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An Effort To Untangle Efforts Standards Under Delaware Law

Ryan Aaron Salem*

ABSTRACT

In today's business world, where contracts between corporations are heavily negotiated and contracting parties are, generally, strictly bound by the terms agreed to in those contracts, most contracting parties feel that including standards to delineate the effort each party must put into upholding the terms of the contract is absolutely critical. These standards, known as "efforts standards," vary and include "good faith efforts," "reasonable efforts," "diligent efforts," "commercially reasonable efforts" and "best efforts." The gradation between these different efforts standards is often a source of confusion among practitioners. The main source of that confusion stems from inconsistencies in the way that (1) uniform laws, such as the Uniform Commercial Code, and (2) the Delaware Court of Chancery, the court in the United States with arguably the most power to shape the future of corporate law, have attempted to clarify the ambiguity surrounding the gradation of efforts standards.

To show how unclear the gradation is between efforts standards, this Comment will begin by describing how various courts and scholars have defined efforts standards. Further, this Comment will demonstrate how those courts and scholars have frequently conflated the efforts standards with one another and with the implied covenant of good faith inherent in every contract. This Comment will then analyze prior cases from the Delaware Court of Chancery to explain that court's previous attempts to clarify the law surrounding efforts standards. Next, this Comment will address potential tactics that Delaware and drafters of uniform laws could use to provide more beneficial guidance on how

* J.D. Candidate, The Pennsylvania State University School of Law, 2018. I want to thank my family and friends for their continued support while working on my Comment, especially my mother, sister, and grandparents, who have been my strongest supporters throughout this Comment process and throughout my entire life. I also want to thank my Comments Editor, Chelsea Nichols, for her helpful insight on drafts of this Comment.

efforts standards are to be interpreted in the future. Finally, this Comment will recommend that the Delaware Court of Chancery and uniform laws equate all efforts standards under a more stringent “reasonable efforts” standard by applying one test to a contract containing an efforts standard and a different test when a contract fails to include an efforts standard.

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I. INTRODUCTION

One area of many mergers and acquisitions and other contracts that is often subject to a large amount of negotiation is the “efforts standard” that will be used within the contract.¹ An efforts standard is typically used within a contract to describe the amount of effort required by each party to fulfill a certain obligation.² Contracting parties typically seek to include some form of an efforts standard in situations where the obligation may be subject to an external factor or a third party’s action.³ In these situations, parties are reluctant to guarantee that certain obligations will unconditionally occur.⁴ Some variations of efforts standards that are typically used include “good faith efforts,” “reasonable efforts,” “best efforts,” “commercially reasonable efforts,” and “diligent efforts.”⁵

Although it is common for an efforts standard to include one of the previously mentioned modifiers, such as “reasonable” or “best,” contracting parties often fail to explain how those efforts standards are to be defined,⁶ leaving courts with the difficult task of measuring exactly how much effort is required of the parties.⁷ The variation in these efforts standards is a source of confusion among practitioners, making it

1. See David Shine, “Best Efforts” Standards Under New York Law: Legal and Practical Issues, M&A LAW., Mar. 2004, at 15.

2. See *id.*

3. See Ryan M. Murphy, *Giving It Your Best Effort. ‘Efforts’ Standards Under Delaware Law*, MERGERS & ACQUISITIONS L. REP., Apr. 25, 2016; see also *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92, at *31 (Del. Ch. June 24, 2016) (involving a merger where one party was required to use “commercially reasonable efforts” in obtaining a tax opinion from a third party certifying that the transaction would be tax-free).

4. See Murphy, *supra* note 3.

5. See, e.g., Kenneth A. Adams, *Understanding “Best Efforts” And Its Variants (Including Drafting Recommendations)*, PRAC. LAW., Aug. 2004, at 12; Murphy, *supra* note 3; Shine, *supra* note 1, at 15.

6. See, e.g., *Williams*, 2016 Del. Ch. LEXIS 92, at *55 (“‘Commercially reasonable efforts’ is a term not defined in the Merger Agreement. The term is not addressed with particular coherence in our case law.”); *Narrowstep, Inc. v. Onstream Media Corp.*, Civil Action No. 5114-VCP, 2010 Del. Ch. LEXIS 250, at *12, *23–31 (Del. Ch. Dec. 22, 2010) (describing one example of where a court was forced to interpret an undefined efforts standard). The court in *Narrowstep* was tasked with interpreting the following contract language:

[E]ach of the parties agrees to use its reasonable best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable, the [Merger Documents] . . .

Narrowstep, 2010 Del. Ch. LEXIS 250, at *12 (second alteration in original). The contract at issue in *Narrowstep* failed to provide any definition for “reasonable best efforts.” See *id.*

7. See *Narrowstep*, 2010 Del. Ch. LEXIS 250, at *12.

difficult to agree on which, if any, of the standards affords the most protection.⁸ In response to this confusion among practitioners, courts across the country have attempted to clarify how different efforts standards should be interpreted, albeit with varying levels of success.⁹

Because of Delaware's preeminence in the field of corporate law¹⁰ and the importance to the future of corporate law of how efforts standards will be interpreted,¹¹ this Comment will focus on the current state of Delaware law¹² and recommend that Delaware courts collapse all efforts standards into one "reasonable efforts" standard.¹³ Delaware is well suited to solve this problem because of the experience that the judges in the Delaware Court of Chancery have with regard to corporate matters and the lack of reliance on an inexperienced jury.¹⁴ The rest of the country could then use Delaware's reasoning to also provide clarity on how efforts standards should be interpreted because of the respect given to the Delaware Court of Chancery on corporate matters.¹⁵

8. See, e.g., *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 613 n.7 (2d Cir. 1979) (stating that the "law is far from clear and it is unfortunate that a federal court must have to apply it" with regards to interpreting an efforts standard); *McDonald's Corp. v. Hinkman*, Civil Action No. 92-CV-3187 (DGT), 1999 U.S. Dist. LEXIS 9587, at *36 (E.D.N.Y. May 28, 1999) ("The standard applied . . . to establish whether a party has fulfilled its obligations under a 'best efforts' clause is murky."); *Ashokan Water Servs., Inc. v. New Start, LLC*, 11 Misc. 3d 686, 689 (N.Y. Civ. Ct. 2006) ("It is still unclear when and how an express 'best efforts' provision is to be enforced in the absence of articulated objective criteria in the agreement, and, particularly, the relationship between 'best efforts' and 'good faith,' 'fair dealing,' and 'reasonable care.'").

9. Some cases have attempted to make a linguistic distinction between efforts standards. See, e.g., *LTV Aerospace & Def. Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 198 B.R. 848, 854-55 (S.D.N.Y. 1996). Some cases have failed to enforce efforts standards because of vagueness. See, e.g., *Kraftco Corp. v. Kolbus*, 274 N.E.2d 153, 156 (Ill. App. Ct. 1971). Some cases have found no distinction between various efforts standards and applied the same test to each. See, e.g., *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990) ("While the phrase 'best efforts' is often used to describe the extent of the implied undertaking, this has been properly termed an 'extravagant' phrase. . . . A more accurate description of the obligation owed would be the exercise of 'due diligence' or 'reasonable efforts.'" (citation omitted)).

10. See LEWIS S. BLACK, JR., DEL. DEP'T OF STATE DIVISION OF CORP., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007), https://corp.delaware.gov/whycorporations_web.pdf.

11. Many disputes over efforts standards involve allegations of one corporation failing to perform an obligation required by an efforts standard to consummate a merger. See, e.g., *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 748 (Del. Ch. 2008) (involving a merger where one corporation alleged that the other corporation did not use its "reasonable best efforts" to secure an opinion stating that the merged entity would be solvent).

12. See *infra* Section II.D.

13. See *infra* Section III.D.

14. See BLACK, JR., *supra* note 10, at 5-7.

15. See *id.* at 1.

First, this Comment will discuss the confusion and ambiguity regarding efforts standards caused by Uniform Commercial Code (UCC) provisions and will discuss the ways in which these provisions should be amended to provide clarity.¹⁶ Second, this Comment will discuss the failed attempts by some courts outside of Delaware to distinguish between certain variations of efforts standards that have been formulated.¹⁷ Third, this Comment will discuss other ways that courts have attempted to interpret the various efforts standards.¹⁸ Finally, this Comment will recommend that courts collapse all of the efforts standards into a single standard that imposes a higher burden than the good faith obligation inherent in all contracts.¹⁹ Adopting this process for interpreting efforts standards will make contracts more clear, easing the burden on the courts interpreting these contracts and reducing litigation between parties trying to determine their obligations. This Comment will conclude by discussing what practitioners and contracting parties should do in the meantime before courts are able to provide a clear interpretation of efforts standards.²⁰

II. DEFINING EFFORTS STANDARDS AND THE CURRENT STATE OF EFFORTS STANDARDS IN DELAWARE

The current state of the law regarding efforts standards is “far from clear,” creating a challenge for practitioners in specifying how much effort parties must use when fulfilling their contractual obligations.²¹ This Part will first focus on defining the implied covenant of good faith, which is inherent in all contracts regardless of whether the parties decide to include any efforts standards.²² Next, this Part will briefly examine how courts and prominent scholars have defined the various efforts standards, such as “best efforts” and “reasonable efforts.”²³ Finally, this Part will examine the current state of the case law, starting with one of the leading cases in the country regarding efforts standards²⁴ and concluding with the current state of the case law in the Delaware Court of Chancery.²⁵

16. *See infra* Section III.A.

17. *See infra* Section III.B.

18. *See infra* Section III.C.

19. *See infra* Section III.D.

20. *See infra* Section III.D.

21. *See Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 613 n.7 (2d Cir. 1979).

22. *See infra* Section II.A.

23. *See infra* Section II.B.

24. *See infra* Section II.C. *See generally Bloor*, 601 F.2d 609.

25. *See generally Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92 (Del. Ch. June 24, 2016); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008); *infra* Section II.D.

A. *Implied Covenant of Good Faith*

Although contract drafters often seek to address every possible issue that is relevant to the contract at hand, accomplishing this feat is nearly impossible.²⁶ For this reason, courts have often resorted to filling perceived “gaps”²⁷ in contracts with default provisions²⁸ when the parties are silent and the court is unable to ascertain the parties’ intent regarding the disputed element.²⁹ For example, to ensure that the party with less contracting power is not coerced into a contract that affords them little protection, courts impose some standards as immutable rules of law that forbid parties from contracting away certain rights.³⁰

One of the most notable examples of an immutable rule implied in all contracts is the “implied covenant of good faith.”³¹ Courts generally state that the implied covenant of good faith requires honesty and “faithfulness to an agreed common purpose” during the performance of contractual obligations.³² If a contract fails to include an efforts standard, or the expected performance requirements, a court will likely fill this gap

26. See Tara Naughter, *5 Contract Drafting Nightmares and How to Avoid Them*, CONTRACT WORKS (Jan. 31, 2017), <https://www.contractworks.com/blog/5-contract-drafting-nightmares-and-how-to-avoid-them> (“Every phase of the contracting cycle presents its own set of challenges. Contract drafting can be particularly brutal with lawyers for each side going round and round over virtually every detail. Unfortunately, sometimes even those lengthy and detailed drafting sessions result in a mediocre contract.”). Addressing every relevant issue within a contract is nearly impossible because contracting parties are generally unable to predict every issue that may cause conflict. See *id.*

27. As used here, the term “gaps” is intended to mean any issue relevant to the contract that is not addressed by the parties in the contract.

28. See, e.g., U.C.C. § 2-305 (AM. LAW INST. & UNIF. LAW COMM’N amended 2002) (dealing with contracts in which price is left open); *id.* § 2-308 (dealing with contracts in which place of delivery is left open).

29. See generally *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 90–92 (1917) (finding that, upon examination of the contract, the plaintiff made an implied promise even though he did not make a promise expressly).

30. See 6 CORBIN ON CONTRACTS § 26.1 (Joseph M. Perillo et al. eds., rev. ed. 2017).

31. RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

32. See *id.* § 205 cmt. a (“Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. . . .”); see also U.C.C. § 1-201(b)(20) (AM. LAW INST. & UNIF. LAW COMM’N amended 2001) (“Good faith . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing.”); *id.* § 2-103(1)(b) (providing that “in the case of a merchant” good faith means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”); *Good Faith*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.”).

by holding the parties to the expectations required by the implied covenant of good faith.³³

B. Defining Efforts Standards and Examining the Various Types Used in Contracts

Because most contracting parties do not want to be left with the court's application of the implied covenant of good faith,³⁴ parties typically include some variant of an efforts standard in their contract.³⁵ An efforts standard is often a heavily negotiated portion of a contract, but for the most part, courts and scholars have failed to provide clear definitions of efforts standards.³⁶ Generally, efforts standards delineate the amount of effort required by one or both parties in fulfilling a certain obligation.³⁷ Efforts standards are especially commonplace in merger agreements between two companies where one party fears that the other party may fail to complete all of their assigned obligations as part of a plan to prevent the merger from being consummated.³⁸

To explain the effort required to fulfill the parties' obligations, practitioners and contracting parties have chosen to use several commonly known efforts standards, such as "reasonable efforts" or "best

33. See, e.g., *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 139 (Ct. Spec. App. 2003). In *First Union*, the court stated:

Because courts sometimes confuse the standard of best efforts with that of good faith, it will be well . . . to make plain the distinction between the two standards. Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance.

Id. (citing E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 7–8 (1984)).

34. Parties likely do not want to be left hoping that a court will definitely read in a good-faith covenant, and parties also likely have concerns over how the court will apply the standard. Therefore, parties prefer to stipulate their own performance standard that they perceive to be more stringent than the covenant of good faith.

35. See, e.g., *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92, at *54–55 (Del. Ch. June 24, 2016) (interpreting a "commercially reasonable efforts" standard); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 748–51 (Del. Ch. 2008) (interpreting a "reasonable best efforts" standard).

36. See *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 613 n.7 (2d Cir. 1979) (stating that the "law is far from clear and it is unfortunate that a federal court must have to apply it" with regards to interpreting an efforts standard); *Murphy*, *supra* note 3.

37. See *Adams*, *supra* note 5, at 12.

38. See, e.g., *Williams*, 2016 Del. Ch. LEXIS 92, at *31–32 (interpreting an efforts standard requiring one party to use "commercially reasonable efforts" to obtain a required tax opinion needed to make the proposed merger a tax-free agreement); *Hexion*, 965 A.2d at 721 (interpreting an efforts standard requiring one party to use "reasonable best efforts" to obtain an opinion stating that the combined entity would be solvent after a merger between two companies occurred).

efforts,” rather than using industry standards or past performance by the parties³⁹ to describe the efforts to be used by the parties.⁴⁰ By examining how courts and scholars have defined the most common efforts standards used in contracts, the ambiguous and circular nature of these efforts standards becomes apparent.⁴¹

Five common efforts standards used by practitioners include “good faith efforts,” “reasonable efforts,” “best efforts,” “commercially reasonable efforts,” and “diligent efforts.”⁴² These five standards will be examined further below to demonstrate the ambiguity facing courts and contracting parties when trying to distinguish between various efforts standards.⁴³ Although some parties believe that standards such as “best efforts” impose the strongest performance requirements,⁴⁴ no clear gradation exists between the various efforts standards that would allow a party to know where each efforts standard falls on a spectrum.⁴⁵ This disconnect between the practitioners writing contracts and the courts tasked with interpreting them creates a problem for contracting parties who simply want to ensure that the obligations of their agreement are fulfilled.⁴⁶

1. “Good Faith Efforts”

One efforts standard that contracting parties have used is “good faith efforts.”⁴⁷ However, the “good faith efforts” standard has achieved limited success, largely because it is not clear how it differs from the

39. Industry standards are the expectations for contracting parties based upon contracts undertaken by others in the same or similar industry, such as would be required by banking industry standards for a bank entering into a contract with settlement service providers. *See Adams, supra* note 5, at 16. Past performance by the parties includes the obligations undertaken by the parties in similar past agreements with each other or with other parties. *See id.* at 16, 18. Industry standards and past performance are just two of several possible benchmarks of which parties could take advantage of to better define how far a party must go to fulfill its obligations. *See id.*

40. *See id.* at 16.

41. *See infra* Sections II.B.1–.5.

42. *See, e.g., Adams, supra* note 5, at 14–15.

43. *See infra* Sections II.B.1–.5.

44. *See Murphy, supra* note 3.

45. For example, some court opinions have suggested that “best efforts” may not impose as strong of a burden as practitioners believe. *See, e.g., Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc., 832 F.2d 214, 228 (1st Cir. 1987)* (“We have found no cases, and none have been cited, holding that ‘best efforts’ means every conceivable effort.”).

46. *See generally Murphy, supra* note 3 (describing the “perceived blurriness among the various ‘efforts’ standards” and the lack of case law clearly defining each of the various efforts standards).

47. *See, e.g., W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, No. 2742-VCN, 2007 Del. Ch. LEXIS 154, at *9 (Del. Ch. Nov. 2, 2007).*

implied covenant of good faith already inherent in each contract.⁴⁸ While parties often want to include more than just the implied covenant of good faith when contemplating the addition of an efforts standard, courts are more likely to interpret a “good faith efforts” standard by using the same techniques they use in applying the implied covenant of good faith.⁴⁹

2. “Reasonable Efforts”

A second efforts standard commonly used by contracting parties is the “reasonable efforts” standard.⁵⁰ Distinguishing the “reasonable efforts” standard from other efforts standards has proven to be a difficult task for many scholars, as exemplified by the following quote from Garner’s Dictionary of Legal Usage: “A provision requiring reasonable efforts is generally thought to impose a lesser standard of diligence [than best efforts] In truth both best efforts and reasonable efforts are vague phrases.”⁵¹ The vagueness of these two phrases is further exemplified by the courts’ confusion in interpreting these two efforts standards, which has left practitioners without a clear definition of either standard and has caused courts to use the two terms interchangeably.⁵²

3. “Best Efforts”

“Best efforts” is an additional standard frequently used by contracting parties.⁵³ Black’s Law Dictionary has defined “best efforts” within the context of a contract to mean “[d]iligent attempts to carry out an obligation.”⁵⁴ Additionally, Black’s Law Dictionary has classified “a best-efforts obligation [a]s stronger than a good-faith obligation” and

48. See BRYAN A GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 108 (3d. ed. 2011) (stating that the phrase “good faith efforts” is essentially a “needless variant” of “reasonable efforts”).

49. See, e.g., *Barbara v. MarineMax, Inc.*, No. 12-CV-0368 (ARR)(RER), 2013 U.S. Dist. LEXIS 120286, at *21 (E.D.N.Y. Aug. 22, 2013) (“Plaintiffs’ breach of contract claim arises not from the implied covenant, but from the express Good Faith Efforts clause [B]ecause there is no contract provision defining ‘good faith,’ the term may be construed to have the same meaning it does in the implied covenant context.”).

50. See, e.g., *In re Oxbow Carbon LLC Unitholder Litig.*, No. 12447–VCL, 2018 WL 818760, at *67–69 (Del. Ch. Feb. 12, 2018).

51. GARNER, *supra* note 48, at 108.

52. See, e.g., *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990) (“While the phrase ‘best efforts’ is often used to describe the extent of the implied undertaking, this has properly been termed an ‘extravagant’ phrase. . . . A more accurate description of the obligation owed would be the exercise of ‘due diligence’ or ‘reasonable efforts.’” (citation omitted)); *Stewart v. O’Neill*, 225 F. Supp. 2d 6, 11 (D.D.C. 2002) (“[T]he agency was obligated to use its best efforts—that is, all reasonable efforts—to comply with all terms of the settlement agreement.”).

53. See, e.g., *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979).

54. *Best Efforts*, BLACK’S LAW DICTIONARY (10th ed. 2014).

noted that “[b]est efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature of the acting party would take.”⁵⁵ Many practitioners view “best efforts” as the most stringent or onerous standard.⁵⁶ However, the case law regarding the “best efforts” standard is unclear as to whether “best efforts” actually requires a higher amount of effort than the other efforts standards.⁵⁷

4. “Commercially Reasonable Efforts”

“Commercially reasonable efforts” is a standard that has appeared within the context of numerous commercial⁵⁸ contracts.⁵⁹ However, whether the phrase “commercially” contributes anything more to the standard of “reasonable efforts” is unclear.⁶⁰ It is likely that the term “commercially” does not add anything to this standard because, for example, inherent in the implied covenant of good faith when merchants⁶¹ contract with one another is that the contractual obligations will be fulfilled while conforming with commonly accepted commercial practices.⁶² “Commercially reasonable efforts” have been defined as

55. *Id.*

56. See CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU 88 (2d ed. 2002) (“‘Best efforts’ is the most stringent standard.”); Murphy, *supra* note 3 (“The conventional thinking subscribed to by most practitioners is a sliding scale in which ‘best efforts’ constitutes the highest level of commitment followed regressively by ‘reasonable best efforts,’ ‘reasonable efforts’ and ‘commercially reasonable efforts.’”).

57. See *Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 228 (1st Cir. 1987) (“We have found no cases, and none have been cited, holding that ‘best efforts’ means every conceivable effort.”); *Bloor*, 601 F.2d at 614 (noting that a “best efforts” requirement did not necessarily prevent the contracting party from giving reasonable consideration to its own interests).

58. See *Commercial*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“Of, relating to, or involving the buying and selling of goods, mercantile.”).

59. See, e.g., *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92, at *55 (Del. Ch. June 24, 2016).

60. See *id.* (stating, in the context of interpreting a “commercially reasonable efforts” provision, that “[i]n *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, this Court equated ‘reasonable best efforts’—a *similar term* also used in the Merger Agreement—with good faith in the context of the contract at issue” (emphasis added)).

61. U.C.C. § 2-104(1) (AM. LAW INST. & UNIF. LAW COMM'N amended 2002). The UCC defines merchant as follows:

“Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id.

62. See *id.* § 2-103(1)(b) (“‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”).

efforts “conducted in good faith and in accordance with commonly accepted commercial practice.”⁶³ Based on this reasoning, a “reasonable efforts” standard that is applied to a dispute arising in a commercial context would likely automatically include aspects of commercial reasonableness, such as industry standards,⁶⁴ without the need for “commercially” appearing before “reasonable.”

5. “Diligent Efforts”

Finally, an efforts standard that is less commonly used by contracting parties is the “diligent efforts” standard.⁶⁵ Legal scholars have defined diligent as “[c]areful and attentive; persistent in doing something; industrious; assiduous” or “[c]arried out with care and constant effort.”⁶⁶ However, a lack of case law exists on the “diligent efforts” standard, and the “diligent efforts” standard is frequently conflated with the other previously mentioned standards, such as “best efforts”⁶⁷ and “reasonable efforts.”⁶⁸ For these reasons, no clear definition of this standard appears that adequately distinguishes it from the other aforementioned efforts standards.

C. *The Oft-Cited Standard Regarding Efforts Standards: Bloor v. Falstaff Brewing Corp.*

Courts forced to tackle the unclear area of efforts standards often cite *Bloor v. Falstaff Brewing Corp.*⁶⁹ because it provides a useful standard for efforts standards and is one of the leading cases on this legal issue.⁷⁰ In *Bloor*, the plaintiff, James Bloor, was a trustee of a brewery

63. *Commercially Reasonable*, BLACK’S LAW DICTIONARY (10th ed. 2014).

64. See, e.g., *LeMond Cycling, Inc. v. PTI Holding, Inc.*, No. 03-5441 (PAM/RLE), 2005 U.S. Dist. LEXIS 742, at *14–15 (D. Minn. Jan. 14, 2005) (“[A] court cannot find that a merchant observed reasonable commercial standards of fair dealing in the trade without evidence of industry practices.”).

65. See, e.g., *Adams*, *supra* note 5, at 12.

66. *Diligent*, BLACK’S LAW DICTIONARY (10th ed. 2014).

67. See *Best Efforts*, *supra* note 54 (“*Diligent* attempts to carry out an obligation . . .”) (emphasis added).

68. See *GARNER*, *supra* note 48, at 108 (“A provision requiring reasonable efforts is generally thought to impose a lesser standard of *diligence* [than best efforts].” (emphasis added)).

69. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258 (S.D.N.Y. 1978), *aff’d*, 601 F.2d 609 (2d Cir. 1979).

70. See, e.g., *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 754–55 (Del. Ch. 2008) (citing *Bloor*, 601 F.2d at 614–15, for the standard used to define various efforts standards); see also Victor P. Goldberg, *Great Contracts Cases: In Search of Best Efforts: Reinterpreting Bloor v. Falstaff*, 44 ST. LOUIS L.J. 1465, 1465 (2000) (referring to the *Bloor* decision as a “casebook favorite”).

formerly named P. Ballantine & Sons (“Ballantine”).⁷¹ Bloor brought an action for breach of contract against another brewery, Falstaff Brewing Corporation (“Falstaff”), for breaching the “best efforts” provision within the purchase agreement.⁷² The purchase agreement between the parties allowed for Falstaff to purchase all of Ballantine’s property, excluding only the Ballantine brewery, after payment of four million dollars and royalty payments.⁷³ Additionally, the purchase agreement between the parties provided that Falstaff shall “use its *best efforts* to promote and maintain a high volume of sales” for the Ballantine brands.⁷⁴

Bloor instituted the breach of contract suit shortly after a sharp decline in the sale of Ballantine products, alleging that Falstaff failed to use its “best efforts” to promote Ballantine’s brand.⁷⁵ The central issue for the court was whether Falstaff’s efforts to promote the Ballantine brand were sufficient to meet the obligations required by the “best efforts” provision within the purchase agreement.⁷⁶ The exact meaning of “best efforts” was, not surprisingly, in dispute by the parties.⁷⁷ Bloor argued for the “best efforts” standard to be interpreted using an objective standard that considered the conduct of an “‘average, prudent[, and] comparable’ brewer.”⁷⁸ Conversely, Falstaff argued for the “best efforts” standard to be interpreted using a subjective standard, which would allow the court to consider the financial difficulties and economic hardship suffered by Falstaff.⁷⁹

In considering both objective and subjective factors when interpreting the “best efforts” provision, the court found that Falstaff breached its duty to promote Ballantine products with its “best efforts.”⁸⁰ In evaluating the subjective component, the court considered the total capabilities of the promising party, Falstaff, and specific circumstances

71. *Bloor*, 454 F. Supp. at 260.

72. *Id.*

73. *Id.*

74. *Id.* (emphasis added).

75. *Id.* at 265.

76. *See id.* at 266.

77. *See id.*

78. *Id.* (citing *Arnold Prods. v. Favorite Films Corp.*, 176 F. Supp. 862 (S.D.N.Y. 1959), *aff’d*, 298 F.2d 540 (2d Cir. 1962)).

79. *See id.*

80. *See id.* at 270. The court decided that some of these factors were a breach of the duty to use “best efforts,” including the failure to entertain a proposal from a large brewery to distribute Ballantine’s products in New York, the elimination of vast amounts of personnel that were responsible for marketing and advertising Ballantine’s products, and the failure to treat Ballantine products with the same regard as its own products. *See id.*

surrounding the agreement.⁸¹ In evaluating the objective component, the court compared Falstaff to the average, prudent, and comparable party.⁸²

In its analysis of the objective component, the court determined that Falstaff did not need to promote the Ballantine products to the extent that a much larger brewer might have.⁸³ Rather, the court considered the financial state of Falstaff, a subjective factor, and determined that Falstaff must promote Ballantine's products to the "extent of its own total capabilities," noting that Falstaff's financial condition was not as dire as it tried to insinuate.⁸⁴ However, the court determined that even if financial difficulty had hindered the advertising of Ballantine's products, "[w]here impossibility or difficulty of performance is occasioned *only* by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused."⁸⁵

The Second Circuit Court of Appeals affirmed the trial court's finding that Falstaff violated the obligations imposed by the "best efforts" standard, and further clarified the lower court's decision by explaining how Falstaff's conduct was to be evaluated using similar objective and subjective factors.⁸⁶ The Second Circuit determined that Falstaff had a "right to give reasonable consideration to its own interests," but the "best efforts" standard that the parties had agreed to required that Falstaff treat the Ballantine products as well as its own in terms of advertising.⁸⁷

In discussing the financial state of Falstaff, a subjective factor, the court determined that the provision "did not require Falstaff to spend itself into bankruptcy to promote the sales of Ballantine products,"⁸⁸ but that Falstaff had the burden of showing that "there was nothing significant it could have done to promote Ballantine sales that would not have been financially disastrous."⁸⁹ Falstaff's approach of seeking to maximize profits, in spite of large losses in volume to the Ballantine brand, ultimately created a breach of the "best efforts" provision.⁹⁰ Although the Second Circuit noted that "the law is far from clear"⁹¹ with regard to efforts provisions, it applied an effective approach to clearing

81. See *Bloor*, 454 F. Supp. at 266–71.

82. See *id.* at 267, 269.

83. See *id.* at 267. Here, the court objectively compared the conduct of Falstaff to the "average, prudent, [and] comparable' brewer." *Id.*

84. See *id.*

85. *Id.* at 267 n.7 (emphasis added) (quoting 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 41 (N.Y. 1968)).

86. See *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979).

87. See *id.*

88. *Id.*

89. *Id.* at 615.

90. See *id.* at 614.

91. *Id.* at 613 n.7.

up this area of law by seeking to consider both objective and subjective factors in evaluating whether the alleged breaching party met the obligations required by the contract's efforts standard.⁹²

D. Existing Delaware Case Law Regarding Efforts Standards

While the court in *Bloor* managed to create a somewhat effective method of evaluating undefined efforts standards, Delaware courts have not been as successful. Efforts standards have become important to the development of corporate law because of the numerous contracts entered into by corporations.⁹³ The Delaware Court of Chancery is known for having particular expertise in the field of corporate law.⁹⁴ This court, dating back to 1792, has a rich history, and its strong reputation in the corporate community is largely due to the fact that judges with corporate expertise, rather than juries, decide the cases.⁹⁵ Due to the expertise and reputation of the Delaware Court of Chancery, an examination of how the Delaware Court of Chancery has attempted to differentiate between various efforts standards is important to better understand this issue faced by the numerous corporate contracting parties. However, the following summary shows that Delaware law is just as muddled and unclear as other courts' interpretations of efforts standards.⁹⁶

1. The Leading Case on Efforts Standards from the Delaware Court of Chancery: *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*

*Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*⁹⁷ is a leading case from Delaware's Court of Chancery interpreting efforts standards.⁹⁸

92. See *id.* at 614–15.

93. Specifically, the number of merger and acquisition agreements entered into by companies continues to increase. See DELOITTE, THE STATE OF THE DEAL: M&A TRENDS 2018, at 1 (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-mergers-acquisitions-2018-trends-report.pdf>; Bourree Lam, 2015: A Merger Bonanza, ATLANTIC (Jan. 9, 2016), <https://www.theatlantic.com/business/archive/2016/01/2015-mergers-acquisitions/423096/>.

94. See BLACK, JR., *supra* note 10, at 1.

95. See *id.* at 5–7.

96. See *infra* Sections II.D.1–2.

97. *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008).

98. See, e.g., Sonja Carlson, *What Are 'Commercially Reasonable Efforts' in M&A Transactions?*, CORP. COUNS. (Oct. 27, 2016), <http://www.corpcounsel.com/id=1202770925109/What-Are-Commercially-Reasonable-Efforts-in-MampA-Transactions?mcode=0&curindex=0&curpage=ALL#> (referring to *Hexion* as “[t]he leading Delaware case” on contractual efforts standards). The Delaware Court of Chancery has cited *Hexion* in other cases involving the interpretation of efforts standards.

In *Hexion*, the plaintiff was Hexion Specialty Chemicals, Inc. (“Hexion”), a New Jersey corporation that was, at the time of the decision, “the world’s largest producer of binder, adhesive, and ink resins for industrial applications.”⁹⁹ The defendant in *Hexion* was Huntsman Corporation (“Huntsman”), a Delaware corporation specializing in the global manufacturing and marketing of chemical products.¹⁰⁰ Hexion and Huntsman had entered into a merger agreement where Hexion agreed to buy Huntsman according to stringent deal terms that included no “financing out.”¹⁰¹ Ultimately, the parties did not consummate the merger, which resulted in Hexion bringing an action against Huntsman seeking, among other things, a declaration that it was not obligated to close the merger with Huntsman.¹⁰²

In Hexion’s suit against Huntsman, Hexion alleged that the merger could not be completed because financing would not have been available and the merged entity would have been insolvent.¹⁰³ Huntsman counter-claimed seeking performance of the contract or, in the alternative, damages from Hexion for failure to consummate the transaction.¹⁰⁴ To determine whether Hexion was liable for damages due to its failure to close the transaction with Huntsman, the court needed to decide whether Hexion committed an intentional breach of any covenant in the merger agreement.¹⁰⁵ The “reasonable best efforts” covenant was one of the covenants located within the parties’ merger agreement that was essential to the court’s analysis.¹⁰⁶

Hexion argued that, despite its “reasonable best efforts,” no qualified party would have been able to deliver an opinion stating that the combined entity after the merger would have been solvent.¹⁰⁷ Because of the inability to obtain this opinion, banks would not have been obligated or even willing to fund the purchase.¹⁰⁸ The court found,

See, e.g., Williams Cos. v. Energy Transfer Equity, L.P., Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92, at *55 (Del. Ch. June 24, 2016).

99. *Hexion*, 965 A.2d at 722.

100. *Id.*

101. *See id.* at 721 (“[I]f the financing the buyer arranged (or equivalent alternative financing) is not available at the closing, the buyer is not excused from performing under the contract.”).

102. *See id.* at 723.

103. *Id.* at 748.

104. *Id.* at 723.

105. *See id.* at 721.

106. *See id.* (“[Hexion] covenanted that it would use its reasonable best efforts to take all actions and do all things ‘necessary, proper or advisable’ to consummate the financing on the terms it had negotiated with its banks . . .”).

107. *See id.* at 748.

108. *See id.* (“The commitment letter requires as a condition precedent to the banks’ obligation to fund that the banks receive a solvency certificate or opinion indicating that the combined entity would be solvent.”).

as Hexion contended, that Hexion was allowed to seek expert advice in assessing its own insolvency and was allowed to take actions to avoid insolvency.¹⁰⁹

However, the court also found that Huntsman did not need to demonstrate that “Hexion had viable options to avoid insolvency while performing its obligation to close.”¹¹⁰ Instead, Huntsman “merely needed to show . . . that Hexion simply did not care whether its course of action was in Huntsman’s best interests so long as that course of action was best for Hexion.”¹¹¹ Once Huntsman was able to make that demonstration, “the burden shifted to Hexion to show that there were no viable options it could exercise to allow it to perform without disastrous financial consequences.”¹¹² The court determined Hexion was unable to meet this burden.¹¹³ Further, in citing to a case from the First Circuit Court of Appeals, the court agreed that a “‘reasonable best efforts’ standard is separate and distinct from good faith,” but that no case could be found where “a party acted in good faith but did not use its best efforts.”¹¹⁴

The court in its conclusion further blurred the distinction between the implied covenant of good faith and the standard of “reasonable best efforts” by stating that Hexion’s failure to confer with Huntsman at all “constitutes a failure to use *reasonable best efforts* to consummate the merger and shows a lack of *good faith*.”¹¹⁵ The court’s complex balancing of subjective and objective factors to resolve the parties’ dispute illustrates that courts have been unable to ascertain parties’ intent when they include an imprecise efforts standard.¹¹⁶ The court’s inability to easily determine the intent behind an efforts standard is a problem that needs to be addressed to ease the future burden on practitioners and courts.

109. See *Hexion*, 965 A.2d at 754–55 (“[A] promise to use best efforts does not strip the party of the ‘right to give reasonable consideration to its own interests’ and does not require the party to ‘spend itself into bankruptcy.’” (citing *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614–15 (2d Cir. 1979))).

110. *Id.* at 755.

111. *Id.* (analogizing this case to *Bloor*, 601 F.2d at 614–15).

112. *Id.*

113. *Id.* (finding that Hexion could have, and failed to, hold a conference with Huntsman management, for virtually no cost, to discuss the insolvency concerns in support of the claim that Hexion made “no effort at all”).

114. *Id.* (citing *Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 222 (1st Cir. 1987)).

115. *Id.* at 755–56 (emphasis added).

116. See *infra* Sections III.B–C.

2. The Delaware Court of Chancery Revisits Efforts Standards: *Williams Companies, Inc. v. Energy Transfer Equity, L.P.*

The Delaware Court of Chancery has continued to hear numerous cases regarding efforts standards.¹¹⁷ As recently as 2016, the Delaware Court of Chancery attempted to refine its approach to efforts standards after being faced with facts similar to *Hexion*.¹¹⁸ *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*¹¹⁹ involved two major gas pipeline companies, Williams Companies, Inc. (“Williams”) and Energy Transfer Equity, L.P. (“Energy Transfer”), seeking to merge into one entity with Energy Transfer purchasing Williams.¹²⁰ After the execution of the merger agreement, the energy market plummeted, which caused a decline in the value of both parties’ pipeline assets and endangered Energy Transfer’s ability to finance the transaction.¹²¹

One important facet of the merger agreement was to ensure that the merger would qualify as a tax-free transaction under the Internal Revenue Code; therefore, the parties stipulated that the merger could only be consummated if Energy Transfer’s outside tax counsel issued an opinion stating that the transaction would qualify as a tax-free transaction.¹²² Because it was critical that the transaction be tax-free, Energy Transfer agreed to use “commercially reasonable efforts” to obtain the tax opinion.¹²³ Energy Transfer’s outside tax counsel ultimately concluded that they would not be able to provide the tax opinion even after considering two of Williams’s proposed restructuring solutions.¹²⁴

Williams brought suit alleging that Energy Transfer had failed to use “commercially reasonable efforts” to obtain the required tax

117. See generally *Fortis Advisors LLC v. Dialog Semiconductor PLC*, No. 9522-CB, 2015 Del. Ch. LEXIS 22 (Del. Ch. Jan. 30, 2015); *Cooper Tire & Rubber Co. v. Apollo Mauritius Holdings Pvt. Ltd.*, Civil Action No. 8980-VCG, 2013 Del. Ch. LEXIS 259 (Del. Ch. Oct. 25, 2013); *Narrowstep, Inc. v. Onstream Media Corp.*, Civil Action No. 5114-VCP, 2010 Del. Ch. LEXIS 250 (Del. Ch. Dec. 22, 2010); *Wavedivision Holdings, LLC v. Millennium Dig. Media Sys., L.L.C.*, No. 2993-VCS, 2010 Del. Ch. LEXIS 194 (Del. Ch. Sept. 17, 2010).

118. See generally *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92 (Del. Ch. June 24, 2016). *Williams* and *Hexion* both involve whether a buyer’s pre-closing conduct met the obligations of the agreed-upon efforts standard. See *id.* at *1–5; *Hexion*, 965 A.2d at 721.

119. *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92 (Del. Ch. June 24, 2016).

120. *Id.* at *1–2.

121. See *id.* at *2–3.

122. See *id.*

123. See *id.* at *31.

124. See *id.* at *16–23.

opinion.¹²⁵ The court found that “commercially reasonable efforts” was not a defined term within the contract.¹²⁶ Additionally, the court determined that by agreeing to the “commercially reasonable efforts” provision, the parties had subjected themselves to an objective standard that required Energy Transfer “to do those things objectively reasonable to produce the desired [tax opinion], in the context of the agreement reached by the parties.”¹²⁷ Although the court stated they were evaluating the claim under an objective standard, when compared with *Hexion*, the court seemed to suggest that subjective factors may also be useful.¹²⁸ In examining the facts in light of this standard, the court found in favor of Energy Transfer because the court could not identify any actions that Energy Transfer could have reasonably taken that would have caused its outside counsel to deliver the tax opinion in good faith.¹²⁹

The court in *Williams* further conflated the gradation between the varying efforts standards by stating that the “commercially reasonable efforts” standard at issue in this case was a similar term in comparison to the “reasonable best efforts” standard at issue in *Hexion*.¹³⁰ The decisions in *Williams* and *Hexion* are not in conflict with one another because of factual distinctions between the two cases.¹³¹ However, *Williams*’s continued analysis of objective and subjective factors without explicitly stating whether there is a distinction between different efforts standards has done little to ease the burden on future practitioners and courts.

As can be seen from the above summary of Delaware courts’ treatment of efforts standards, Delaware courts have not provided consistent and reliable interpretations of varying efforts standards, leaving Delaware courts and practitioners in a continuing state of confusion regarding how efforts standards will be interpreted in the future.

125. *Id.* at *31.

126. *Id.* at *55.

127. *Id.*

128. *Compare id.* at *55–60 (finding that even though Energy Transfer did not seek out other viable options or exhaust every possible option to restructure its deal, it did not need to based on the facts of this transaction, but rather merely needed to abstain from affirmatively frustrating its closing conditions), *with Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 755 (Del. Ch. 2008) (finding that the party performing an action needed to seek out every possible viable option that would allow it to perform without disastrous financial consequences).

129. *See Williams*, 2016 Del. Ch. LEXIS 92, at *56–57.

130. *See id.* at *55.

131. *See id.* at *63 (“Like this case, perhaps, the *Hexion* buyer had an incentive to avoid the merger. Unlike the record in this case, in *Hexion* the buyer actively and affirmatively torpedoed its ability to finance.”).

III. TACTICS DELAWARE COULD USE TO DEFINE EFFORTS STANDARDS CONSISTENTLY AND CLEARLY

Despite *Williams*'s further explanation of the standard articulated in *Hexion*, the Delaware Court of Chancery failed to explain whether the *Williams* decision would have been different had the court been analyzing, for example, a "best efforts" standard rather than a "commercially reasonable efforts" standard.¹³² This is not a surprising outcome, considering that no "best efforts" standard was at issue in *Williams*,¹³³ and any holding in that regard would likely be viewed as dicta.¹³⁴ Further, while the court in *Williams* appeared to try to expand on the *Hexion* ruling on how best to evaluate the relevant efforts standard in a contract, the court continued to conflate the efforts standard used in the contract with the concept of good faith that is implied in all contracts.¹³⁵ However, the Delaware Court of Chancery's difference in opinion displayed in *Hexion* and *Williams* could merely be explained by the Delaware Court of Chancery's ability to distinguish the facts of the two cases.¹³⁶ In spite of the guidance offered by *Williams*, practitioners are still left in a precarious position when negotiating what efforts standard should be used in a contract. This Part will examine possible solutions to the issue to illustrate how further clarity could be provided.¹³⁷

First, this Part will discuss uniform laws' impact on the confusion and ambiguity regarding efforts standards, using UCC provisions as an example to examine the ways in which uniform laws discussing efforts standards should be amended to provide clarity.¹³⁸ Second, this Part will discuss failed efforts by some courts outside of Delaware that have attempted to make a linguistic distinction between variations of efforts standards.¹³⁹ Third, this Part will discuss other ways, aside from trying to draw a distinction between the different efforts standards, that courts have attempted to use to interpret various efforts standards.¹⁴⁰ Finally,

132. See *id.* at *55 (finding "reasonable best efforts" to be a "similar term" to the "commercially reasonable efforts" standard at issue in this case).

133. See *id.* at *31 (describing that the efforts standard that was allegedly breached was a "commercially reasonable efforts" standard).

134. See *Judicial Dictum*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight.").

135. See *Williams*, 2016 Del. Ch. LEXIS 92, at *5 (basing its conclusion on the tax attorney's inability in "good faith" to deliver the tax opinion, and the tax attorney's inability to deliver the tax opinion after "commercially reasonable efforts").

136. See *id.* at *61–62.

137. See *infra* Sections III.A–C.

138. See *infra* Section III.A.

139. See *infra* Section III.B.

140. See *infra* Section III.C.

this Part will recommend that courts collapse all of the efforts standards into a single standard that imposes a higher burden than the good faith obligation inherent in all contracts.¹⁴¹ Further, this Part will conclude by discussing what practitioners and contracting parties should do in the meantime before courts are able to provide a clear interpretation of efforts standards.¹⁴²

A. UCC Section 2-306(2) in its Current Form Further Blurs the Distinction Between Efforts Standards

One potential solution to the ambiguity surrounding efforts standards involves revising the language of certain portions of Article 2 of the UCC that currently conflate efforts standards with one another.¹⁴³ This Section will recommend that the UCC collapse each variant of an efforts standard into the definition of “reasonable efforts” to ensure that all efforts standards are treated the same for purposes of the UCC regardless of the qualifier placed in front of the efforts standard. Further, this Section will recommend that the UCC clarify the definition of “reasonable efforts” to distinguish the “reasonable efforts” standard from the implied covenant of good faith.

The UCC is “a uniform statute that governs commercial transactions, including sales of goods, secured transactions, and negotiable instruments,” and “has been adopted in some form by every state and the District of Columbia.”¹⁴⁴ Section 2-306 of the UCC is one provision that offers explicit mention of efforts standards in its attempt to define and regulate output, requirements, and exclusive dealings.¹⁴⁵ In articulating the standard required of an exclusive dealing, the UCC states that “[a] lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use *best efforts* to supply the goods and by the buyer to use *best efforts* to promote the sale.”¹⁴⁶

In the comment to Section 2-306(2) on exclusive dealing, the UCC states that this subsection “makes explicit the commercial rule . . . under which the parties to [exclusive dealing] contracts are held to have . . . bound themselves to use *reasonable diligence* as well as *good faith* in their performance of the contract.”¹⁴⁷ Further, “[u]nder [exclusive dealing] contracts the exclusive agent is required . . . to use *reasonable*

141. *See infra* Section III.D.

142. *See infra* Section III.D.

143. *See* U.C.C. § 2-306 (AM. LAW INST. & UNIF. LAW COMM’N amended 2002).

144. *Uniform Commercial Code*, BLACK’S LAW DICTIONARY (10th ed. 2014).

145. *See* U.C.C. § 2-306.

146. *Id.* § 2-306(2) (emphasis added).

147. *Id.* § 2-306 cmt. 5 (emphasis added).

efforts and *due diligence* in the expansion of the market or the promotion of the product.”¹⁴⁸ In describing the obligations of parties to exclusive dealing contracts, the UCC mixes together “reasonable efforts,” “best efforts,” “diligence,” and “good faith,” which only adds to the confusion of practitioners seeking to differentiate between these three standards.¹⁴⁹

In an effort to alleviate the confusion caused by conflating various efforts standards with the implied covenant of good faith, uniform laws and statutes such as the UCC must make a better effort to distinguish the various efforts standards from the implied covenant of good faith. As will be demonstrated later with regard to how the Delaware Court of Chancery could provide the most clarity regarding efforts standards,¹⁵⁰ the best way to distinguish between these standards is for uniform laws to collapse the various efforts standards into just one standard, a “reasonable efforts” standard, with each efforts standard being defined the same as the others.¹⁵¹ Under this method, any attempt to use an efforts standard will impose a more stringent burden than is typified of the tests used for “reasonable efforts,” and the absence of an efforts standard in a contract will require the obligations to be fulfilled consistent with the implied covenant of good faith.¹⁵²

The drafters of the UCC could make these changes by expressly defining “reasonable efforts” as requiring a party to comply with the implied covenant of good faith and an additional level of diligence. Further, the UCC could collapse all efforts standards into the definition of “reasonable efforts” by stating within this definition that any iteration of an efforts standard, for example, “best efforts” or “diligent efforts,” would be defined in the same manner as “reasonable efforts.”

Additionally, the UCC could clarify the proposed definition of “reasonable efforts” by explaining that the additional level of diligence required involves an examination of the objective and subjective factors of the contracting parties’ conduct.¹⁵³ To ensure that this added definition of “reasonable efforts” makes sense within the UCC, all references within the UCC to any other efforts standard, such as “best efforts,”¹⁵⁴ should be changed to “reasonable efforts.” Also, any language within the UCC which implies that “reasonable efforts” imposes the same burden as the implied covenant of good faith¹⁵⁵ should be amended or removed to

148. *Id.* (emphasis added).

149. *See id.* § 2-306(2) & cmt. 5.

150. *See infra* Section III.D.

151. *See infra* Section III.C.2.

152. *See infra* Section III.D.

153. This analysis of objective and subjective factors is similar to the test applied in *Bloor*. *See Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979).

154. *See, e.g.*, U.C.C. § 2-306.

155. *See, e.g., id.* § 2-306 cmt. 5.

demonstrate that the “reasonable efforts” standard imposes more of a burden than the implied covenant of good faith.

The aforementioned changes to the UCC would not be enough to solve the problem surrounding the ambiguous interpretation of efforts standards because the UCC only applies to a limited number of contracts.¹⁵⁶ However, the suggested changes would provide added guidance for practitioners dealing in the specific contexts to which the UCC applies. More importantly, the changes could help to influence courts, such as the Delaware Court of Chancery, to adopt changes to their interpretations of efforts standards in the future. By giving credence to the aforementioned recommendations, the UCC would help in facilitating a more clear and consistent method to deal with ambiguous, undefined efforts standards.

B. Failed Attempts by Courts to Make a Linguistic Distinction Between “Best Efforts” and “Reasonable Efforts”

Another potential solution to the ambiguity surrounding the definition of efforts standards would be for courts to make a linguistic distinction between efforts standards that would allow practitioners to understand where each standard stands in comparison to others.¹⁵⁷ Courts have rarely had the opportunity to make this linguistic distinction because the contract provisions at issue generally only include one formulation of an efforts standard,¹⁵⁸ making it unnecessary for courts to dissect the gradation of varying efforts standards. However, two notable examples of contractual disputes over an efforts standard exist in which the courts stated where each efforts standard fits on a spectrum of most stringent to least stringent.¹⁵⁹

In *LTV Aerospace & Defense Co. v. Thomson-CSF, S.A.*,¹⁶⁰ the court was tasked with determining whether LTV Aerospace & Defense Company (“LTV”) fulfilled its contractual obligation to use “all reasonable efforts” to assist Thomson-CSF, S.A. (“Thomson”) in

156. For example, the UCC only applies in the context of commercial transactions. See *Uniform Commercial Code*, *supra* note 144.

157. See, e.g., *LTV Aerospace & Def. Co. v. Thomson-CSF, S.A.*, 198 B.R. 848, 854–55 (S.D.N.Y. 1996).

158. See, e.g., *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92, at *31 (Del. Ch. June 24, 2016) (interpreting a “commercially reasonable efforts” standard); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 721 (Del. Ch. 2008) (interpreting a “reasonable best efforts” standard).

159. See *LTV Aerospace*, 198 B.R. at 854–55; *Krinsky v. Long Beach Wings*, B148698, 2002 Cal. App. Unpub. LEXIS 9026, at *24–26 (Cal. Ct. App. Sept. 26, 2002).

160. *LTV Aerospace & Def. Co. v. Thomson-CSF, S.A.*, 198 B.R. 848 (S.D.N.Y. 1996).

negotiations with the United States Department of Defense for a security arrangement.¹⁶¹ The court ultimately found that LTV had fulfilled its contractual obligations to use “all reasonable efforts,” but not before attempting to distinguish between various efforts standards found within the contractual agreement.¹⁶²

In at least two other locations in the agreement, the parties used a “best efforts” standard rather than the “all reasonable efforts” standard at issue.¹⁶³ In comparing the two standards, the court explained that “[t]he standard imposed by a ‘reasonable efforts’ clause such as that contained in section 7.01 of the Agreement is *indisputably less stringent* than that imposed by the ‘best efforts’ clauses contained elsewhere in the Agreement.”¹⁶⁴ This remark seems to be confirming what many practitioners have long thought, which is that “best efforts” imposes a much more onerous burden on the parties than “reasonable efforts.”¹⁶⁵

Unfortunately, this commentary by the court is further complicated by the very next sentence of the opinion, which states that “[e]ven in the face of a best efforts clause, however, a party is entitled to give ‘reasonable consideration to its own interests’ in determining an appropriate course of action to reach the desired result,” leaving one to wonder if “best efforts” really imposes the highest burden of the efforts standards.¹⁶⁶ The court then used the balancing test from *Bloor*,¹⁶⁷ which was originally used to interpret a “best efforts” standard, to evaluate the “all reasonable efforts” standard at issue in *LTV Aerospace*.¹⁶⁸ In applying the *Bloor* test, the court failed to explain how its conclusion or test would differ, if at all, if it were evaluating the “best efforts” standard in the contract rather than the “all reasonable efforts” standard in the contract.¹⁶⁹ Further, because the “best efforts” portion of the contract was not at issue, the distinction between “best efforts” and “reasonable

161. *Id.* at 855–56 (“Section 7.01 of the Agreement requires both LTV and Thomson to ‘use all reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable under Applicable Law to consummate the transactions contemplated by this Agreement.’”).

162. *See id.* at 854–55.

163. *See id.* at 854.

164. *Id.* (emphasis added).

165. *See* FOX, *supra* note 56, at 88; GARNER, *supra* note 48, at 108; Murphy, *supra* note 3.

166. *LTV Aerospace*, 198 B.R. at 854 (citing *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979)); *see also* *Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 226 (1st Cir. 1987).

167. The test used involved the balancing of subjective and objective factors. *See Bloor*, 601 F.2d at 614.

168. *See LTV Aerospace*, 198 B.R. at 854–55.

169. *See id.*

efforts” was not critical to the conclusion of the court.¹⁷⁰ For these two reasons, the court’s attempt to distinguish between “best efforts” and “reasonable efforts” was not successful.

In addition to conflating the distinction between “reasonable efforts” and “best efforts,” the court caused added confusion by stating, “in order to prevail upon its allegations that LTV did not exert reasonable efforts to consummate the transaction, Thomson must demonstrate that LTV’s actions were inconsistent with *good faith* business judgments.”¹⁷¹ Here, the court was attempting to expound upon the balancing test of subjective and objective factors that it adopted from *Bloor* but instead seemed to wrongfully incorporate the separate standard for “good faith” into its analysis.¹⁷² This portion of the opinion does little to clarify the gradation of efforts standards for practitioners and courts because it seems to directly conflict with a settled principle that efforts standards impose a higher burden than the implied covenant of good faith.¹⁷³

A second case that attempted to make a linguistic distinction between different efforts standards was *Krinsky v. Long Beach Wings*.¹⁷⁴ In *Krinsky*, the court had to interpret a “best efforts” standard that was not defined in the lease agreement between the two parties.¹⁷⁵ In an attempt to distinguish “best efforts” from other efforts standards, the court stated that “the plain meaning of [best efforts] denotes efforts more than usual or even merely reasonable.”¹⁷⁶ While this gives the appearance that the court was stating that “best efforts” imposes a higher burden than, for example, “reasonable efforts,” the authority to which the court cited for this proposition only sought to distinguish “best efforts” from the implied covenant of good faith.¹⁷⁷ This analysis contributes very little to alleviating the concerns of practitioners tasked with selecting an appropriate efforts standard because most scholars, practitioners, and

170. *See id.* at 854.

171. *Id.* at 855 (emphasis added).

172. *See id.* at 854–55.

173. *See, e.g., Cruz v. Fxdirectdealer, LLC*, 720 F.3d 115, 124 (2d Cir. 2013) (“[B]est efforts’ requires more than ‘good faith’, which is an implied covenant in all contracts . . .” (alteration in original)); *see also supra* Section II.A.

174. *Krinsky v. Long Beach Wings*, B148698, 2002 Cal. App. Unpub. LEXIS 9026, at *24–25 (Cal. Ct. App. Sept. 26, 2002).

175. *Id.* at *24.

176. *Id.*

177. *See id.* at *24–25; *see also Nat’l Data Payment Sys. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000) (“The duty of best efforts ‘has diligence as its essence’ and is ‘more exacting’ than the usual contractual duty of good faith.”); 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 383–84 (2d ed. 1998).

courts have long recognized that “best efforts” requires more than simply good faith.¹⁷⁸

As demonstrated by *LTV Aerospace* and *Krinsky*, attempting to solve the ambiguity of efforts standards by making a linguistic distinction is particularly problematic. For this approach to work effectively, courts making a linguistic distinction between efforts standards should endeavor to explain exactly how the obligations required by the most common efforts standards relate to one another. The best way for a court to do this would be to define each efforts standard separately in a way that makes the gradation between the efforts standards clear. Courts using this potential solution must also explain that all efforts standards impose a higher burden than the implied covenant of good faith to help show where good faith actually fits on the spectrum with the various efforts standards.

Even with this guidance in mind for courts attempting to draw distinctions between efforts standards, attempting to make a linguistic distinction between efforts standards would still be problematic. The main problem with this approach is the sheer difficulty in trying to provide different, but also concrete, definitions of the various efforts standards used by parties.¹⁷⁹ For example, courts may easily be able to say in an opinion that “best efforts” imposes a higher burden than “reasonable efforts” and that “reasonable efforts” imposes a higher burden than “diligent efforts.” However, the difficulty arises in trying to provide tests on exactly how much more of a burden each efforts standard imposes in comparison to the others because scholars and courts have not been able to provide clear definitions for any of the efforts standards,¹⁸⁰ let alone for five different standards. This comparison would require courts to adopt at least five different tests, one for each efforts standard that is commonly used, in addition to the test used for the implied covenant of good faith. Developing and maintaining this large number of tests would likely not make distinguishing between efforts standards more efficient for either courts or practitioners and, therefore, this solution is not ideal.

C. Other Interpretations of Efforts Standards by Courts

Because of the failed efforts by both case law and uniform statutory laws, courts have taken other approaches to tackling the confusion

178. See, e.g., *Cruz*, 720 F.3d at 124 (“‘Best efforts’ requires more than ‘good faith’, which is an implied covenant in all contracts . . .”); see *supra* Section II.A.

179. See *supra* Section II.B.

180. See *supra* Section II.B.

surrounding efforts standards.¹⁸¹ These methods include failing to enforce undefined efforts standards because of vagueness¹⁸² and finding no distinction between “best efforts” and “reasonable efforts,” resulting in the application of the same standard for both.¹⁸³ As will be demonstrated, the best solution is to find no distinction between different efforts standards and impose the same burden on all efforts standards that is more stringent than the implied covenant of good faith.¹⁸⁴

1. Failure to Enforce Efforts Standards Because of Vagueness

Because numerous contracts have failed to include a definition for the efforts standards contained within the contracts,¹⁸⁵ it is not surprising that some courts have chosen not to enforce them for being too vague.¹⁸⁶ One example of this comes from the decision in *Kraftco Corp. v. Kolbus*.¹⁸⁷ *Kraftco* involved Kolbus’s obligation to use his “best efforts” to sell and distribute the products of Kraftco.¹⁸⁸ The court took issue with the parties’ lack of specificity in clarifying Kolbus’s obligation by stating, “In this case there was no obligation upon Kolbus other than to use his best efforts. He had no obligation to sell any specific quantity and no obligation to meet any quotas.”¹⁸⁹ Because of the failure to specify Kolbus’s obligations, the court determined that “[t]he mere allegation of best efforts is too indefinite and uncertain to be an enforceable standard.”¹⁹⁰

By finding that the “best efforts” standard was unenforceable, the court was able to avoid undertaking the complex analysis of objective and subjective factors used by other courts,¹⁹¹ and instead made the entire contract between the parties unenforceable.¹⁹² Nearly three decades

181. See *infra* Sections III.C.1–2.

182. See *infra* Section III.C.1.

183. See *infra* Section III.C.2.

184. See *infra* Section III.D.

185. See, e.g., *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 266 (S.D.N.Y. 1978); *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92, at *55 (Del. Ch. June 24, 2016); *Narrowstep, Inc. v. Onstream Media Corp.*, Civil Action No. 5114-VCP, 2010 Del. Ch. LEXIS 250, at *12 (Del. Ch. Dec. 22, 2010).

186. See *Kraftco Corp. v. Kolbus*, 274 N.E.2d 153, 155–56 (Ill. App. Ct. 1971); *Timberline Dev. LLC v. Kronman*, 263 A.D.2d 175, 178–80 (N.Y. App. Div. 2000).

187. *Kraftco Corp. v. Kolbus*, 274 N.E.2d 153 (Ill. App. Ct. 1971).

188. *Id.* at 154.

189. *Id.* at 156.

190. *Id.*

191. See *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979); *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92, at *54–60 (Del. Ch. June 24, 2016); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 754–55 (Del. Ch. 2008).

192. See *Kraftco*, 274 N.E.2d at 156.

following the *Kraftco* decision, a New York court reached a similar conclusion by refusing to enforce efforts standards unless evidence of “objective criteria against which a party’s efforts can be measured” is implicit or explicit.¹⁹³

These decisions send a message to practitioners that they must draft their efforts standards with more specificity or risk the possibility that the entire contract will not be enforced. However, the decisions go too far by failing to enforce the contract because contracting parties almost always intend for their efforts standard to mean something.¹⁹⁴ Courts’ decisions not to enforce contracts because of vague efforts standards are too harsh of a punishment, and this punishment has not been effective in changing how practitioners have drafted contracts, as demonstrated by the countless court decisions following these cases that deal with similar vague efforts standards.¹⁹⁵ For these reasons, failing to enforce undefined efforts standards because they are too vague is not an ideal solution.

2. No Distinction Between “Best Efforts” and “Reasonable Efforts”

Courts have been searching for a different solution to the confusion created by indistinguishable efforts standards and the enforcement issues they create.¹⁹⁶ This search has led courts in numerous jurisdictions to find no distinction between the various efforts standards.¹⁹⁷ For example, in *Permanence Corp. v. Kennametal, Inc.*,¹⁹⁸ the court noted the following: “While the phrase ‘best efforts’ is often used to describe the extent of the implied undertaking, this has been properly termed an ‘extravagant’ phrase. . . . A more accurate description of the obligation owed would be the exercise of ‘due diligence’ or ‘reasonable efforts.’”¹⁹⁹ This same logic of collapsing the “best efforts” standard and the “reasonable efforts” standard has been followed by various other courts tasked with interpreting efforts standards.²⁰⁰ The court in *Permanence* continued by

193. *Timberline Dev. LLC v. Kronman*, 263 A.D.2d 175, 178 (N.Y. App. Div. 2000).

194. Otherwise, every efforts standard appearing in a contract would be superfluous. See *Adams*, *supra* note 5, at 12.

195. See, e.g., *Bloor*, 601 F.2d at 614; *Williams*, 2016 Del. Ch. LEXIS 92, at *54–60; *Hexion*, 965 A.2d at 754–55.

196. See, e.g., *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990).

197. See, e.g., *id.*; *Trecom Bus. Sys. v. Prasad*, 980 F. Supp. 770, 774 n.1 (D.N.J. 1997).

198. *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98 (6th Cir. 1990).

199. *Id.* at 100 n.2 (citation omitted).

200. See, e.g., *Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research*, No. 15-CV-2044 (AJN), 2016 U.S. Dist. LEXIS 5441, at *19 (S.D.N.Y. Jan. 15, 2016) (analogizing the “best efforts” standard to “due diligence,” “diligent efforts”

distinguishing “best efforts” from the implied covenant of good faith, stating that “[a]n implied best efforts obligation is distinct from an implied covenant of good faith performance and fair dealing, which every contract contains.”²⁰¹ Similar to how courts have adopted *Permanence*’s logic in finding no distinction between varying efforts standards, courts have also followed suit in differentiating the “best efforts” standard from the implied covenant of good faith.²⁰²

D. The Best Option for Delaware: Collapsing All Efforts Standards into One “Reasonable Efforts” Standard

The approach taken by the court in *Permanence*²⁰³ has proven useful in interpreting efforts standards and is the best solution for the Delaware Court of Chancery to adopt in combatting the problems surrounding efforts standards.²⁰⁴ Under this approach, “good faith efforts,” “reasonable best efforts,” “best efforts,” “commercially reasonable efforts,” “diligent efforts,” and any other formulation of an efforts standard would all be defined the same way.²⁰⁵ The best method to define these efforts standards would be to obligate each party to the implied covenant of good faith inherent in all contracts, plus an extra

and “reasonable efforts” standards); *Soroof Trading Dev. Co. v. GE Fuel Cell Sys. LLC*, 842 F. Supp. 2d 502, 511 (S.D.N.Y. 2012) (“When interpreting the meaning of a ‘reasonable efforts’ clause, ‘New York courts use the term “reasonable efforts” interchangeably with “best efforts””); *Stewart v. O’Neill*, 225 F. Supp. 2d 6, 11 (D.D.C. 2002) (“Nonetheless, the agency was obligated to use its best efforts—that is, all reasonable efforts—to comply with all terms of the settlement agreement.”); *Trecom*, 980 F. Supp. at 774 n.1 (stating that an obligation to make “best efforts” is more accurately described as the exercise of “due diligence” or “reasonable efforts”).

201. *Permanence*, 908 F.2d at 100 n.2.

202. See, e.g., *Gilson v. Rainin Instrument, LLC*, No. 04-C-852-S, 2005 U.S. Dist. LEXIS 16825, at *13 (W.D. Wis. Aug. 9, 2005). The court in *Gilson* stated:

Because courts sometimes confuse the standard of best efforts with that of good faith, it will be well at the outset to make plain the distinction between the two standards. Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance. The two standards are distinct and that of best efforts is the more exacting.

Id.

203. See *supra* Section III.C.2.

204. See *supra* Part II. The Delaware Court of Chancery is best suited to undertake this solution because this court relies on experienced judges rather than inexperienced juries and because this court is regarded as possessing the ability to influence the rest of the country with respect to corporate matters. See BLACK, JR., *supra* note 10, at 1, 5–7.

205. See *supra* notes 199–200 and accompanying text. When defined in this way, each efforts standard would impose more of a burden than that of the implied covenant of good faith. See *Gilson*, 2005 U.S. Dist. LEXIS 16825, at *13; *supra* notes 201–02 and accompanying text.

level of diligence that involves balancing the objective and subjective factors of the parties' conduct.²⁰⁶

In other words, two tests would exist that the Delaware Court of Chancery could use when interpreting a contract depending on whether the contract contains an efforts standard. If no efforts standard is specified for an obligation, the obligation must meet the requirements that come with the implied covenant of good faith inherent in all contracts.²⁰⁷ Alternatively, if any efforts standard is specified for an obligation, regardless of whether it is "best efforts," "reasonable efforts," or some other formulation, that standard must be equated with "reasonable efforts," which will require meeting the requirements of the implied covenant of good faith and complying with an extra level of diligence. When determining what is required by this extra level of diligence, the Delaware Court of Chancery could balance the objective and subjective components of the parties' conduct similar to the courts' balancing in the *Bloor*, *Hexion*, and *Williams* cases.²⁰⁸ Not only would this ease the burden on courts tasked with interpreting these efforts standards, but this approach would also ease the burden on practitioners and contracting parties who currently engage in extensive negotiations with one another to decide on the appropriate efforts standard to include.²⁰⁹

To accomplish this task, the next time the Delaware Court of Chancery is tasked with interpreting an undefined efforts standard, the court should state that no matter what adjective is placed before the efforts standard, the efforts standard will be equated with "reasonable efforts" and will be interpreted using the same test mentioned in the preceding paragraph. The court could then add that the parties would only be obligated to comply with the implied covenant of good faith, without any extra level of diligence, if the parties did not include an efforts standard. Even though this extra assertion by the court would likely be considered dicta, it would give practitioners guidance to work from in future negotiations and give future courts an additional reason to

206. See *supra* Sections II.C, II.D.1–2 (discussing the various objective and subjective factors that courts have considered when interpreting an efforts standard).

207. See *supra* Section II.A (discussing what the implied covenant of good faith entails).

208. See *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979); *Williams Cos. v. Energy Transfer Equity, L.P.*, Nos. 12168-VCG, 12337-VCG, 2016 Del. Ch. LEXIS 92, at *54–60 (Del. Ch. June 24, 2016); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 754–55 (Del. Ch. 2008).

209. Presumably, the burden on practitioners and contracting parties would be lessened because they would only have to choose whether or not to include an efforts standard in the contract, rather than negotiating which modifier to place in front of the efforts standard.

make this an affirmative holding when they are faced with a situation where the parties failed to include an efforts standard.

If future decisions by the Delaware Court of Chancery regarding efforts standards are able to consistently apply the proposed test, the problem involving the ambiguous interpretation of efforts standards will be solved. If Delaware can solve this problem through the Delaware Court of Chancery, the rest of the country can look to this court for guidance, hopefully leading to nationwide clarity on this issue.

Meanwhile, practitioners need to spend more time articulating more precisely how the efforts standard is to be measured rather than focusing on the modifier that comes before the efforts standard.²¹⁰ Practitioners could better specify the amount of effort required by using benchmarks within the language of the efforts standard.²¹¹ Some examples of benchmarks include past performance by parties in their relationship with one another, past performance by the parties in other relationships, industry standards for the industry of the contracting parties, or specific promises made between parties while negotiating.²¹² Practitioners could also specify the amount of effort required by clarifying what parties do not have to do to fulfill their obligations, such as spend more than a certain amount of dollars, commit an action that would lead to insolvency, or commit an action that would cause litigation to ensue.²¹³

By eliminating the confusion regarding how efforts standards should be interpreted, the Delaware Court of Chancery could solve the problems inherent in courts making linguistic distinctions between efforts standards²¹⁴ and courts not enforcing efforts standards because of vagueness.²¹⁵ Put differently, practitioners would still have their contracts enforced,²¹⁶ but would be encouraged to spend more time in carefully drafting the most important detail of the efforts standard—how it is to be measured—as opposed to worrying about which modifier to place before the efforts standard.²¹⁷

210. See Adams, *supra* note 5, at 15–16, 20.

211. See *id.* at 15–16.

212. See *id.*; Murphy, *supra* note 3.

213. See Adams, *supra* note 5, at 18–19. Even negotiating these benchmarks or carveouts may prove difficult because of, among other reasons, the high upfront cost of negotiating. See Murphy, *supra* note 3. However, the inclusion of some benchmarks or carveouts within an efforts standard could help assure a party that it would not be required to take action “out of proportion to the benefits [accrued] to it under the contract.” See Adams, *supra* note 5, at 18. Further, parties could avoid the possibility of litigation, and, thus, the application of a test that they did not consent to, by including these benchmarks or carveouts. See Murphy, *supra* note 3.

214. See *supra* Section III.B.

215. See *supra* Section III.C.1.

216. See *supra* Section III.C.1.

217. See Adams, *supra* note 5, at 15–16, 20.

IV. CONCLUSION

As stated in the landmark case of *Bloor*, when it comes to efforts standards, the “law is far from clear.”²¹⁸ Practitioners and contracting parties continue to squabble over which efforts standard is best suited to exemplify how much effort is required to fulfill the obligations of the contract.²¹⁹ Likewise, courts forced to interpret these efforts standards whenever a dispute arises have struggled to differentiate among the variations of efforts standards that exist.²²⁰ Because of the inherent problems involving efforts standards, the Delaware Court of Chancery and drafters of uniform laws, such as the UCC, should endeavor to equate all efforts standards under one standard that is more stringent than the good faith covenant implied in every contract.²²¹

Collapsing the different efforts standards into one efforts standard would provide courts with only one standard that could be applied to the efforts standard in the contract, and a different standard that could be applied when an efforts standard is lacking.²²² Further, because the same, default standard would be applied regardless of which efforts standard is used, practitioners would spend less time selecting an efforts standard and more time crafting how they want the efforts of the contracting parties to be measured.²²³ Practitioners would know the basic test that the court would apply to their efforts standard with absolute certainty, giving them an opportunity to inform the court of what objective and subjective factors should be considered most important to the court’s analysis.²²⁴

In the meantime, while courts and uniform laws fail to clearly define the adjectives coming before efforts standards, parties should spend more time specifying, with precise language, how the efforts should be measured rather than wasting time on the adjective included before the efforts standard.²²⁵ In the absence of clarity from the Delaware Court of Chancery or from uniform laws on efforts standards, a practitioners’ failure to heed this advice will likely lead to unpredictable results²²⁶ that may not always be favorable to their clients.

218. *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 613 n.7 (2d Cir. 1979).

219. *See supra* note 1 and accompanying text.

220. *See supra* Section III.B.

221. *See supra* Section III.D.

222. *See supra* Section III.D.

223. *See supra* Section III.D.

224. *See supra* Section III.D.

225. *See supra* notes 210–13 and accompanying text.

226. *See, e.g., supra* Section III.C.I.
