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Diligence Efforts in Life Sciences Transactions

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In complex commercial agreements, parties are often required to use a specified level of "effort" when performing their obligations. But what distinguishes "best efforts," "commercially reasonable efforts" or "good faith efforts"? These terms are especially significant in licensing, collaboration and development agreements in the life sciences industry, where outcomes are often uncertain and timelines can be lengthy. Despite their routine use, these terms are rarely straightforward and can carry significantly different implications depending on the context.

When parties clearly define an efforts standard in their agreement, courts will generally apply that agreed-upon definition. However, if the term is left undefined and the parties rely on its ordinary meaning, courts have broad discretion to interpret the term. In such cases, they will examine the language of the agreement, the commercial context, relevant industry practices and applicable case law in the governing jurisdiction to determine the appropriate level of obligation.

"Best efforts" are usually interpreted by lawyers and clients as imposing the most onerous obligation on the performing party. In general, "reasonable" or "commercially reasonable" efforts are considered to impose a less strict requirement on the performing party to achieve the stated goal. "Good faith efforts" are often interpreted as the least onerous requirement.

Jurisdictions differ in how they approach these standards. Courts in England and Wales recognize a hierarchy among different levels of effort and have sought to distinguish the obligations they impose. By contrast, courts in New York and Delaware have been more resistant to recognizing a strict hierarchy, often treating these terms as functionally equivalent. Nonetheless, across all jurisdictions, courts acknowledge that these standards are inherently flexible and must be interpreted in light of the specific circumstances in which the obligation arises and is (or is not) fulfilled.

1. New York

New York courts have not tended to recognize a hierarchy between efforts levels. New York courts evaluate whether an "efforts" obligation has been met by considering the totality of the circumstances, including objective factors – such as industry standards and customs – and subjective factors like the parties' business interests and financial resources.

- **Best efforts.** In New York, "best efforts" do not require a party to expend every conceivable effort to achieve the contractual obligation. Judges have tended to interpret such an obligation with a "reasonableness" qualification, effectively requiring a party to pursue "all reasonable" options in achieving the result.
- **Commercially reasonable efforts.** While New York courts have equated "best efforts" and "reasonable efforts," there is some nuance in interpreting "commercially reasonable efforts" – a party is not required to act against its own business interests in exerting its commercially reasonable efforts. While the performing party must be able to demonstrate "some conscious exertion" to accomplish the result, it is not required to "jeopardize" its own commercial interests in doing so.
- **Good faith efforts.** Every contract under New York law contains an implied covenant of good faith and fair dealing. In addition, parties may specify that a party must perform an obligation in good faith. New York courts interpret "good faith efforts" as requiring a party to act honestly and reasonably toward fulfilling contractual obligations, but not to go so far as to sacrifice its own legitimate business interests or guarantee a result.

Ultimately, New York courts resist interpreting a difference between efforts levels regardless of the terms used and broadly will interpret any "efforts" obligation as requiring a party to pursue reasonable courses of action to achieve the result, but allowing the party to consider its own interests in determining the appropriate course of action.

2. Delaware

Similar to New York, Delaware courts have been reluctant to distinguish between different levels of efforts in contracts and in some cases have stated that no distinction should be drawn, even if the different terms are used within the same contract. This may make it difficult for parties using the ordinary meaning of the words to know what is expected of them.

- **Best efforts**. In general terms, parties that are subject to a "best efforts" obligation are required to "take all reasonable steps" to solve problems and must have reasonable grounds to take the action they take.
- **Commercially reasonable efforts**. While parties would likely consider "commercially reasonable efforts" to impose a less strict standard than "best efforts," Delaware courts have determined that this obligation requires the performing party to take "all reasonable steps" to achieve the relevant objective and effectively equated this with "best efforts." The reluctance of Delaware courts to distinguish between different levels of efforts creates ambiguity in what will be expected of a party if such an obligation comes before the courts, which provides further impetus to define in advance exactly what will be expected of the party performing the obligation.
- **Good faith efforts**. Delaware courts interpret "good faith efforts" as an enforceable obligation requiring parties to act honestly and take reasonable, affirmative steps toward achieving the contract's purpose. The standard does not demand self-sacrifice or actions that would be commercially unreasonable, but it prohibits passive noncooperation, sabotage or pretextual conduct. Courts emphasize that "good faith efforts" clauses impose more than a minimal obligation – they require diligent, genuine pursuit of the agreed objective while still allowing a party to consider its own legitimate business interests.

As a result, parties drafting agreements governed by Delaware law should not rely on nuanced differences between "efforts" standards and should instead clearly define each obligation to avoid uncertainty and ensure enforceability.

3. England and Wales

English courts recognize a hierarchy between different efforts levels, with "best efforts" being the most onerous obligation.

- **Best efforts**. "Best efforts" require the performing party to take all steps in its power to achieve the result that is the object of the obligation, and the performing party could be required to incur substantial losses to achieve the result. There are some limits on what the performing party is required to do to achieve the result, but this is a high bar and has previously been interpreted as allowing the performing party to stop short only of fraud or breaching another agreement. Notably, a "best efforts" obligation presupposes that the performing party may incur costs in achieving the applicable result, and courts have held that financial considerations cannot be used as a reason for the performing party to be excused from using its best efforts to achieve a particular result.
- **Commercially reasonable efforts**. The key distinction between "reasonable efforts" or "commercially reasonable efforts" as compared with "best efforts" under English law is that the performing party is only required to take one reasonable course of action.
    - The general standard for assessing whether a party has used "commercially reasonable efforts" is whether a reasonable and prudent person, acting properly in their own commercial interest, would have taken similar steps in the specific circumstances.
    - A party is not required to take steps that would be futile or insufficient, provided it can demonstrate that such steps would not affect the outcome. In such cases, no action is required if it would make no practical difference.
    - A key exception arises when the contract explicitly requires certain actions; in those cases, the performing party must take the specified steps, even if they conflict with its commercial interests. Absent such contractual direction, the party may balance its performance against commercial considerations, such as cost, reputation and the likelihood of success.
- **Good faith efforts**. English courts are traditionally reluctant to imply broad duties of good faith, but where parties expressly agree to use "good faith efforts," the obligation is enforceable and given substantive meaning. Courts interpret such clauses as requiring parties to act honestly, fairly and consistently with the contract's objectives – though not to the point of sacrificing their own commercial interests.

Parties drafting English law contracts should be aware of the meaning that courts give to different efforts levels as they may not be consistent with the parties' intentions. The parties should specifically define their expectations of performance levels to ensure that their obligations align with their intention.

Takeaways

Terms like "best efforts" and "commercially reasonable efforts" are useful when parties cannot commit to a guaranteed outcome, but the interpretation of these terms can vary significantly across jurisdictions and may not align with the parties' original intent. To avoid ambiguity and ensure predictability – particularly for key obligations – the most effective approach is to define these terms within the contract itself using objective criteria (such as industry standards or the conduct of similarly situated parties) and clearly outline any specific exclusions or limitations on performance.

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