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Expert Analysis

Assessing 'Commercially Reasonable Efforts' Provisions Under New York Law

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Although commercial contracts frequently include provisions relating to the "effort" that the parties are required to make, the meaning of such provisions can often be the subject of litigation. This outcome is hardly surprising as courts themselves have recognized that interpreting efforts clauses under New York law "is anything but a model of clarity." *Holland Loader Co. v. FLSmidth A/S*, 313 F. Supp. 3d 447, 469 (S.D.N.Y. 2018), aff'd, 769 F. App'x 40 (2d Cir. 2019). And although a number of New York courts have sought to define so-called "best efforts" and "reasonable efforts" provisions, "the opposite is true with respect to 'commercially reasonable efforts' obligations." Id. at 471.

In this article we explore a few recent New York cases that have attempted to articulate clearer guidelines for interpreting what it means to make commercially reasonable efforts.

In *Holland*, Judge Gregory Woods of the Southern District of New York crafted the first clear "standard" for interpreting commercially reasonable efforts provisions under New York law. In that case, the court held that the defendant breached its duty to use "commercially reasonable efforts" in promoting the plaintiff's product because it failed to develop any marketing plans or strategies similar to the other products it sold. See *Holland Loader Co.*, 313 F. Supp. 3d at 472-73.

After surveying relevant New York jurisprudence, the court ultimately defined "commercially reasonable efforts" as requiring "at the very least some conscious exertion to accomplish the agreed goal, but something less than a degree of efforts that jeopardizes one's business interests." Id. at 473. The court concluded that a "contracting party's efforts are judged objectively in light of proven standards." Id.

This understanding of commercial reasonability has been reaffirmed and expounded, including in recent months. In *3DT Holdings v. Bard Access Systems*, No. 17-CV-

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5463 (LJL), 2022 WL 2951593 (S.D.N.Y. June 24, 2022), appeal filed, No. 22-1598 (2d Cir. July 21, 2022), plaintiff 3DT Holdings sued defendant Bard for breach of contract and breach of the covenant of good faith and fair dealing related to an agreement between the parties that Bard would develop a product incorporating 3DT Holding's technology. Id. at *1. 3DT Holdings argued that Bard failed to provide "commercially reasonable personnel, financial and other support" as required by the parties' agreement. Id. (citation omitted).

In assessing the issue following discovery, summary judgment, and a bench trial, Judge Lewis Liman agreed with Judge Woods' standard from *Holland* that "compliance with a 'commercially reasonable efforts' clause requires at the very least some conscious exertion to accomplish the agreed goal, but something less than a degree of efforts that jeopardizes one's business interests." Id. at *16 (citation omitted).

Liman also expanded upon the factors that the court may consider in determining whether a party has exerted a commercially reasonable effort. Specifically, he noted that in determining commercial reasonability, a court can consider "the practices of the particular industry" and "the financial resources, business expertise, and practices of [the defendant]" in determining how a party can adhere to the provision. Id. at *16 (alteration in original) (citation omitted).

Considering these factors, the court found that defendant Bard did not breach the contract because, among other reasons, it provided commercially reasonable support by assembling a team with relevant experience that had assistance from outside vendors and conducted studies. Id. at *16-17.

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The court also concluded that the fact that the level of support the defendant provided fluctuated over a three-year period did not render its support commercially unreasonable. Id.

Judge Liman's conclusion in *3DT Holdings* that the standard for satisfying commercial reasonability under New York law is a "fairly lenient one," id. at 16 (citation omitted), is consistent with other courts that have considered the issue since *Holland*. See, e.g., *Shane Campbell Gallery v. Frieze Events*, 441 F. Supp. 3d 1, 4 (S.D.N.Y. 2020) (concluding that plaintiff's allegation that it was exceedingly hot inside a tent was insufficient to show defendant failed to use commercially reasonable efforts to provide common area air conditioning).

Additionally, commercial reasonability does not require any party to act against its own business interests. See *3DT Holdings*, 2022 WL 2951593, at *16; see also *MBIA Ins. v. Patriarch Partners VIII*, 950 F. Supp. 2d 568, 618 (S.D.N.Y. 2013) ("A contractual requirement to act in a commercially reasonable manner does not require a party to act against its own business interests, 'which it has a legal privilege to protect.'" (citation omitted)).

Thus, taken together, under these standards, a business that engages in almost any effort to abide by a commercial reasonable efforts provision may be able to prove that it has engaged

in commercially reasonable efforts, even if those standards are not expressly defined in the contract.

Even when commercial reasonability is expressly defined in the contract, however, litigation can still ensue. In *InspiRx v. Lupin Atlantis Holdings SA*, 554 F. Supp. 3d 542 (S.D.N.Y. 2021) a medical device developer sued a pharmaceutical company for breach of contract and breach of the implied covenant of good faith and fair dealing. In the contract, the parties agreed that:

(1) defendant's efforts could "not be less than the efforts that other similarly situated companies would normally use to accomplish a similar task or objective under similar circumstances exercising reasonable business judgment," id. at 555 (citation omitted);

(2) defendant could "tak[e] into account efficacy, safety, approved labeling, the competitiveness of alternative products in the marketplace, the patent and other proprietary position of the product, and other relevant factors commonly considered in similar circumstances," id. at 555-56 (alteration in original) (citation omitted); and

(3) "the level of efforts required to meet the above standard may change over time if there are changes in the status of the Products or of the above criteria applicable to the Products," id. at 556 (citation omitted).

Denying the motion for summary judgment, the court rejected plaintiff's argument that defendant failed to exhibit commercially reasonable efforts because it deprioritized the products at issue and cut its marketing resources. See id. at 556. Instead, the court found that defendant did not breach the contract and that "[a] commercially reasonable efforts clause is not a 'hell or high water' clause tying the signatory to use all efforts possible, no matter the cost." Id. at 557.

Further, "[a] claim for a material breach of a commercially reasonable efforts provision 'cannot be established simply by observing, in hindsight, that [the party] could have done something differently that would have produced a better result.'" Id. at 562 (second alteration in original) (citation omitted).

In conclusion, despite the "fairly lenient" standard for commercially reasonable efforts and the recent articulation of factors that may be considered in assessing a party's efforts, total clarity as to the meaning of "commercially reasonable efforts" remains elusive. Instead, the ultimate determination of whether or not a party's efforts are reasonable remains highly fact-and circumstance-dependent.

Thus, while a party should consider whether defining the actions it will take under a contract may provide additional guidance and arguments down the road, those provisions may not provide a definitive, final assessment as to whether or not efforts are commercially reasonable. Instead, potential litigants should recognize that a court will take a global view—and typically require factual development through discovery—to assess whether a party has met its contractual obligations with respect to "commercially reasonable efforts."