

# Understanding “Best Efforts” And Its Variants (Including Drafting Recommendations)

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*A standard feature of contracts is the “best efforts” provision and its variants,  
but there is a lot of confusion about what they mean.  
Fortunately, careful drafting allows you to avoid the pitfalls.*

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**CONTRACT PROVISIONS USING** the phrase *best efforts* or one of its variants are often a source of contention and confusion when a contract is being negotiated. They can also be a source of dispute after the contract has been signed. This article analyzes how lawyers use *best efforts* and its variants; what *best efforts* and its variants mean when not defined by contract; and how courts go about determining whether

a party has made the required efforts. This article recommends that if you provide in a contract that a party is subject to an *efforts* standard, generally you should specify by means of a defined term what sort of actions would satisfy that requirement. This article discusses which defined term to use and how to define it, and also addresses issues relating to the wording of *efforts* provisions.

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**THE FUNCTION OF “BEST EFFORTS” PROVISIONS** • When accomplishing a certain goal is not entirely within Acme’s control, Acme would generally not be willing to enter into a contract that makes it Acme’s absolute duty to accomplish that goal—doing so would pose undue risk of future liability for nonperformance. In such situations, the parties might instead agree that Acme is to use best efforts, or some other level of effort, to accomplish that goal. Contracts impose an *efforts* standard in connection with many different obligations, such as an obligation to cause a registration statement to become effective by a certain time, an obligation to obtain consents required for closing, or an obligation to promote sales of a product.

Different from an explicit *efforts* provision of this sort is an *efforts* standard that a court imposes even though the contract language at issue might be read as requiring that the promisor actually achieve a specific result. See E. Allan Farnsworth, 2 *Farnsworth on Contracts* §7.17c (3d ed. 2004). This sometimes occurs with agency contracts. See *Restatement (Second) of Agency* §377 cmt. b (1958) (“Under ordinary circumstances, the promise to act as an agent is interpreted as being a promise only to make reasonable efforts to accomplish the directed result”). An explicit *efforts* provision can also be distinguished from a duty to use efforts to accomplish a goal that is read into a contract either by a court or by statute in the absence of an explicit undertaking regarding that goal. See *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917); U.C.C. §2-306(2); Farnsworth, *supra*, at §7.17c. This article focuses on explicit *efforts* provisions.

**“BEST EFFORTS” AND ITS VARIANTS, AND WHAT THEY MEAN** • Public companies are required to file with the Securities and Exchange Commission any “material contracts”

that they enter into. Contracts filed with the SEC are a source of useful information about current contract-drafting usages.

### The “Efforts” Variants and How Often They’re Used

The following table shows the different *efforts* phrases used in contracts filed with the SEC in January 2004, how many contracts used each phrase, and how many contracts treated each phrase as a defined term. The table shows that *best efforts* was the phrase used most often, but *commercially reasonable efforts*, *reasonable best efforts*, and *reasonable efforts* were each used often, in the aggregate more so than *best efforts*. *Good-faith efforts*, *commercially reasonable best efforts*, and *diligent efforts* were used significantly less often, while *good-faith best efforts*, *every effort*, and an oddity, *commercially reasonable and diligent efforts*, bring up the rear.

Phrase	No. Contracts Using	No. Contracts Defining
<i>best efforts</i>	627	1
<i>commercially reasonable efforts</i>	425	1
<i>reasonable best efforts</i>	345	0
<i>reasonable efforts</i>	307	0
<i>good-faith efforts</i>	58	0
<i>commercially reasonable best efforts</i>	46	0
<i>diligent efforts</i>	23	0
<i>good-faith best efforts</i>	8	0
<i>every effort</i>	5	0
<i>commercially reasonable and diligent efforts</i>	3	1

### What Lawyers Think “Best Efforts” Means

The conventional wisdom among corporate lawyers is that *best efforts* is the most onerous of

the *efforts* standards—that the promisor is required to do everything in its power to accomplish the goal, even if it bankrupts itself in the process—while other *efforts* standards are less onerous. See Lou R. Kling & Eileen T. Simon, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* §13.06 n.3.2 (2003) (“[P]ractitioners, probably based on some of the broad interpretations given to ‘best efforts,’ tend to view all the other phrases, while perhaps not being too different from each other, as being definitely different from ‘best efforts’”); Charles M. Fox, *Working with Contracts* 88 (2002) (“‘Best efforts’ is the most stringent standard”).

### What Case Law Says “Best Efforts” Means

The case law, however, paints a different picture. Courts have not required that a party under a duty to use best efforts to accomplish a given goal make every conceivable effort to do so, regardless of the detriment to it. See, e.g., *Coady Corp. v. Toyota Motor Distrib.*, 361 F.3d 50, 59 (1st Cir. 2004) (“‘Best efforts’...cannot mean everything possible under the sun...”); *Triple-A Baseball Club Assocs. v. Northeastern 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 v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979), *cert. denied*, 485 U.S. 935 (1988) (“The requirement that a party use its best efforts necessarily does not prevent the party from giving reasonable consideration to its own interests”).

Some courts have held that the appropriate standard is one of good faith. See *Triple-A Baseball Club Assocs.*, 832 F.2d at 225 (“We have been unable to find any case in which a court found...that a party acted in good faith but did not use its best efforts.”); *Bloor*, 601 F.2d at 614 (best efforts imposes an obligation to act with good faith in light of one’s own capabilities); *W. Geophysical Co. of Am. v. Bolt Assocs., Inc.*, 584

F.2d 1164, 1171 (2d Cir. 1978) (stating that an obligation to use best efforts can be met by “active exploitation in good faith”). Good faith “has honesty and fairness at its core.” Farnsworth, *supra*, at §7.17c; see also *Black’s Law Dictionary* 701 (7th ed. 1999) (defining good faith as “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”).

But more recent cases have held that the standard is higher than that of good faith. See *Satellite Broad. Cable, Inc. v. Telefonica De Espana*, 807 F. Supp. 210, 217 (D.P.R. 1992) (holding that the net effect of the “best efforts” clause at issue was “to expand extra-contractual damages beyond a mere good faith requirement”); *Kroboth v. Brent*, 215 A.D.2d 813, 814 (N.Y. App. Div. 1995) (“‘[B]est efforts’ requires more than ‘good faith,’ which is an implied covenant in all contracts...”).

As an alternative to a *good faith* standard, some recent cases have used a *reasonableness* standard. See, e.g., *Coady Corp.*, 361 F.3d at 59 (“‘Best efforts’ is implicitly qualified by a reasonableness test...”); *Kroboth*, 215 A.D.2d at 814 (“‘Best efforts’ requires that plaintiffs pursue all reasonable methods...”).

Other recent cases have followed Professor Farnsworth (see Farnsworth, *supra*, at §7.17c) in describing the appropriate standard as one of diligence. See *National Data Payment Systems v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000) (quoting Professor Farnsworth); *T.S.I. Holdings, Inc. v. Jenkins*, 924 P.2d 1239, 1250 (Kan. 1996) (same). That term is also used by the official comment to U.C.C. §2-306(b)(2), which states that the implied obligation to use best efforts requires that parties “use reasonable diligence as well as good faith in their performance of the contract.” See U.C.C. §2-306(b)(2) official cmt. 5.

Diligence can be defined as “the attention and care required from a person in a given situation.” *Black’s Law Dictionary*, supra, at 468. Use of both *good faith* and *diligence* to give meaning to the term *best efforts*, not only in the official U.C.C. comment but also in case law, raises the question whether in such contexts a *diligence* standard should subsume, and therefore render superfluous, a *good faith* standard. See, e.g., *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1350-51 (6th Cir. 1991) (likening the promise to use best efforts to the implied duty of good faith and fair dealing imposed on each party to a contract under Tennessee law, and suggesting that this duty requires a party to make a reasonable effort and exercise reasonable diligence); *Great W. Producers Co-op. v. Great W. United Corp.*, 200 Colo. 180 (Colo. 1980) (“The ‘best efforts’ obligation required that United and its board of directors make a reasonable, diligent, and good faith effort to accomplish a given objective...”). And diligence would seem to incorporate the concept of reasonableness—it is hard to imagine how performing an obligation diligently could require that you do more or less than act reasonably.

### **The “Efforts” Variants Mostly Mean the Same Thing**

The case law on the meaning of *best efforts* suggests that instead of representing different standards, other *efforts* standards mean the same thing as *best efforts*, unless a contract definition provides otherwise.

### **“Reasonable Best Efforts”**

Consider *reasonable best efforts*. Because recent case law suggests that *best efforts* incorporates the concept of reasonableness, *reasonable best efforts* would seem to mean the same as *best efforts*. There is no case law on point, but two courts that have considered a contract provision referring to *reasonable best efforts* have ignored the

word *reasonable*. See *Herrmann Holdings Ltd. v. Lucent Techs., Inc.*, 302 F.3d 552 (5th Cir. 2002); *In re ValueVision Int’l Sec. Litig.*, 896 F. Supp. 434 (E.D. Pa. 1995). A third court fastened on the word “reasonably” in holding that a party had satisfied an obligation that it use “reasonably [sic] best efforts” not to disclose certain information. *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 538 (2d Cir. 1974). This led one analysis to suggest that the phrases *best efforts* and *reasonable best efforts* “should not be used interchangeably.” Glenn D. West & Susan Y. Chao, *Annual Survey of Texas Law: Corporations*, 56 SMU L. REV. 1397, 1423 n.208 (citing *Stamicarbon*). But that court did not address whether it would have reached the same conclusion even in the absence of the word *reasonable*. Case law construing the phrase *best efforts* suggests that it would have had ample basis for so doing.

### **“Reasonable Efforts”**

By extension, as a matter of semantics there is no basis for suggesting that *reasonable efforts* should be given a meaning different from *best efforts* or *reasonable best efforts*. Most courts use the terms *best efforts* and *reasonable efforts* interchangeably. See *Stewart v. O’Neill*, 225 F. Supp. 2d 6, 14 (D.D.C. 2002) (stating that “the agency was obligated to use its best efforts—that is, all reasonable efforts—to comply with all terms of the settlement agreement”); *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990) (stating, in the context of a case addressing an implied *best efforts* provision, that “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.’” (citations omitted)); *Trecom Bus. Sys. v. Prasad*, 980 F. Supp. 770, 774 n.1 (D.N.J. 1997) (stating in the context of an implied *best efforts* provision that whether one uses the

term *best efforts* or *reasonable efforts* is “merely an issue of semantics”). The one court that states that the two phrases impose different standards fails to provide any rationale for so saying. See *In re Chateaugay Corp.*, 198 B.R. 848, 854 (S.D.N.Y. 1996), *aff’d* 108 F.3d 1369 (2d Cir. 1997) (“The 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”).

### “Commercially Reasonable Efforts”

*Commercially reasonable efforts* should mean the same thing as *reasonable efforts* and, by extension, *best efforts* and *reasonable best efforts*: A reasonableness standard applied to a commercial dispute would necessarily incorporate commercial notions of reasonableness. (There is no case law on point.) The same applies to *commercially reasonable best efforts*.

### “Diligent Efforts”

*Diligent efforts* presumably represents a more stringent standard than *good-faith efforts*; how those terms compare to *best efforts* presumably depends on whether one sees *best efforts* as reflecting a *good faith* standard or a *reasonableness* or *diligence* standard.

### “Every Effort”

There would seem no reason to regard *every effort* as having a meaning different from *best efforts*; the case law construing *every effort* suggests as much. See, e.g., *Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp.*, 230 F.3d 569, 578 (2d Cir. 2000).

**DETERMINING WHETHER A PARTY HAS MADE SUFFICIENT EFFORTS** • *Best efforts* and its variants are vague. (Some courts have described *best efforts* as ambiguous. See, e.g.,

*Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 233 (3rd Cir. 2001) (“‘Best efforts’ has been widely held to be an ambiguous contract term”). But it is not. If a word or phrase is capable of having two or more inconsistent meanings, it is ambiguous; if instead it does not have a precise meaning—which is the case with *efforts* terms—then it is vague. See Kenneth A. Adams, *A Manual of Style for Contract Drafting* §7.1 (2004).) Equating *best efforts* with *diligence* or *reasonableness* does not change this, since those terms are themselves vague. The result of this vagueness is that determining whether a party has made sufficient efforts necessarily depends on the circumstances of the case, with all the uncertainty that entails. See *Martin*, 240 F.3d at 233 (“‘Best efforts’ depends on the factual circumstances surrounding an agreement.”); *Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987) (stating that *best efforts* “cannot be defined in terms of a fixed formula; it varies with the facts and the field of law involved”); Victor P. Goldberg, *Great Contracts Cases: In Search of Best Efforts: Reinterpreting Bloor v. Falstaff*, 44 St. Louis L.J. 1465, 1465 (2000) (“‘Best efforts’ can only be defined contextually”).

### Establishing a Benchmark

Determining whether a party has complied with an *efforts* provision is facilitated if the efforts that were actually made can be compared against some benchmark. There are a number of possible benchmarks:

- Promises made during contract negotiations for guidance on what efforts had been expected. See *Stone v. Caroselli*, 653 P.2d 754, 757 (Colo. Ct. App. 1982) (stating that testimony by manufacturers as to distributors’ promise during negotiations to “hit the road” to promote the product was admissible to explain the distributors’ im-

plied duty to use best efforts). *But see Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1373 (7th Cir. 1990) (“The contract contains an integration clause, and the district judge was correct that the parol evidence rule forbade inquiry into precontractual discussions or agreements concerning the meaning of best efforts”);

- Industry practice. *See Zilg v. Prentice-Hall*, 717 F.2d 671, 681 (2d Cir. 1983), *cert denied*, 466 U.S. 938 (noting that plaintiff’s expert testified that “[defendant’s] efforts were ‘perfectly adequate,’ although they were ‘routine’ and [defendant] ‘did not follow through as they might’”); *First Union Nat. Bank v. Steele Software Systems Corp.*, 838 A.2d 404, 448 (Md. Ct. Spec. App. 2003) (stating that in determining whether an obligation to use best efforts had been satisfied, the jury was entitled to consider such things as “the standard in the industry regarding similar contracts between banks and their settlement service vendors”);
- Efforts used by the promisor in connection with other contracts imposing an *efforts* standard. *See Olympia Hotels Corp.*, 908 F.2d at 1373 (holding that where the promisor has similar contracts with other promisees, “‘best efforts’ means the efforts the promisor has employed in those parallel contracts where the adequacy of his efforts have not been questioned”);
- How the promisor would have acted if the promisor and promisee had been united in the same entity. *See Farnsworth, supra*, at §7.17c. This approach was used in a case involving a promise by the buyers of a business to use best efforts to collect all accounts receivable on the books of the business on the closing date, the court noting that the parties had accepted that the buyers had had the duty to “use such efforts as it would have been prudent to use in their own behalf if they had owned the receivables, or such efforts as it would have been prudent for the [sellers] to use if they had retained pos-

session of them.” *Petroleum Mktg. Corp. v. Metropolitan Petroleum Corp.*, 151 A.2d 616, 619 (Pa. 1959).

### **Balancing Without A Benchmark**

In the absence of any such benchmark, a requirement that a promisor use efforts to accomplish a contract goal would likely be balanced against the broader constraints faced by the promisor in conducting the business that is the subject of the contract. *See Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 235 (3rd Cir. 2001) (holding that in agreeing to use best efforts, defendant did not compromise its right to exercise sound business judgment). Without such balancing, the promisor could be forced to expend sufficient resources as to render the contract uneconomic. The circumstances of a case may lead a court to reject such balancing; one instance of this can be found in the well-known case of *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979), *cert. denied*, 485 U.S. 935 (1988) (holding that because the royalty payable to Ballantine on sales of Ballantine beer constituted part of the purchase price for its assets, defendant Falstaff’s search for profits could not be used to justify limiting its efforts to sell Ballantine beer).

### **Narrowly Directed Efforts**

Another context that poses a risk of a court holding that a promisor was required to make what may seem like disproportionate efforts is when an *efforts* provision applies to only a discrete aspect of a business relationship, making it perhaps less obvious that one is to balance the required efforts against the benefits to the promisor under that relationship, or how one is to do so. For example, one court has suggested, in dicta, that a party that undertook to use best efforts to take all actions necessary on its part so as to permit consummation of a merger might be required to divest a subsidiary if that was

necessary to obtain regulatory approval. See *Carteret Bancorp v. Home Group, Inc.*, 1988 Del. Ch. LEXIS 2, at \*20–21 (Del. Ch. Jan. 13, 1988).

**THE ENFORCEABILITY OF "EFFORTS" PROVISIONS**

• Courts in most jurisdictions have held that *efforts* provisions are enforceable. The principal exception is Illinois courts, which have held that a promise to use best efforts is too vague to be binding if the parties fail to indicate what performance the phrase requires. See, e.g., *Kraftco Corp. v. Kolbus*, 274 N.E.2d 153, 156 (Ill. App. Ct. 1971) ("The mere allegation of best efforts is too indefinite and uncertain to be an enforceable standard."). For a discussion of Illinois case law on *best efforts*, see James M. Van Vliet, Jr., "Best Efforts" Promises Under Illinois Law, 88 Ill. B. J. 698 (Dec. 2000).

In addition, some New York cases ostensibly stand for the proposition that a clear set of guidelines against which to measure a party's best efforts is essential for enforcing a *best efforts* provision. See *Kling & Nugent*, supra, at § 13.06, n.3.1 (citing two of these cases); Van Vliet, supra, at 698 n.2 (citing one of these cases). These cases do not, however, address enforceability of an agreement to use efforts to accomplish a contract goal. Instead:

- One case involves a provision relating to use of best efforts in negotiations. See *Pinnacle Books, Inc. v. Harlequin Enterprises, Ltd.*, 519 F. Supp. 118, 121–22 (S.D.N.Y. 1981).
- Two others involve agreements to negotiate in good faith. See *Jilley Film Enterprises, Inc. v. Home Box Office, Inc.*, 593 F. Supp. 515, 520–21 (S.D.N.Y. 1984); *Candid Productions, Inc. v. International Skating Union*, 530 F. Supp. 1330 (S.D.N.Y. 1982).
- A fourth relates to a claim that a party was under an implied obligation to make a good-faith effort. See *Mocca Lounge, Inc. v. Misak*, 462 N.Y.S. 2d 704 (N.Y. App. Div. 1983).

- And a fifth addresses a *best efforts* provision that the defendant argued was incorporated by reference from one contract into another. See *Cross Props. v. Brook Realty Co.*, 430 N.Y.S. 2d 820, 825-26 (N.Y. App. Div. 1980).

There is other, more pertinent New York precedent to the effect that a contract need not explicitly define *best efforts* for a *best efforts* provision to be enforceable. See *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979), cert. denied, 485 U.S. 935 (1988); *US Airways Group, Inc. v. British Airways PLC*, 989 F. Supp. 482, 491 (S.D.N.Y. 1997); *Kroboth v. Brent*, 215 A.D.2d 813, 814 (N.Y. App. Div. 1995).

**DEFINING WHAT "EFFORTS" MEANS**

• As discussed above, corporate lawyers see gradations of meaning in *best efforts* and its variants that are not reflected in the case law and are not semantically justifiable; this confusion can result in a party's having unrealistic expectations of the performance required of another party that is under an *efforts* obligation. Also discussed above is the fact that determining whether a party has made sufficient efforts is an uncertain process entailing the risk that a court will hold that a promisor was obligated to make efforts out of proportion to the benefits to it under the contract in question. And finally, also discussed above is precedent in Illinois and, to a lesser extent, in New York to the effect that for a *best efforts* provision to be enforceable, a contract must contain a clear set of guidelines against which to measure performance of the party making the efforts; failure to include such guidelines would likely (in Illinois) or could conceivably (in New York) result in a court holding that an *efforts* provision is unenforceable.

The way to avoid these problems would be to specify by contract what sort of efforts must be made by a party that is under an obligation to make efforts to accomplish a particular contract

goal. The obvious way to do that would be to create a defined term. The table above suggests that despite the benefits, very few drafters provide a defined term for *efforts* standards; the cautious drafter would be advised to do so. This section proposes what defined term to use and how to define it; it also suggests in what context an *efforts* standard is best used without a defined term.

### “Reasonable Efforts”

To use a defined term to convey a level of efforts equivalent to the *diligence* and *reasonableness* standards recognized by case law, one must first determine which term to use as one’s defined term. It would be preferable to avoid any term using the word *best*, namely *best efforts*, *reasonable best efforts*, or *commercially reasonable efforts*, since in these phrases the word *best* does not serve to convey the standard meaning of *best*, namely “excelling all others in quality.” 2 *The Oxford English Dictionary* 139 (2d ed. 1989). Of the various alternatives, *reasonable efforts* has the most to commend it: it has the advantage of being the simplest and most neutral.

### The Core Definition

Any definition of *reasonable efforts* should specify what the core meaning is and, as necessary, specify what the definition excludes. I recommend the following core definition:

*“Reasonable Efforts” means, with respect to a given goal, the efforts that a reasonable person in the position of [the promisor] [Acme] would use so as to achieve that goal as expeditiously as possible.*

This core definition is based on a definition of *best efforts* found in contracts filed with the Securities and Exchange Commission. The word *promisor* is used as a more concise alternative to “the person obligated to use reasonable efforts.” If more than one party is subject to any given *reasonable efforts* provision, refer in the de-

inition to *the one or more promisors*; if only one party to a contract is subject to all the *reasonable efforts* provisions in that contract, you can use that party’s name instead of *promisor*.

Sometimes the parties will want to specify that what constitutes *reasonable efforts* is to be determined by reference to the promisor’s past practice or the practice in a given industry. This concept can be added to the core definition:

*“Reasonable Efforts” means, with respect to a given goal, the efforts [ , consistent with its past practice] [ , consistent with the practice of comparable pharmaceutical companies with respect to pharmaceutical products of comparable market potential,] that a reasonable person....*

### Carve-outs

Since the principal concern of a party subject to an *efforts* standard would be to avoid being required to take actions that are out of proportion to the benefits to it under the contract, it is likely that negotiations regarding the definition of *reasonable efforts* would mostly concern carve-outs, which specify what is excluded from the definition.

An initial issue is the language used to introduce carve-outs. Often a definition will place the carve-outs in a proviso: *provided, however, that an obligation to use Reasonable Efforts under this agreement does not require the promisor to....* But a standard, and more economical, way to introduce carve-outs in definitions is *but does not include*. See Adams, *supra*, at § 6.16.

A *reasonable efforts* carve-out could, like the core definition, be vague; it could, for instance, refer to “any action or expenditure that is disproportionate or unduly burdensome.” But any carve-out so phrased would logically be captured by the core definition, since a reasonable person would not take any action or make any expenditure that would be disproportionate or unduly burdensome. And the purpose

of carve-outs is to provide certainty of the sort that a vague carve-out would not provide. So it would be better to offset the vagueness of the core definition by making the carve-outs highly specific.

In this vein, one could exclude from the definition of *reasonable efforts* any one or more of the following (revising the wording to include, as appropriate, any available defined terms):

- Incurring any expenses [in excess of \$X individually and \$Y in the aggregate] not expressly contemplated by this agreement, including without limitation (1) out-of-pocket costs incurred in gathering information and making filings with any governmental authority, (2) fees and expenses of counsel and consultants, (3) taxes, fees, and penalties charged by any governmental authority, (4) fees and penalties charged by any other person, and (5) extraordinary employee costs;
- Taking any actions that would, individually or in the aggregate, cause the promisor to incur costs, or suffer any other detriment, out of reasonable proportion to the benefits to the promisor under this agreement;
- Taking any actions that would, individually or in the aggregate, cause a material adverse change in the promisor;
- Incurring any liabilities;
- Changing the promisor's business strategy;
- Disposing of any significant assets of the promisor;
- Taking any action that would violate any law or order to which the promisor is subject;
- Taking any action that would imperil the promisor's existence or solvency;
- Initiating any litigation or arbitration.

Sometimes an *efforts* definition will specify actions that the promisor must take to meet its obligations under the *efforts* standard. For in-

stance, when in a registration rights agreement an issuer is required to use reasonable efforts to cause a registration statement to become effective as soon as practicable after filing, it is commonplace for the definition of *reasonable efforts* to be along the following lines:

*"Reasonable Efforts" means, among other things, that the Company shall submit to the SEC, within two business days after the Company learns that no review of a particular Registration Statement will be made by the staff of the SEC or that the staff has no further comments on the Registration Statement, a request for acceleration of effectiveness of that Registration Statement to a time and date not later than 48 hours after submission of that request.*

Since the purpose of an *efforts* standard is to capture that which cannot be specified at the time the contract is signed, it is counterproductive to bury an obligation in the definition of *reasonable efforts*. And note how, in this case, the core definition has been reduced to "among other things."

### **A Standard More Demanding Than "Reasonable Efforts"**

If you wish to impose on a party a duty to make efforts beyond the efforts that would be required by a *reasonable efforts* standard, it would be best to accomplish that by imposing obligations on that party instead of by using a vague *efforts* standard.

### **"Good-Faith Efforts"**

An alternative to a *reasonable efforts* standard would be a *good-faith efforts* standard. Given that courts describe *best efforts* in terms of good faith as well as diligence and reasonableness, it is not evident that courts would consistently distinguish *good-faith efforts* from *reasonable efforts*. But if one wishes to use a *good-faith efforts* standard, it would be simplest to do without a defined

term: the concept of good faith is probably better understood than that of best efforts. See Farnsworth, *supra*, at §7.17c

While in a given contract a party might want to exclude some actions from the scope of a *good-faith efforts* standard, that can be accomplished without using a defined term. Consider how, in the following extract, the defined term (shown in strikethrough) is superfluous: *Acme shall make a Good-faith Effort to market and sell the Products world-wide on a non-exclusive basis through all of its distribution channels. “Good-faith Effort” means that Acme will market and sell the Products [,] subject to local market conditions, the presence or absence of competition, and product pricing.*

**THE WORDING OF “EFFORTS” PROVISIONS** • Ensuring that *efforts* provisions are clear, concise, and consistent requires that one pay attention not only to how the term—as per this article, *reasonable efforts*—is defined, but also to how the *efforts* provisions themselves are worded:

- It is sufficient—indeed preferable—to have a party undertake to *use reasonable efforts*, as opposed to *use its reasonable efforts* or *use all reasonable efforts*;
- If contracts filed with the Securities and Exchange Commission are at all representative, drafters refer to a party *using* efforts roughly four times as often as they refer to a party *making* efforts. Semantically, both verbs are acceptable;
- In *efforts* provisions, *effort* is generally used in the plural rather than the singular, although occasionally a contract will require a party to *use every reasonable effort* or *make a reasonable effort*. It is preferable to use the plural, if only in the name of consistency;

There are two usages that are symptomatic of unthinking use of *efforts* provisions. One is use of two or more different *efforts* standards—such as *best efforts* and *reasonable efforts*—in one contract. If this were intentional on the part of the drafter, both terms would need to be carefully defined. The odds are, however, that this practice is unintentional, and the terms are invariably undefined. The risk is that a court will feel compelled to ascribe a different meaning to each term.

Similarly unfortunate is use of the terms *good faith* or *diligence*, or both in an *efforts* provision. An example: *Each party shall use reasonable efforts, undertaken diligently and in good faith, to obtain all Consents prior to Closing.* Given the confused case law regarding whether *best efforts* reflects a *good faith* standard or a *reasonableness* or *diligence* standard, such surplusage can only muddy the waters, whether or not the *efforts* standard is defined in the contract in question.

**CONCLUSION** • Although the term *best efforts* and its variants are a standard feature of contracts, there is much confusion surrounding what those terms mean. Furthermore, a court could hold that a party subject to an *efforts* provision was obligated to make efforts out of proportion to the benefits to it under the contract in question. When in drafting a contract you wish to require that a party act diligently to further a contract goal, you could avoid these problems by using the defined term *reasonable efforts* and using the definition recommended in this article, while counsel to a party on whom such a requirement is imposed should consider the possible carve-outs listed in this article.