforts*, it is important to include objective criteria by which performance of such obligation may be measured. Under the law of each of the states referenced above, unless such criteria are set forth, parties risk losing the benefit of their bargain as courts may ascribe an unintended meaning to the phrase or an unanticipated standard for fulfilling an obligation to use *best efforts*, or, courts may decline to enforce such a provision altogether on the basis that it is too vague or indefinite.

To avoid these unintended consequences, drafters should include clear, objective and measurable criteria for meeting an obligation to exercise *best efforts*; for example, an agreement should contain a deadline by which the obligation must be performed. If possible, the contract should set forth specific actions that parties will endeavor to take to comply with the clause. Conversely, if there are certain actions which a party refuses to take or would not be expected to take, they should be carved out of the required criteria. The parties should consider comparable transactions, prior history, and industry standards to set forth specific objectives that, if met, would evidence a party's *best efforts*.

By setting forth objective criteria for satisfying *best efforts*, parties will ensure a clear understanding of their rights and obligations under an agreement and increase the likelihood that such agreement will be enforced as intended by each of the parties.

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52. *Corwin v. DeTrey*, No. 6808, 1989 WL 146231, 1-2 (Del. Ch. 1989).

53. *Id.* at 2.

54. *Id. See also Eckmar Corp. v. Malchin*, 297 A.2d 446, 450 (Del. Ch. 1972). In a dispute over a finder's fee in a merger transaction, the Eckmar court noted that a corporation was bound by a contractual *best efforts* requirement to seek a registration statement.

55. *Conley v. Dan-Webforming Int'l A/S (Ltd.)*, No. 91-401 MMS, 1992 WL 401628, 19 (D. Del. 1992).

56. *Id.*

57. *Id*. at 20.

58. *Crum & Crum Enters., Inc. v. NDC of California, L.P.*, No. 09-145, 2010 WL 4668456, slip copy at 4-5 (D. Del. 2010).

59. *Id.*