

Efforts Provisions in Commercial Contracts: Best Efforts, Reasonable Efforts, and Commercially Reasonable Efforts USA (National/Federal)

Related Content

This Practice Note discusses the use of efforts clauses in commercial contracts, including the various definitions and standards that courts apply to best efforts, reasonable efforts, and commercially reasonable efforts terms. Because of the lack of uniformity in the use and interpretation of efforts terms among attorneys, courts, and under the Uniform Commercial Code (UCC), efforts clauses can lead to uncertainty in contract interpretation and performance. This Note provides practical tips to avoid this uncertainty.

Parties to a contract can use efforts clauses to qualify one party's absolute obligation to perform an act. These clauses can be particularly useful when:

- One or both parties cannot guarantee a specific outcome because:
 - the goal is beyond the promising party's control; or
 - the parties cannot easily predict the promising party's ability to achieve the goal when they sign the contract.
- The promising party refuses to provide an absolute covenant.

For example, a sales representative might qualify its obligation to sell minimum quantities of goods by promising to use reasonable efforts to sell the minimum amount. This protects the sales representative if it fails to meet the minimum due to factors beyond its control, such as an economic downturn or the release of a new competing product.

Other situations where efforts clauses are commonly used include:

- Selling, licensing, or marketing a product or property.
- Negotiating rates or prices on another's behalf.
- Securing regulatory or agency approval.
- Registering stock with the SEC.
- Obtaining shareholder approval for a major stock or asset sale.

This Practice Note considers:

- The most commonly used efforts terms in contracts.
- The lack of clarity on the definition of efforts terms under the UCC.
- The various standards courts have applied when interpreting efforts terms (see [How Courts Have Interpreted Efforts Clauses](#)).
- Practical tips for avoiding confusion and ambiguity when using efforts clauses (see [Practical Steps](#)).

What are Efforts Clauses?

Efforts clauses require a party to commit to use a certain level of effort to achieve a stated goal. A variety of efforts terms are used in contracts. Three commonly used terms are:

- Best efforts (see [Best Efforts and Reasonable Efforts](#)).
- Reasonable efforts (see [Best Efforts and Reasonable Efforts](#)).
- Commercially reasonable efforts (see [Commercially Reasonable Efforts](#)).

Attorneys often view these efforts standards as distinct and believe they have a clear hierarchy in how much effort they require, with:

- Best efforts as the most demanding standard.
- Reasonable efforts as a somewhat less demanding standard than best efforts, but more demanding than a commercially reasonable efforts standard.
- Commercially reasonable efforts as the least demanding standard.

However, the UCC and case law do not clearly support this distinction or hierarchy. Although efforts clauses are commonly used in commercial contracts, there are no universally accepted definitions or standards for interpreting these terms. The [Uniform Commercial Code](#) (UCC) uses different efforts terms interchangeably (see [The UCC Standards are Unclear](#)) and case law is conflicting on the issue (see [How Courts Have Interpreted Efforts Clauses](#)). This can cause ambiguity and uncertainty in contract interpretation and performance. If a dispute arises between the parties, it can be difficult to predict the promising party's obligations and the outcome of a lawsuit, especially where the parties have used efforts provisions but failed to define them.

The UCC Standards are Unclear

The UCC provides little clarity on the definition of efforts terms and does not distinguish between different efforts standards. [UCC Section 2-306\(2\)](#) and the related Comment 5 use best efforts interchangeably with good faith and reasonable diligence. [Section 2-306\(2\)](#) requires both the buyer and seller of an exclusive dealing contract for the sale of goods to use "best efforts." However, Comment 5 to [Section 2-306\(2\)](#) explains the obligation as requiring the parties to use "reasonable diligence as well as good faith[.]" standards some would consider as less than "best efforts."

How Courts Have Interpreted Efforts Clauses

When evaluating if a party has exerted the required efforts, a court generally first looks for a definition of the efforts term in the contract. If there is one, the court usually applies that standard. If the contract does not define the term, a court has considerable discretion to interpret an efforts term by considering the contract's surrounding facts and circumstances.

When evaluating efforts terms, courts tend to impose standards of:

- Good faith, which requires honesty and fairness from the acting party.
- Reasonableness, which requires diligence from the acting party and is generally more demanding than good faith.

Some courts combine the two standards when discussing the meaning of efforts terms. Others evaluate efforts by comparing the promising party's actions to an independent standard, such as the effort:

- A reasonable third party would have exerted in the same situation.
- The party would have taken on its own behalf in the same situation.
- The party would have taken on behalf of a single entity, if both parties to the contract were a part of that entity.

Additionally, courts in some jurisdictions, such as Texas, enforce an efforts clause only if the underlying contract includes objective guidelines or criteria against which a party's efforts can be measured (see [DaimlerChrysler Motors Co., LLC v. Manuel](#), 362 S.W.3d 160, 170 (Tex. App. 2012) and [Kevin M. Ehringer Enter. v. McData Serv.](#), 646 F.3d 321, 326 (5th Cir. 2011)). For examples of objective criteria, see [Use Objective Criteria or Benchmarks](#).

Best Efforts and Reasonable Efforts

Courts do not always recognize the hierarchy that attorneys and some commentators tend to believe exists between best efforts and reasonable efforts. Instead, many courts interpret the two terms as creating substantially similar obligations.

For example, courts interpreting New York law have held that:

- Best efforts and reasonable efforts are interchangeable terms.
- Both best efforts and reasonable efforts:
 - impose an obligation to act with good faith in light of one's own capabilities;
 - allow promising parties the right to give reasonable consideration to their own interests; and
 - permit promising parties to rely on their good faith business judgment.

(*Soroof Trading Dev. Co. v. GE Fuel Cell Sys. LLC*, 842 F. Supp. 2d 502, 511 (S.D.N.Y. 2012); *Bd. of Managers of Chocolate Factory Condo. v. Chocolate Partners, LLC*, 992 N.Y.S.2d 157 (N.Y. Sup. Ct. 2014); and *Scott-Macon Sec., Inc. v. Zoltek Co.*, 2005 WL 1138476, at *14 (S.D.N.Y. May 12, 2005).)

However, there is also support in New York case law for the hierarchy in which a best efforts standard is more onerous than a reasonable efforts standard (see *In re Chateaugay Corp.*, 198 B.R. 848, 854 (S.D.N.Y. 1996)).

The California Court of Appeals has held that a promise to use best efforts creates a more exacting standard than a promise to use good faith. The court also stated, however, that best efforts requires diligence and is framed within the bounds of reasonableness, which leaves the hierarchy between best efforts and reasonable efforts unclear. (*California Pines Prop. Owners Ass'n v. Pedotti*, 206 Cal. App. 4th 384, 394-95 (Cal. Ct. App. 2012).) The US District Court for the District of Delaware has similarly found that a best efforts clause requires the promising party to undertake its contractual obligations diligently and with reasonable effort (*Crum & Crum Enter., Inc., v. NDC California, L.P.*, No. 09-145, 2010 WL 4668456 (D. Del. Nov. 3, 2010)).

Whichever standard a court uses, most courts agree that the determination of whether a party used best efforts or reasonable efforts is a fact-intensive inquiry.

Commercially Reasonable Efforts

The hierarchy of standards used for best efforts, reasonable efforts, and commercially reasonable efforts, if there is one, is unclear and may depend on the industry in which the term is used (see *Citri-Lite Co. v. Cott Beverages, Inc.*, 2011 WL 4751110 (E.D. Cal. Sept. 30, 2011) and *WaveDivision Holdings, LLC v. Millennium Digital Media Sys., L.L.C.*, 2010 WL 3706624 (Del. Ch. 2010)). To determine if a promising party has made commercially reasonable efforts, courts have considered the specific facts of the case and the totality of the parties' business relationship, including:

- Whether the promising party used the level of effort that a reasonable business entity would have used in similar circumstances.
- The economic feasibility and profitability of an action, as well as other factors relevant in the particular industry.
- How cost, skills, and efficacy factors relate to relevant industry standards.
- The promising party's financial resources, business expertise, and business practices.
- Whether the promising party used reasonable efforts and worked in good faith to fulfill its obligations.

(*Eastwood Ins. Serv., Inc. v. Titan Auto Ins.*, 469 Fed. Appx. 596 (9th Cir. Feb. 27, 2012) and *Citri-Lite Co.*, 2011 WL 4751110.)

Limitations of Efforts Provisions

The obligation to use best efforts, reasonable efforts, or commercially reasonable efforts does not mean that the promising party must be successful or take exhaustive measures to fulfill the obligation. Courts have frequently held that these efforts terms do not require a party to:

- Take every conceivable effort.
- Take unreasonable actions.
- Sacrifice its own economic and business interests.
- Incur substantial losses to perform its contractual obligations.

(*MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 950 F. Supp. 2d 568 (S.D.N.Y. 2013); *California Pines Prop.*, 206 Cal. App. 4th at 394-95; and *Citri-Lite Co. v. Cott Beverages, Inc.*, 721 F. Supp. 2d 912 (E.D. Cal. 2010).)

Practical Steps

Parties can avoid unnecessary confusion and ambiguity when using efforts clauses by carefully drafting these clauses in the contract. When drafting efforts clauses, parties should:

- Define the meaning of the terms in the contract (see [Define Efforts Terms in the Contract](#)).
- Consider including specific carve outs in the definition (see [Include Carve Outs in the Definition](#)).
- Use the terms consistently throughout the contract (see [Use Efforts Terms Consistently](#)).
- Use objective criteria to describe the required effort (see [Use Objective Criteria or Benchmarks](#)).

Based on the contract and expected obligations, some parties should consider making the efforts requirement an unqualified obligation (see [Consider Making the Conduct an Obligation Instead of an Efforts Requirement](#)).

Define Efforts Terms in the Contract

During litigation, courts first turn to contract definitions to determine compliance. Only if the term is ambiguous do courts apply another definition. Defining best, reasonable, or commercially reasonable efforts in the contract helps to ensure that in a dispute, the court applies the same meaning the parties intended during contract negotiations.

The defined term should specify the level of effort that the promising party must use to accomplish its contractual obligations. The definition should:

- Specify the term's meaning.
- Be unambiguous.
- Not guarantee an outcome.
- Be broad enough to capture all actions related to the contract.

Include Carve Outs in the Definition

When the definition of the efforts term is broad (or the efforts term is undefined), parties should consider including carve outs to describe the kind of efforts the promising party is not obligated to take. Carve outs help align the parties' understanding of efforts clause requirements and clarify the parties' intent in case of litigation.

For example, carve outs can state that the efforts clause does not require the promising party to:

- Spend a specified dollar amount that is not expressly included in the agreement, including:
 - filing fees or other payments to a governmental agency;
 - fees and expenses for outside counsel or consultants; or
 - excessive employee costs.
- Engage in conduct that would have a materially adverse effect on the promising party.
- Take any action that would cause it to incur costs or suffer any other detriment that is out of reasonable proportion to its benefits under the agreement.
- Take any action that would subject it to liabilities.
- Disregard its own business strategy and economic interests.
- Take illegal actions.
- Take any action that would harm its existence or solvency.

Use Efforts Terms Consistently

Parties should use efforts terms consistently throughout a contract. If the contract includes definitions of efforts terms, the parties should use the terms only according to their defined meanings. If the contract uses different efforts terms inconsistently, whether the terms are defined or undefined, the parties risk both:

- Creating confusion among themselves.
- Suggesting that they do not understand or value differences between the efforts terms used, which invites courts to impose their own standards.

Use Objective Criteria or Benchmarks

Objective criteria provide standards against which the required efforts can be measured to determine if a party has met its efforts obligations. Objective criteria can include a:

- **Timeframe.** The timeframe can be broad or specific, such as:
 - as promptly as practicable;
 - in the most expeditious manner practicable; or
 - within a specific number of days, weeks, or months from the effective date of the agreement or specified date during the term.
- **Triggering event.** For example, the promising party can use best efforts to transfer patents to the other party to the contract when the promising party meets a specified royalty threshold.
- **Quantity or production level.** For example, the promising party can use best efforts to produce a specified volume or amount of a product.

Consider Making the Conduct an Obligation Instead of an Efforts Requirement

In some cases, parties should consider simply excluding the efforts clause. If the drafted definition, objective criteria, or carve outs for an efforts standard are so specific and demanding that what the parties are actually negotiating is an unqualified obligation, the parties should remove any efforts clause and instead simply make the obligation express.

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