

[Best Efforts, Commercially Reasonable Efforts, and Reasonable Efforts Provisions in Commercial Contracts](#)

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Reviewed on: 05/23/2019

It is common for commercial agreements to include a term addressing the standard of effort that parties must exert in their performance of the agreement. Such standard often compels a party to use its “best efforts,” “commercially reasonable efforts,” or “reasonable efforts” with respect to its performance of all or specifically designated contract duties.

Effort provisions must be drafted with care, as no uniform definition for efforts clauses has been adopted. To the contrary, efforts clauses have been interpreted differently by various courts and, consequently, may entail different requirements in different jurisdictions. The lack of any uniformity can result in uncertainty regarding what efforts a party must actually employ to fulfill its contractual obligations. Moreover, some courts have ruled that certain efforts provisions alone, when not accompanied by any objective criteria, are too vague to be enforced. Counsel should therefore consider whether use of such terms is appropriate in a client’s agreement and, if included, must have a thorough understanding as to how such term has been construed in jurisdictions relevant to the clients’ commercial agreements.

This practice note discusses the use and legal effect of efforts clauses in commercial agreements. This note will also provide guidance in drafting agreements to avoid and/or minimize the risk associated with the use of efforts clauses.

For related information, see [Duty and Performance Requirements of Each Party](#).

Use of an Efforts Provision in Commercial Agreements

An efforts provision can be used to address a wide variety of obligations in commercial agreements. The clause may address a party’s general obligation to complete a transaction or to perform a specific function, such as obtaining regulatory approval, consents, or financing required to consummate a deal. An efforts clause can also address a party’s obligations with respect to a particular aspect of its performance, such as to develop a product, to market and sell goods, or rendering services.

While parties to an agreement may believe they understand what the designated efforts term requires, the law has proven to be quite uncertain as to what actual efforts must be utilized. Moreover, a party’s understanding of what an efforts clause entails may often be different from the other party’s interpretation, as well as from what the law actually requires. Additionally, a party may discover after a perceived breach has occurred that if the provision was not properly drafted it may not be enforced at all, thereby causing it to lose what may have been a bargained for term that is of critical importance with respect to the transaction.

Efforts clauses are often used to address terms in an agreement that involve a degree of uncertainty or are dependent upon the unilateral efforts of a party to carry out certain functions or actions that will permit the contract to proceed or will allow the parties to achieve the goals and/or financial benefits of the agreement. For example, a contract may be contingent upon one of the parties obtaining financing or acquiring permits or approvals. While such events will, to a certain extent, be contingent upon external factors, such as obtaining approval from a third party regulatory or government agency, a party’s efforts can have a great impact on the final result. Other

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agreements may include efforts provisions regarding the parties' activities throughout the term of the agreement, such as a sales agency agreement which requires the agent to use its best efforts to promote, market, and sell the supplier's goods, or a software development agreement in which the parties agree to use their best efforts to develop a new product. Regardless of the context in which it is used, the ultimate success of the contract and the parties' ability to reap the full benefits of their bargain will often be based upon the other party's diligent and good faith adherence to the designated efforts standard.

Best Efforts

A "best efforts" standard is generally deemed the most difficult and arduous of the various efforts clauses that can be used, and imposes a greater burden than a provision calling for commercially reasonable or reasonable efforts. Best efforts generally require that a party pursue all reasonable methods to satisfy the relevant contractual obligations, and that a party act according to what would be expected of persons involved in the same industry, exercising reasonable prudence while acting under similar circumstances and conditions, and with regard for the interests of all parties to the contract.

Judicial interpretation of best efforts clauses has varied greatly. While the courts in some states hold that "best efforts" requires something greater than "reasonable" efforts, other jurisdictions find no significant difference between the two standards. In other jurisdictions "best efforts" has been equated by the courts with "good faith," while other courts have held that the standard has diligence as its essence. Such courts have noted that best efforts is separate from and more exacting than good faith, which is founded upon honesty and fairness rather than diligence, and that best efforts requires the promisor to pursue all reasonable methods to satisfy its obligations. For further discussion on good faith, see [The Implied Covenant of Good Faith and Fair Dealing](#).

A few courts have ruled that use of the term "best efforts," without more, is too vague to be enforceable. Such courts have opined that without objective criteria or a clear set of guidelines against which it can measure a party's best efforts, it cannot decide whether the standard has been met without imposing its own conception of what the parties should or might have done, rather than rendering its decision based upon the bargain mutually agreed upon by the parties when entering into the contract.

Accordingly, the disparate judicial interpretations of best efforts reveals that, depending on what court is construing the provision, parties may not be afforded any benefit from the clause or may not receive the heightened effort it bargained for when negotiating the agreement.

Parties sometimes lack a clear understanding as to what best efforts requires, erroneously believing that it requires the promisor to take every available action that exists to accomplish the designated objective. Courts, however, have made clear that compliance with a best efforts clause has limitations and does not require a party to take every conceivable measure within its power to accomplish the desired result. A promise to use best efforts does not require a party to disregard its own reasonable interests, or incur expenses that will cause it to become insolvent or bankrupt. However, while a best efforts provision does not compel a party to exclusively devote itself to serving the contractual interests of the other party, it is mandated to give due consideration to the other party's objectives under the agreement.

Nor is a party required to incur extraordinary expenses or pursue costly and baseless endeavors simply to satisfy its best efforts obligation. Rather, many courts have held that best efforts is qualified by a reasonableness test, which compels a party to use reasonably diligent efforts and prudence in its performance, which in turn will be largely based on the particular facts and circumstances presented in the case. In other words, assessment of whether the standard has been met will be based on what a reasonable person or business would do in a similar situation.

When a dispute regarding a best efforts provision arises, the operative question will usually be how hard a party was required to try to achieve the articulated objectives set forth in the agreement and what measures the party was required to carry out in order to satisfy its best efforts obligations. Construction of an efforts clause will be dependent on a multitude of factors, including the terms and nature of the particular agreement, the capability and

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resources of the party, and the plaintiff's justifiable expectations. Determination of whether the standard has been met is usually a question of fact for the jury, based on the unique facts of the case.

Compliance with a best efforts provision and a determination of whether such standard has been met is not, however, dependent upon whether a defendant proves successful in its efforts. Such a clause does not serve as a guarantee of any results that will be achieved, but only goes to the labors a party must apply to achieve the desired result. Where a party encounters difficulties in carrying out the terms of a contract, despite its diligent and good faith efforts to secure the contemplated result, there will usually be no basis for a claim that the standard was breached. In addition, when asserting a claim that a party breached its best efforts obligations, the plaintiff must not only show that the defendant failed to use best efforts, but also establish that had the defendant's behavior been different and met the standard, the results desired by the plaintiff would have been achieved.

Consideration may be given to numerous factors when determining the sufficiency of a party's efforts, including:

- The expertise and abilities of a party
- The party's financial status
- The experience of the party
- The costs associated with a party's performance in comparison to the anticipated financial benefits it will derived from the contract
- The opportunities available to a party with respect to performance
- The mutual goals of the parties under the subject contract
- Industry standards and practices
- Promises made by the parties during negotiations
- A party's practices with respect to other similar contacts
- How the promisor would have acted if the promisor and promisee had been the same entity

As these factors indicate, courts will often not limit itself to the express terms of the contract to define best efforts. Rather, courts may look to external standards or circumstances when they impart a reasonable degree of certainty to the meaning of a best efforts clause in an agreement. A court will interpret a best efforts clause as it would any other contractual provision, with the primary focus on ascertaining the intention of the parties at the time they entered into the contract. If the parties' intent can be determined from the plain meaning of the contract language, there will be no need for the court to consider any extraneous criteria. If the contract language fails to provide any objective criteria or guidance or is ambiguous, the courts may look to extrinsic evidence for direction on how to interpret the provision.

Commercially Reasonable Efforts

Parties will sometimes use a "commercially reasonable efforts" standard. This standard has been subject to less judicial scrutiny than the other efforts standards. The courts have noted that the term is ambiguous and subject to multiple interpretations, and that no clear definition of commercially reasonable efforts has been established. The courts have further observed that it is not clear how a commercially reasonable efforts clause differs from a best efforts standard.

Courts have characterized commercially reasonable efforts as an objective standard requiring a business to use the efforts that a reasonable business entity would have made under similar circumstances. Some courts also inquire whether a party acted in good faith when determining whether a commercially reasonable efforts provision has been satisfied. While some commentators and courts have opined that commercially reasonable efforts is a less strenuous standard than best efforts, other courts have provided the same treatment for these two standards.

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To establish a violation of a commercially reasonable efforts clause, a plaintiff must usually offer evidence to demonstrate that the defendant's efforts were deficient in violation of the relevant standard customarily followed in the party's industry. Simply disagreeing with the particular efforts undertaken by a party or alleging that such efforts were deficient are, alone, inadequate to establish that the standard was not met. Similarly, a violation cannot be established by merely observing, in hindsight, that the defendant could have done something differently that would have produced a better result. Plaintiffs must usually present proofs of the applicable standard for the trade, which often will require specialized industry knowledge that will be in the form of expert testimony. As with the other efforts standards, an analysis of what constitutes commercially reasonable efforts will entail a fact-intensive inquiry taking into consideration the relevant circumstances of the case.

When construing commercial reasonableness, the courts generally will not make an item by item review of every action the promisor engaged in to determine whether any specific measure should or should not have been used. Rather, the courts will look at a party's efforts as a whole, which efforts may be measured against an objective industry standard. Courts will avoid interjecting their opinion as to what activities should and should not have been carried out, as the courts are not experts with respect to the contracts they rule upon and will not rewrite the parties' contract to include terms they may deem more appropriate.

The argument that only industry standards are relevant to a determination of commercial reasonableness has, however, been rejected. The courts have held that both objective and subjective components are relevant. Because a party would not agree to perform a contract to its detriment, subjective factors such as a party's financial resources, business expertise, and business practices will be relevant when deciding if its efforts satisfied commercial reasonableness.

The parties' obligations to perform the terms of a contract must be evaluated in the context of the totality of the business arrangement contemplated by the contract. Application of industry standards in relation to commercial reasonableness must take into account factors such as the skills and costs associated with a party's conformance to industry standards, as well as the relative usefulness of such industry standards to the subject contract.

Reasonable Efforts

Use of a "reasonable efforts" standard generally implies that a party will do what it can and what is reasonable under the prevailing circumstances, which will depend upon the context, purpose, and amount of the subject contract. As with other efforts standards, what is reasonable will be a relative term that takes into consideration the facts and circumstances presented in a particular contract. Accordingly, most disputes involve factually specific determinations for the jury or trier of fact.

Although reasonable efforts standard is usually construed to be less onerous than best efforts, several courts have given the term the same meaning as best efforts. For example, a federal district court opined when interpreting the meaning of reasonable efforts that "New York courts use the term reasonable efforts interchangeably with best efforts," which in turn requires a party to act with good faith in light of its capabilities.

Depending on the jurisdiction, a "best efforts" clause may only require a contracting party to engage in efforts that are reasonable under the circumstances, which is the same standard provided by a "reasonable efforts" provision.

TIP: When drafting or negotiating a contract, counsel should review the governing law that will control the agreement and ascertain how the courts in that jurisdiction interpret efforts provisions. If the courts do not distinguish between "best" and "reasonable" efforts, there will be no need to utilize negotiating leverage over the type of efforts the agreement will require, as the courts will apply the same standard regardless of the language used in the agreement.

Drafting an Efforts Provision

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Counsel must proceed with caution before using an efforts standard in their clients' agreements. An efforts provision, alone, is vague and whether it has been met will depend on the unique circumstances presented in every case. The lack of any established definition of the terms and the inherent subjectivity involved in construing such provisions results in great uncertainty for clients, who may be subjected to significant damages if they are found to have breached an efforts provision.

When negotiating an agreement, parties and their counsel will often focus on what efforts standard should be used in the contract, and whether the agreement should require a "best efforts," "commercially reasonable efforts," or "reasonable efforts," or some hybrid compromise. However, the difference between the verbiage used in the efforts term, such as whether best efforts is preferable to commercially reasonable efforts, may be of negligible importance. Rather, greater focus should be directed at what the efforts clause actually means and what it requires from the parties, as well as how to gauge whether a party has satisfied the articulated efforts requirement.

Drafting an effective efforts provision is further necessitated by the fact that there is no generally applied or accepted standard for any of the efforts clauses. As such clauses may require a party to carry out different levels of performance in various jurisdictions based on the disparate interpretations of such provisions by the courts, the use of an efforts provision alone presents a level of ambiguity and may create uncertainty as to what a party must specifically do under a contract. Moreover, the type of effort required by a contract may be largely inconsequential, as many courts do not see any meaningful distinctions between the various efforts standards.

Another risk presented when an efforts term is not adequately provided for in the agreement is that the court may look to external sources for guidance in determining what actions are required to satisfy such standard. For example, the court may look to industry practice or standards to help gauge whether a party fulfilled its obligations in a specific contract, especially with regard to commercially reasonable efforts. In some cases, there may be well developed industry standards that will provide a reasonable degree of certainty as to the meaning of an efforts provision. The courts have also observed that evidence of the actions or capabilities of other entities not subject to the parties' contract may sometimes be relevant when construing an efforts provision, so long as the evidence of performance by such third parties also evinces the capabilities of the contracting party. Parties may therefore be subjected to a standard that was not contemplated or desired when entering into the agreement.

Careless or inadequate drafting of efforts terms can create unnecessary and unwanted uncertainty in an agreement for both parties. A client may not know what specific efforts are required for performance, whether its actions are insufficient, and when it is in breach of contract. Conversely, the party benefiting from the efforts clause may not have a meaningful basis to determine whether the other party has complied with the efforts standard or if it breached the agreement.

Rather than spending significant time negotiating the type of efforts standard that will be used in the contract, counsel would be far better served directing his or her attention to setting forth what the parties will be required to do in order to meet the articulated standard. Although drafting terms that set forth benchmarks to measure a party's efforts in performing a contract will usually be more challenging than merely choosing what words to use to define the standard, the failure to do so could render the efforts term ineffective or even unenforceable. Use of standards, examples, and benchmarks can significantly reduce the uncertainty regarding what actions the client will actually be required to take with respect to performance of its contract.

Use Objective Criteria When Drafting an Efforts Provision

Simply using an efforts standard in a contract without any benchmarks or objective criteria to measure a party's performance will result in great uncertainty. Clients may not have a good understanding of what they actually have to do to meet the standard, the parties may have different interpretations of what is required, the courts may rely upon industry and external standards not agreed to by the parties, and in certain cases the clause may be unenforceable. Parties can remove such uncertainty by including detailed terms regarding the specific efforts that must be carried out to meet the requirements of an efforts clause. Thoughtfully drafted efforts provisions can benefit both parties; the promisor will have clear guidelines to gauge its activities and the promisee will benefit from objective criteria from which it can determine if the efforts provision has been met.

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As previously noted, some courts refuse to enforce a best efforts clause when not accompanied by any objective performance criteria on the grounds that such a term is too indefinite to be enforceable. A court will always be reluctant to substitute its standard for that of the contracting parties, or to provide instructions as to what resources a party should allocate to perform its duties, especially where the parties themselves failed to properly address such obligations in their agreement. It is not the court's place to interject its own idea of what the parties should or could have done. In contrast, when parties use a best efforts standard along with performance criteria, courts will generally enforce such a provision, as there will be an objective basis from which the court can gauge whether a party met its promise to use best efforts.

Counsel can avoid the pitfalls prevalent with efforts clauses when drafting the agreement by setting forth objective criteria in the agreement. An efforts provision can include specific activities and efforts that must be carried out by the party, or identify specific industry standards or other benchmarks to gauge performance. Among other things, counsel can:

- Define the efforts term with particularity in the agreement
- Include specific actions a party must take to meet the standard
- Use examples of what measures a party can carry out to satisfy the efforts duty
- Apply an agreed upon industry or other external standard to gauge a party's performance
- Include specific benchmarks
- Base performance of an efforts provision on similarly situated industry peers
- Use efforts carried out by a party in its other contracts
- Include a time frame or a deadline by which a party must perform certain obligations
- Include a limitation or cap on the amount a party will be required to expend pursuant to an efforts clause

By using sample performance benchmarks, counsel will greatly enhance the likelihood that the efforts clause will be upheld by a reviewing court, that the client will receive the level of performance it bargained for, and the parties will be provided with meaningful guidance as to what measures they are required to take to perform the agreement.

TIP: If specific actions are included in an efforts provision, counsel may want to ensure the clause is drafted in a manner so that such measures are only minimum requirements but are not deemed as exhaustive. Counsel can use language such as "including but not limited to" or "among other things," to make clear that the list is not intended to be all-inclusive and does not limit the measures a party may be required to take, as it will usually be impracticable to foresee and designate all reasonable measures a party may take to perform the contract at the time of contracting.

Use of such objective criteria can also help avoid costly and protracted litigation, as parties will have clear guidelines from which to measure their required performance. The issue of whether a party performed in accordance with an efforts clause will usually be fact intensive and not appropriate for resolution on summary judgment. Similarly, courts will often require expert testimony to establish industry standards with regard to a commercially reasonable standard. The use of objective criteria can therefore help avoid a dispute, allow the issue to be resolved in a summary manner in cases where the breach or satisfaction of the standard is readily apparent based on the objective criteria, and avoid incurring expert fees to establish industry standards.

For example, in a contract to remove an unknown quantity of contaminants from real property, the removal company was required to use its best efforts. The contract, however, also included specific goals and estimates regarding the amount of anticipated soil removal, particle target levels and a time frame in which to perform. When the landowner professed dissatisfaction with the efforts and refused to pay the removal company, the court was able to review the performance criteria and conclude that the company satisfied the best efforts obligation.

Limitations on a Party's Obligations

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If an agreement includes any objective criteria, benchmarks, or specific actions that a party will be required to take to meet its obligations under an efforts provision, counsel should carefully review such terms with the client and confirm that they are acceptable to and can be carried out by the client. Counsel may also want to place reasonable limitations on what measures a client must take to satisfy an efforts standard. For example, in some transactions a party may not be willing to incur expenses beyond a certain amount, or that would jeopardize its solvency, or is disproportionate to the benefits it will derive from the contract. Consider terms setting forth any limitations on the financial expenditures a client will incur in performing the agreement.

Clients may also be concerned that an efforts clause not require it to change its general business strategy, incur liabilities, initiate a legal action, take action that might violate any of its other contractual obligations, etc., in which event such limitations should be spelled out in the agreement.

TIP: If objective criteria are used in the agreement to define or explain an efforts clause, and there are specific actions a party is not willing to take, counsel should include express language that carves out such actions.

When drafting the contract, counsel should further consider that the client may be confronted with unanticipated obstacles or costs in connection with its performance of the agreement. Events not foreseen at the time of contracting may cause a party's performance to conflict with its own business interests or diminish the contemplated benefits of the transaction, such that it may no longer be incentivized to engage in best efforts (or any efforts) to achieve a result that is no longer desired or beneficial. Similarly, a client may not be willing to incur substantial amounts, in comparison to the value of the contract for that party, in order to carry out the objective of the contract. Counsel should confer with the client and ensure that the agreement will not require the client to engage in any efforts or incur any expenses that the client considers unreasonable under the circumstances. By defining the efforts term or including objective criteria or guidelines in the agreement, a party can set forth the specific measures it is willing to perform to accomplish the objective and place reasonable limits on what it will be required to do and amounts it will be required to expend to meet the standard.

Counsel will also want to be sure that an efforts provision will not inadvertently serve to restrict or preclude a client from pursuing other business interests. Unless expressly agreed to by the parties, engaging in best efforts should not mean that a party must dedicate all its time and resources to achieving the results contemplated by the contract, at the expense of other business opportunities. For example, a best efforts clause in a product development agreement usually should not prevent a party from being able to dedicate some of its personnel and resources to developing other products unrelated to the agreement. In such cases, consider using express language that permits a party to pursue other business endeavors and that such pursuits will not violate a best efforts standard.

TIP: Counsel should also consider including a jury waiver provision in contracts which include an efforts standard. Most disputes regarding whether an efforts provision has been breached will be factually specific and left to the jury to decide (if there is no jury waiver), as such issues are usually not appropriate for summary judgment. A client may prefer to have a judge interpret and rule upon the issue of whether a party satisfied the efforts standard rather than a jury.

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