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# Commercial division update: Enforcement of 'best efforts' clauses

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**This article addresses the divergent approaches to analyzing best efforts clauses and the efforts by the Commercial Division courts to advance a consistent approach.**

When drafting contracts, parties may be inclined to hold the other side to more than just good faith by including language requiring the other side to use its "best efforts" to ensure the contract is fulfilled. At the time of contracting, the parties may have a clear idea of the conduct that would qualify as best efforts, or may believe that it is self-evident when best efforts have been achieved, and as a result feel comfortable in allowing this term to remain undefined in the contract. Doing so, however, may leave a party asserting breach with one less ground upon which to base claim for breach.

New York decisions are not entirely consistent on this issue. Some courts have declined to enforce a best efforts clause where the clause itself has not delineated "objective criteria" or "clear guidelines" by which to gauge whether the efforts were satisfactory, while others have enforced best efforts provisions without such criteria being expressed in the contract.

In 1979, the U.S. Court of Appeals for the Second Circuit characterized New York law on this issue as being "far from clear." *Bloor v. Falstaff Brewing*, 601 F.2d 609, 613 n.7 (2d Cir. 1979). More recently, the Commercial Division has observed that, since *Bloor*, "the Appellate Divisions have continued to issue conflicting rulings on whether contracts containing best efforts clauses must also include 'objective criteria' for those clauses to be enforceable." *Maestro West Chelsea SPE v. Pradera Realty*, 38 Misc. 3d 522, 528 (N.Y. Co. 2012).

We address below these divergent approaches to analyzing best efforts clauses and the efforts by the Commercial Division courts to advance a consistent approach.

## Appellate division precedent

The Third Department has explained that "'best efforts' requires more than 'good faith.'" *Kroboth v. Brent*, 215 A.D.2d 813, 814 (3d Dep't 1995). The *Kroboth* court based this finding on the logic that good faith "is an implied covenant in all contracts" such that, when parties insert additional language requiring the use of best efforts, the resulting

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obligation necessarily must be heightened. *Kroboth* defined this heightened obligation as requiring a party to "pursue all reasonable methods" to achieve the bargained-for result.

In addition to defining what constitutes best efforts, the Appellate Division as explained that best efforts can be implied "to avoid failure of the contract for lack of mutuality, especially where the parties have indicated the intent to be contractually bound." *Non-Linear Trading v. Braddis Assocs.*, 243 A.D.2d 107 (1st Dep't 1998).

More specifically, an obligation to use best efforts may be implied "where the occurrence of [a] condition [precedent] is largely or . . . exclusively within the control of one of the parties." *Rachmani v. 9 E. 96th St. Apt*, 211 A.D.2d 262, 270 (1st Dep't 1995).

The court in *Timberline Dev. v. Kronman*, 263 A.D.2d 175, 178 (1st Dep't 2000), went further in finding an implied best efforts obligation is "implicit in every agreement." Thus, *Timberline* further suggests, on top of *Non-Linear* and *Rachmani*, that parties may be able to bring a claim based on breach of best efforts even where the contract does not contain a best efforts clause.

Appellate Division cases have been fairly uniform in requiring that there be objective criteria or guidelines against which a party's best efforts can be assessed. Both the First and Second Departments have considered the issue of whether a best efforts clause can be enforced without some objective criteria for measuring those efforts—whether expressed in the contract or implied from circumstances outside the four corners of the contract—with both answering in the negative.

The First Department has held that "to be enforceable, there must be objective criteria against which a party's efforts can be measured, whether the [best efforts] requirement is deemed to be implicit or explicit." *Timberline*, 263 A.D.2d at 178; *see also Schleifer v. Yellen*, 173 A.D.3d 624, 625 (1st Dep't 2019); ***Digital Broadcast v. Ladenburg, Thalmann & Co.***, 63 A.D.3d 647, 647 (1st Dep't 2009); *Brown v. Business Leadership Grp.*, 57 A.D.3d 212, 213 (1st Dep't 2008); *StoreRunner Network v. CBS*, 8 A.D.3d 127, 128 (1st Dep't 2004).

Similarly, the Second Department has declined to enforce best efforts clauses without some criteria against which a party's efforts will be judged. Second Department precedent on this issue stretches back to 1980, when the court in *Cross Props. v Brook Realty*, 76 A.D.2d 445, 454 (2d Dep't 1980), examined New York law enforcing best efforts clauses and recognized that prior courts had only done so where there exists an "objective set of guidelines against which one's 'best' or 'reasonable' efforts may be measured." *See also Bernstein v. Felske*, 143 A.D.2d 863, 865 (2d Dep't 1988); *Mocca Lounge v. Misak*, 94 A.D.2d 761, 763 (2d Dep't 1983).

More recent opinions in *Strauss Paper v. RSA Executive Search*, 260 A.D.2d 570, 571 (2d Dep't 1999), and *2004 McDonald Ave Realty v. 2004 McDonald Ave*, 50 A.D.3d 1021, 1022-23 (2d Dep't 2008), have continued to reject claims for failure to exercise best efforts where the contract failed to articulate clear guidelines.

While Appellate Division cases are uniform in requiring that the court be able to assess some objective criteria, they are split on whether that criteria must be set forth in the contract itself. For example, the court in *Brown v. Business Leadership Grp.*, 57 A.D.3d 212, 212-13 (1st Dep't 2008) found the best efforts language to be unenforceable because "*the agreement's 'best efforts' clause* does not contain 'objective criteria against which [the party's] efforts can be measured'" (emphasis added).

Likewise, in *StoreRunner Network v. CBS*, 8 A.D.3d 127, 128 (1st Dep't 2004), the court declined to enforce best efforts language, noting " *the provision of the contract* upon which plaintiff relies did not set forth objective criteria against which defendants' efforts could be measured" (emphasis added).

In contrast, in *Cross Properties v. Brook Realty*, 76 A.D.2d 445, 453 (2d Dep't 1980), the Second Department surveyed prior case law within its department holding that the criteria or guidelines for enforcement can be implied from the circumstances even if they are not expressly stated in the contract.

Although the court ultimately ruled that the contract at issue was merely an agreement to agree, denying the breach of contract claim on that ground, the court explained that earlier Second Department cases had found objective guidelines outside the four corners of the contract sufficient to enforce a best efforts obligation:

"Similarly, objective guidelines for enforcement were also impliedly found in [*Scientific Management Institute v. Mirrer*, 27 A.D.2d 845 (2d Dep't 1967)]. In that case defendant terminated his employment with plaintiff, and in violation of the restrictive covenant in the employment contract with plaintiff accepted employment shortly thereafter with a client of plaintiff. This court rejected defendant's contention that the employment contract lacked mutuality of obligation since plaintiff was under a duty to use its best efforts to provide defendant with work and not to refuse unreasonably to consent to other employment of defendant in the event plaintiff had no work to assign him."

However, other Second Department cases have held: "No objective criteria or standards against which the defendant's efforts can be measured were stated in the [letter of intent], and they may not be implied from the circumstances of this case." *2004 McDonald Ave Realty v. 2004 McDonald Ave*, 50 A.D.3d 1021, 1022-23 (2d Dep't 2008); *Bernstein v. Felske*, 143 A.D.2d 863, 865 (2d Dep't 1988).

## Commercial division application

Commercial Division decisions on this point appear to be more uniform. Generally, courts of the Commercial Division find best efforts clauses enforceable even when the criteria for measuring those efforts are left undefined in the contract itself, provided that some objective criteria can be gleaned from circumstances surrounding the contract—such as industry customs or the past performance of the parties. These decisions frequently rely on opinions of New York federal courts, which have not required that the best efforts criteria be set forth in the contract itself.

In *Maestro West Chelsea SPE v. Pradera Realty*, 38 Misc. 3d 522, 528-29 (N.Y. Co. 2012), Justice Eileen Bransten of the New York County Commercial Division relied on the New York Court of Appeals decision in *Van Valkenburgh, Nooper & Neville v. Hayden Publishing*, 30 N.Y.234 (1972), observing that "the [New York] Court of Appeals enforced a contract's best efforts clause despite the contract's lack of objective criteria by which to measure the breaching party's behavior."

The court continued saying that the First Department precedent is "unclear whether the 'objective criteria' need be included in the contract containing the implied or express best efforts clauses, or whether the 'objective criteria' could be established from the circumstances of the case."

The *Maestro* court contrasted this uncertainty with, and ultimately adopted, federal court precedent on New York law expressly holding that "[i]f external standards or circumstances impart a reasonable degree of certainty to the meaning of the phrase best efforts, the clause can be enforced."

In another Commercial Division case, *Glanzer & Co. v. Air Line Pilots Association*, 2013 WL 5796201, at *1 (N.Y. Co. 2013), Justice Marcy Friedman of the New York County Commercial Division acknowledged that there was "substantial authority" stemming from Appellate Division decisions that best efforts language is unenforceable without criteria or guidelines.

On the other hand, the court simultaneously found that "there is also substantial authority that a 'best efforts' provision may be enforceable, notwithstanding that the contract itself does not set forth objective criteria by which to measure the best efforts." *Glanzer* looked to federal courts that had "cited the governing standards [for best efforts] as 'good faith in the light of one's own capabilities' and efforts as good as the 'average prudent comparable' performer."

The contract in *Glanzer* obligated the Airline Pilots Association (ALPA) to use its best efforts to locate a third party to pay a fee owed to its investment banker. While the contract contained no guidelines or objective criteria with which to measure ALPA's efforts, the court looked to past practice to assess how ALPA had negotiated with third parties to obtain payments for its investment banker in prior contracts between ALPA and the investment banker that contemplated the same fee arrangement.

The court stated that ALPA may have deviated from past practice, but it ultimately ruled there was a material question of fact as to whether such deviation was justified, and thus held "that triable issues of fact exist as to whether ALPA used its reasonable best efforts to obtain payment" for the investment banker.

In *Chocolate Factory Condominium v. Chocolate Partners*, 2014 WL 1910237, at *5-8 (Kings Co. 2014), Justice Carolyn Demarest of the Nassau County Commercial Division reached a similar conclusion to *Maestro* and *Glanzer*, also relying on New York federal court decisions.

The court first highlighted that the Second Circuit had "recently observed [that] the New York Court of Appeals has not endorsed the requirement that the contract must contain 'clear guidelines' before a 'best efforts' clause can be enforced." *Chocolate Factory* then held "'a best efforts provision may be enforced even in the absence of contractually articulated criteria' … where the contractual language and the circumstances permit an inference as to the applicable criteria for performance."

*Chocolate Factory* assessed a breach of contract claim brought by a condominium board against the condominium's sponsor. The plaintiff board alleged that the sponsor had failed to use its best efforts to obtain certain contracted-for tax benefits for the condominium.

The court first found that the contract included "clear guidelines" for determining best efforts because "it expressly requires the Sponsor to 'file all applications and timely comply with all procedures required to properly process and maintain the tax benefits.'" Further, the court noted the existence of regulations and a guidebook that outlined the procedures for securing the tax benefits, "thereby providing external standards which impart a reasonable degree of certainty to the meaning of the phrase 'best efforts.'"

Ultimately ruling that the sponsor had failed to satisfy its best efforts obligation, the court emphasized that, although the sponsor filed its initial application on time, the application was incomplete, and the sponsor ignored multiple notices that the application was incomplete and eventually deemed withdrawn.

## Conclusion

Contract language requiring that parties use their best efforts to produce a bargained-for result may be effective in creating a greater obligation than what is typically required under the good faith standard.

Regardless of the heightened best efforts standard, however, a party suffering breach may be unable to prevail on such a claim if the contract fails to specify criteria or guidelines against which best efforts can be judged. While parties may have success litigating a claim for breach of a best efforts clause in the Commercial Division, this success may be short if it encounters on appeal adverse Appellate Division precedent.

The most prudent course, then, would be for practitioners to advise in favor of defining what best efforts will mean, to ensure the best chance that this obligation will be enforced.