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Trying to expend best efforts

By Neill May

The concepts of "best efforts", "reasonable efforts" and similar expressions are funny for a variety of reasons. They are very frequently used in commercial contracts but seldom defined, demonstrating (one might say) an ironic lack of effort to articulate the standard actually contemplated. It is also difficult to determine what those standards mean without context, and the contexts in which they are considered and litigated are invariably cases where the party committing to expending effort is motivated not to do so. I expect that there are countless famous and apt quotes to the effect that it's all about the effort, though I admit I haven't actually looked for such quotes as that would involve effort.

The recent high-profile Delaware Court of Chancery case of *Williams Companies, Inc. v. Energy Transfer Equity, L.P.,* the fall-out of a failed transaction initially valued at approximately US$33 billion, has again focused attention on "efforts" provisions, and it highlights how analysis of these provisions tends to be highly fact-specific.

Energy Transfer Equity, L.P. entered into an agreement to effectively acquire The Williams Companies, Inc. in an agreement reached in the fall of 2015. The transaction was structured in an unusual and "tax-intensive" manner, to accommodate Williams' objective for its stockholders to receive a substantial cash payment as well as continuing holdings of publicly traded stock. The agreement was conditional on ETE's tax counsel providing a "should-level" opinion that one of the steps in the merger transaction would be tax-free, and ETE agreed to use its "commercially reasonable best efforts" to obtain that opinion.

Two things happened after the signing of the merger agreement. First, the energy market precipitously declined, significantly affecting the value of the assets of the two companies (both owners of energy infrastructure), making the transaction far less appealing to ETE (the acquiror). And ETE's tax counsel apparently noticed a detail in the transaction steps that made the contemplated tax opinion difficult to provide, ironically because of the diminished value of Williams' assets. Predictably, Williams asserted that there was an even greater connection between these two developments, specifically that ETE's tax counsel determined that they were unable to give the opinion about the same time that their client determined that they would prefer not to proceed with the deal.

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The court's analysis focuses on intuitive factors, including: whether there was evidence or indication at the time of the agreement that the opinion mightn't be deliverable; why it was that the parties were content if there may be issue about this for the parties' counsel to give the opinion rather than an independent source; whether ETE's counsel's epiphany about the deal terms was in good faith, etc. Ultimately, the court concluded that there was genuine uncertainty on the tax issue, and that counsel's reputational considerations were significant and suggested that it was not reaching a convenient conclusion just to benefit its client. Despite the press about the case, the court's treatment of the "efforts" concept is pretty straightforward: Williams produced no evidence as to what ETE should or could have done to have its counsel issue an opinion that it was not comfortable to deliver; hence, the covenant was not breached.

The Delaware court did state what I believe most would assume, namely that, by agreeing to make "commercially reasonable efforts" to get the tax opinion, ETE submitted itself to an objective standard, binding itself to do those things objectively reasonable to achieve the desired outcome.

In Canadian practice, it appears to be generally understood that a "reasonable efforts" standard imports some objective perspective. More confusing is what is meant by "best efforts"; many practitioners believe that standard imposes a higher obligation than "reasonable efforts" because of court decisions that apply a "no stone unturned" approach to defining "best efforts," but those cases are often cluttered by reasonableness language and limits on the lengths to which the covenant-giver must go.

The wording of these standards is typical, but for the reasons noted, the interpretation is context-specific and may not be so straightforward. If Bill Clinton can create confusion over the meaning of the word "is" then there may be no avoiding this. One way for commercial lawyers to feel better about this is to note the other wording issue raised by the ETE/Williams litigation, the concept of a tax "should-level" opinion. If you have time to kill, ask a tax advisor about the difference between should, strong should, weak should, more likely and other types of opinions, but do so surrounded by mattresses so you have a soft place to land unconscious. That is, if you don't fulfil your commercially reasonable efforts commitment to pay attention. **CL**

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