

Best Efforts and Reasonable Efforts Clauses: Couldn't You Try Just a Little Bit Harder?

by George W. Kuney



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INTRODUCTION

Contracts are filled with standards for behavior. This article concerns two of the most common: "best efforts" and "reasonable efforts" covenants. The law regarding their interpretation is context-sensitive and variable from case to case and jurisdiction to jurisdiction. But although the meaning of these covenants may be ill-defined, the case law makes clear that they are enforceable. As a result, they should not be included in a contract without considering what they actually mean. A best or reasonable efforts clause should be drafted with specific objective benchmarks and standards by which to judge efforts as "best" or "reasonable." Such covenants should be the product of conscious and deliberate choice.

Words matter. The contract drafter should plan for how hard the parties must try before they can abandon an effort without breaching the contract. A review of the case law indicates that leaving the matter to chance may be exactly what results from an undefined covenant to use best or reasonable efforts.

BEST EFFORTS, REASONABLE EFFORTS

When has one tried hard enough to keep one's promises, even if those attempts are unsuccessful? This question often arises in breach of contract actions in which one or more of the parties is under a

best efforts or similar obligation such as reasonable efforts.

When Does a Duty of Best Efforts Arise?

A duty to use best efforts usually arises in one of three ways in contracts cases. First, the contract itself may specifically require that the promisor put forth his or her best efforts. Second, the contract language might specify a result, and this may be interpreted as imposing a duty of best efforts. Finally, a court may impose a duty of best efforts based simply on the facts and circumstances surrounding a contract. Farnsworth, *Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U Pitt L Rev 1 (1984).

There Is No Single Best Efforts Test

There appears to be no firm rule as to what constitutes sufficient best efforts. In general, each case turns on its particular facts. Some cases suggest that best efforts requires the same amount of effort under a contract as that expended under other, similar contracts where the quality of effort has not been questioned. See *Olympia Hotels Corp. v Johnson Wax Dev. Corp.* (7th Cir 1990) 908 F2d 1363, 1373. Others imply that the promisor should merely avoid manifestly harmful conduct. See *Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publishing Co.* (1972) 30 NY2d 34, 281 NE2d 142. The duty to act "reasonably," like a duty to employ "best efforts," or

to act in "good faith," is said not to be reducible to "a fixed formula, . . . [It] varies with the facts and the field of law involved." *Rey v Lafferty* (1st Cir 1993) 990 F2d 1379, 1393. See, e.g., *US Ecology, Inc. v California* (2001) 92 CA4th 113, 111 CR2d 689 (state of California's breach of best efforts clause in agreement to acquire, develop, and license low-level radioactive waste facility in Ward Valley).

The proper test for whether a party has used best efforts in any particular case focuses on the efforts expended, not whether the efforts yield the desired result.

These tests highlight the desirability of setting forth what the duty means in a particular contract, because one cannot depend on the courts to do so uniformly. The question of whether a party has met this vaguely defined standard is normally a question for the jury, making a clear definition in the contract even more desirable. See *United Telecommunications, Inc. v American Television & Communication Corp.* (10th Cir 1976) 536 F2d 1310, 1319 (competing evidence had been submitted on issue of best efforts, thus it was a jury question).

The Evolution of Best Efforts Into an Enforceable Covenant

Perhaps the most widely known, if not the first, best efforts opinion was written by Justice Cardozo in *Wood v Lucy, Lady Duff-Gordon* (1917) 222 NY 88, 118 NE 214. In that case, the court found an implied duty on the part of the licensee of a licensed product to use reasonable efforts to promote the sale of the product. In effect, the court held that the existence of this obligation was necessary to provide the mutuality of obligation required to make the contract legally binding. See 222 NY at 91.

NOTE: If one party to a contract is under no real obligation to perform, that party's promise is considered illusory. The contract is said to lack mutuality of obligation, and will be unenforceable. *Money Store Inv. Corp. v Southern Cal. Bank* (2002) 998 CA4th 722, 120 CR2d 58. For a recent California case following *Wood v Lucy, Lady Duff-Gordon*, *supra*, see *Third Story Music, Inc. v Waits* (1995) 41 CA4th 798, 48 CR2d 747.

In *Milenbach v Commissioner* (9th Cir 2003) 318 F3d 924, the Ninth Circuit held that the duty of the Oakland Raiders to merely use best efforts to construct

luxury suites and operate them profitably, and to devote any profits to repay an advance of funds, was sufficiently non-illusory to support characterizing the advance as a loan rather than income, even though repayment was not absolutely or unconditionally required. See also *New Paradigm Software Corp. v New Era of Networks* (SD NY, Dec 9 2002, 99 CIV 12409) US Dist Lexis 23753.

For years after *Wood*, the prevailing view was that the duty of best efforts was too vague to be enforceable, but this began to change in the mid-1980s. Today, "best efforts" is a familiar term to lawyers and not unusual to find in a contract." *Ramirez v DeCoster* (D Me 2001) 142 F Supp 2d 104, 110. Unlike an agreement to agree, an agreement to use best efforts to achieve a goal is a "closed, discrete, and actionable proposition." *Cable & Computer Technol., Inc. v Lockheed Sanders, Inc.* (9th Cir 2000) 214 F3d 1030, 1034.

Best Efforts Is Different Than Good Faith

A duty of best efforts is sometimes confused with the duty of good faith. See, e.g., *Triple-A Baseball Club Assocs. v Northeastern Baseball Inc.* (1st Cir 1987) 832 F2d 214, 225 (equating the two standards under Maine Commercial Code). The two obligations are separate and distinct, however. Good faith is a standard with a moral component that has honesty and fairness at its core and is imposed on every party to a contract. See *Storek & Storek, Inc. v Citicorp Real Estate, Inc.* (2002) 100 CA4th 44, 59, 122 CR2d 267. See also *Kransco v American Empire Surplus Lines Ins. Co.* (2000) 23 C4th 390, 400, 97 CR2d 151. "Best efforts is a standard that has diligence as its essence and is only imposed on those contracting parties that have undertaken that level of performance." Farnsworth, 46 U Pitt L Rev at 8.

Focusing on Efforts, Not Results

The proper test for whether a party has used best efforts in any particular case focuses on the efforts expended, not whether the efforts yield the desired result. See *S.N. Sands Corp. v British Pac. Aggregates, Ltd.* (ND Cal, Aug 19, 2002, CO-1966 SI) 2002 US Dist Lexis 15470. One court has stated that "best efforts, as commonly understood, means, at the very least, some effort. It certainly does not mean zero effort." *Hinc v Lime-O-Sol Co.* (7th Cir 2004) 382 F3d 716, 721 (licensee of stain removal formula made no attempt to manufacture or market the product). See also *Satellite Broadcasting Cable, Inc. v Telefonica de Espana, S.A.* (D PR 1992) 807 F Supp

210, 212 (duty to exert best efforts requires affirmative steps toward satisfaction of condition precedent).

Most courts, when determining that a party did not exert its best efforts, do not specify what more the party could have done to meet its obligations. See, e.g., *Walser Auto Sales, Inc. v City of Richfield* (Minn App 2001) 635 NW2d 391, 400 (“efforts needed to satisfy [best efforts] standard are substantially more than what respondents gave”). In *Walser Auto Sales*, the court held that sending two letters requesting a voluntary interior inspection of buildings did not constitute the city’s best efforts to obtain permission to inspect.

Breach of a best efforts duty has been found when the promisor ceased performance before its termination of the contract was effective. See, e.g., *Marsu, B.V. v Walt Disney Co.* (9th Cir 1999) 185 F3d 932; *United Roasters, Inc. v Colgate-Palmolive Co.* (4th Cir 1981) 649 F2d 985, 990, cert denied 454 US 1054. Breach has also been found when the promisor engaged in a number of malfeasances and nonfeasances (see *Bloor v Falstaff Brewing Corp.* (2d Cir 1979) 601 F2d 609, 614) and when the promisor engaged in conduct that perhaps can best be described as “jerking around” the other party while purporting to perform the contract (see *Chen v Thomas & Betts Corp.* (ND Cal, July 13, 2005, C-02-3540 SC) 2005 US Dist Lexis 16010 (distributor did not use best efforts under distributorship agreement when he repeatedly modified, canceled, and reinstated orders and intimated that he would become the other party’s competitor)).

When a promisor encounters difficult problems in carrying out the terms of the contract, no breach of the best efforts clause has been found. See *Western Geophysical Co. v Bolt Assocs.* (2d Cir 1978) 584 F2d 1164, 1171. Compounding, or perhaps acknowledging, the murkiness of the duty, one court stated that (*United States v Board of Educ.* (7th Cir 1986) 799 F2d 281, 292):

any best efforts clause . . . can be satisfied by any of a wide range of possible levels and types of performance that comport with the exercise of “good faith” by the obligor.

Best Efforts Contracting: Be Specific, Get Enforced

In determining the enforceability of best efforts clauses, many courts initially attempt to determine whether the contract sets some kind of goal or guideline—an objective to be accomplished by a party’s best efforts—against which the party’s best efforts may be measured. See *Herrmann Holdings Ltd. v*

Lucent Technol., Inc. (5th Cir 2002) 302 F3d 552, 558 (under Texas law, best efforts clause must set some goal or guideline or else the clause is not enforceable). See also *First Union Nat’l Bank v Steele Software Sys. Corp.* (Md App 2003) 838 A2d 404 (“best efforts to refer business” clause could reasonably be interpreted to require less than 50 percent of bank’s business). Courts may require a clear set of guidelines, either express or implied, against which parties’ best efforts may be measured. See *Laboratory Corp. v Upstate Testing Lab., Inc.* (ND Ill 1997) 967 F Supp 295; *Pinnacle Books, Inc. v Harlequin Enterprises, Ltd.* (SD NY 1981) 519 F Supp 118. If the clause is too vague, it may be held unenforceable. *Fairbrook Leasing, Inc. v Mesaba Aviation, Inc.* (D Minn 2003) 295 F Supp 2d 1063, 1076 (duty to use best efforts to obtain extensions of subleases was too vague to be enforceable).

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On the other hand, lack of a concrete standard is not always fatal, and courts will turn to an objective standard of reasonableness if needed. In *Gentieu v Tony Stone Images/Chicago, Inc.* (ND Ill 2003) 255 F Supp 2d 838, the court found that a best efforts clause in an exclusive licensing agreement between a photographer and a photographic agency, which obligated the agency to use best efforts to license the photographer’s work and maximize profits from the licensing, imposed an obligation on the agency to use good faith reasonable efforts to do so, despite the lack of a specific standard in the contract.

The Uniform Commercial Code recognizes, and may even impose, a best efforts standard, but does not itself define the term. See, e.g., Com C §2306(2). It validates contractual standards adopted by the parties as long as the standards are not manifestly unreasonable. See Com C §1102(3).

The Model Asset Purchase Agreement published by the American Bar Association includes the following definition of “best efforts” (Model Asset Purchase Agreement with Commentary 15 (ABA 2001)):

[T]he efforts that a prudent Person desirous of achieving a result would use in similar circumstances to achieve that result as expeditiously as possible, provided, however, that a Person required to use Best Efforts under this Agreement will not be thereby required to take actions that would result in a material adverse change in the benefits to such

Person of this Agreement and the Contemplated Transactions or to dispose of or make any changes to its business, expend any material funds or incur any other material burden.

This definition, however, does not really clarify the issue. The proviso specifying that best efforts do not require material adverse change, expenditure of material funds, or any material burden detracts from the concept of “best.” As commonly understood, doesn’t best efforts imply some kind of material effort, expense, or change? The ABA’s alternative, the standard of “commercially reasonable efforts,” is subject to the same criticism.

As with best efforts, the question of whether a party to the contract exercised reasonable efforts or reasonable diligence is a factual question depending to a great extent on the fact finder’s determination of credibility. . . . What might constitute “reasonable efforts” in one setting might be manifestly unreasonable in another.

The best suggestion in the Model Asset Purchase Agreement commentary is to provide for a specific dollar limit on expenses to be incurred on account of specific best efforts covenants or for all similar covenants together. See Model Asset Purchase Agreement With Commentary §1.1 at 15 (ABA 2001). Unless this technique is used, both definitions in the Model Asset Purchase Agreement appear too vague.

Best Efforts When the Contract Is Silent on the Standard

Courts have held that a contract need not explicitly define “best efforts” for a best efforts provision to be enforceable. *U.S. Airways Group, Inc. v British Airways PLC* (SDNY 1997) 989 F Supp 482, 491. These courts are likely to find that a duty to use best efforts requires that a party pursue “all reasonable means for obtaining” the promised goal, and whether such an obligation has been fulfilled “will almost invariably . . . involve a question of fact.” 984 F Supp at 491. In the *U.S. Airways Group* case, the federal district court held that whether a party has fulfilled its promise to use best efforts is a factual question dependent on the nature of the undertaking for which the best efforts commitment has been made. See also *Grant v Board of Educ.* (Ill App 1996) 668 NE2d 1188, 1192, and *Coleman v Madison Two Assoc.* (Ill

App 1999) 718 NE2d 668, 674, in which the court stated that “best efforts” may mean:

such efforts as are reasonable in the light of that party’s ability and the means at its disposal and of the other party’s justifiable expectations.

In *Matthews v Transamerica Transp. Servs.* (9th Cir 1991) 945 F2d 269, the contract required defendant to use its best efforts to supply 600 trailers for sale to plaintiff within a 2-year period. Although defendant was not under an absolute duty to do so, the Ninth Circuit affirmed the district court’s holding, based on the facts and circumstances, that defendant had breached the agreement. Defendant sold over 600 trailers to other companies in the same period, did not place anyone in charge of overseeing performance of the agreement, and refused to use brokers or incentive programs that could have enabled it to deliver additional trailers to plaintiff.

Whatever the precise test, there is no question that courts today regard the standard of best efforts—like that of good faith—as a workable standard for determining whether there has been a breach in a wide variety of situations. Farnsworth, 46 U Pitt L Rev at 12. As noted above, whenever there is a dispute over the interpretation of “best efforts,” this question is properly one for the jury. *United Telecommunications, Inc. v American Television & Communications Corp.* (10th Cir 1976) 536 F2d 1310, 1319.

“Best Efforts” Versus “Reasonable Efforts”

Another clause often found in business contracts is a covenant to use “reasonable efforts” to complete performance. Some courts have found that reasonable efforts clauses are synonymous with best efforts clauses. *Scott-Macon Securities, Inc. v Zoltek Cos.* (SD NY, May 12, 2005) 2005 US Dist Lexis 9034 (New York courts use the term “reasonable efforts” interchangeably with “best efforts”). See also *Timerline Dev. LLC v Kronman* (NY App Div 2000) 702 NYS2d 237, in which the court noted that there must be objective criteria in the contract against which a party’s efforts can be measured, whether the requirement of reasonable efforts is express or implied. But see 1 Model Asset Purchase Agreement with Commentary 15 (ABA 2001) (suggesting that “commercially reasonable efforts” is a different standard than “best efforts”).

As with best efforts, the question of whether a party to the contract exercised reasonable efforts or reasonable diligence is a factual question depending to a great extent on the fact finder’s determination of credibility. *Swartz v Mann* (Mo App 2005) 160 SW3d 411. See *Aubin v Miller* (Conn App 2001) 781 A2d

396. What might constitute “reasonable efforts” in one setting might be manifestly unreasonable in another. As stated by the court in *In re J.B. Van Sciver Co.* (Bankr ED Pa 1987) 73 BR 838, 845:

This court has no empirical standard which would resolve the [question] . . . [T]he cases which consider the issue of “reasonable efforts” focus on individual circumstances.

The knowledge and mutual understandings of both parties are unquestionably relevant to the determination of whether or not the “objective” standard has been met. See, *e.g.*, *Aubin v Miller* (Conn App 2001) 781 A2d 396.

Best Efforts to Reach Agreement Versus Agreements to Agree

Parties in preliminary negotiations, either oral or written, may intend to bind themselves to negotiate further in good faith. Some may even promise to use their best efforts to do so. Doing so can elevate what may have been an unenforceable agreement to agree

into an enforceable agreement to negotiate in good faith, which is a somewhat vague, and thus troublesome duty. See *Drafting Business Contracts: Principles, Techniques and Forms* §20.26 (Cal CEB 1994) (regarding enforceability of letters of intent). See, *e.g.*, *Cable & Computer Technol., Inc. v Lockheed Sanders, Inc.* (9th Cir 2000) 214 F3d 1030.

CONCLUSION

Most case law does not support a clear distinction between best efforts and reasonable efforts clauses as used in contracts. In breach of contract actions, courts most often find that the question of whether a party failed to use best or reasonable efforts is one for the trier of fact, and have not been clear in defining what constitutes best or reasonable efforts. The task of drawing a bright-line test for either of these clauses is nearly impossible, unless the parties include an objective test in the contract itself. The answer varies in each case based on the facts and circumstances.



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