

Interpreting and Drafting *Efforts* Provisions: From Unreason to Reason

By Kenneth A. Adams*

Contracts often feature efforts standards—best efforts, reasonable efforts, and other variants. In the United States, England, and Canada, many who work with contracts accept the idea of a hierarchy of efforts standards, with some imposing obligations that are more onerous than others. With minor exceptions, U.S. courts have rejected the idea, whereas courts in England and Canada have accepted it. But no one has coherently explained their position. This article demonstrates that a hierarchy of efforts provisions is unworkable, for three reasons. First, imposing an obligation to act more than reasonably is unreasonable. Second, requiring that a contract party act more than reasonably creates too much uncertainty as to what level of effort is required. And third, legalistic meanings attributed to efforts standards conflict with colloquial English. Furthermore, rationales offered to validate the idea of a hierarchy of efforts standards fall short. This article proposes how courts should interpret efforts provisions. Specifically, they should ignore the conventional wisdom that a best efforts obligation is more onerous than a reasonable efforts obligation. This article also recommends how drafters can take control of efforts provisions. It proposes a simple and unobtrusive fix—use only reasonable efforts and structure efforts provisions to minimize the vagueness.

Contracts often feature obligations expressed using *efforts* standards—*best efforts, reasonable efforts, commercially reasonable efforts*, and other variants. Given that they're such a fixture, one would expect these phrases to have settled meanings. But that's not the case.

Specifically, does it make sense to think in terms of a hierarchy of *efforts* standards, with different formulations imposing obligations of different levels of onerousness? In the United States, England, and Canada, many commentators and many who work with contracts accept this notion. In England and Canada, so do the courts. U.S. courts have generally rejected it, putting them at odds with practitioner expectations and at odds with courts in England and Canada. (This article limits its analysis to interpretation and use of *efforts* standards in those three countries.)

But no one has attempted a reasoned analysis of whether it makes sense to distinguish between different *efforts* standards. That's what this article offers. It

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examines the function of *efforts* standards, what people think the different *efforts* standards mean, the caselaw on *efforts* standards, and what attempts have been made to explain the idea of a hierarchy of *efforts* standards. It then explains why a hierarchy of *efforts* standards doesn't make sense.

Because understanding the confusion surrounding *efforts* standards offers a path to eliminating that confusion, this article considers how to interpret *efforts* provisions, and then how to draft *efforts* provisions to minimize the risk of dispute. (This article uses “*efforts* standard” to refer to a phrase featuring the word *efforts*. It uses “*efforts* provision” to refer to a contract sentence that includes an *efforts* standard.)

Obviously, the part on interpreting is primarily intended for those who are called on to interpret *efforts* provisions, whereas the part on drafting is primarily intended for those involved with transactions. But those who interpret would benefit from understanding what clear *efforts* provisions look like, and those who draft would benefit from understanding how *efforts* provisions might be interpreted.

I. THE FUNCTION OF *EFFORTS* STANDARDS

Contract parties use *efforts* standards when one party wants another to further a goal and one or more nonparties have a say in achieving that goal. Examples include obtaining a permit that a government agency must issue, having consumers buy a product, causing a securities registration statement to become effective, and obtaining nonparty consents to closing. Using an *efforts* standard might also be appropriate if the weather or some other unpredictable or unknown aspect of the natural world were a factor in achieving a goal.

When achieving a goal isn't entirely within a contract party's control, that party should be reluctant to assume an unqualified obligation to accomplish the goal, as in *Acme shall obtain the Permits*. Doing so would expose that party to liability regardless of how hard it had worked to achieve that goal.¹ And both parties should be reluctant to have one party assume an unqualified obligation to promote a goal, as in *Jones shall promote the sale of Widgets*—the parties might end up arguing over whether the performance required is negligible or all-consuming. The parties might instead agree to use a *reasonable efforts* standard,

1. See LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 13.06 (2018 & Release 47) (noting that “a party might think it unwise to bind itself to perform a certain kind of obligation since liability for breach of contract under common law turns on a concept of strict liability and parties are held to the standard expressed in the words of the contract”); ABA BUS. LAW SECTION MERGERS & ACQUISITIONS COMM., MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 212 (2d ed. 2010) [hereinafter MODEL STOCK PURCHASE AGREEMENT] (“An absolute duty to perform covenants or similar obligations relating to future actions will often be inappropriate or otherwise not acceptable to one or more parties to the agreement, as, for instance, when a party's ability to perform depends upon events or third-party acts beyond that party's control.”); E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 3 (1984) (“[A]s every first-year law student learns, contract liability is absolute liability—that is to say, liability not based on fault. In the law of contracts, trying is not enough.”).

or some other *efforts* standard, to express either kind of obligation.² All provisions featuring *efforts* standards are inherently vague—complying with an *efforts* obligation is a function of the circumstances.³

Efforts standards can also be expedient, as they allow contract parties to save time and money and reduce contention by sparing the parties from having to negotiate specific requirements.⁴

This article focuses on explicit *efforts* standards, as opposed to *efforts* standards that courts imply in the absence of explicit obligations,⁵ although the caselaw on the implied duty of good faith is relevant to how courts interpret *efforts* standards.⁶

II. THE COMPONENTS OF *EFFORTS* STANDARDS

A bewildering variety of alternatives can be found in provisions featuring *efforts* standards; they are discussed in this part. The principal variants are summarized in figure 1.

In the United States and Canada, drafters prefer the word *efforts*, but in England they prefer *endeavours*.⁷ One sometimes encounters the Americanized version of *endeavours*, lacking a *u*—*endeavors*. There’s no reason to think that the difference between *efforts* and *endeavours* involves anything other than style.⁸ (The alternatives described in this part apply equally to *efforts* and *endeavours*, and unless discussing the practice in a given jurisdiction, this article uses the word *efforts* to refer to both *efforts* and *endeavours*.) Both are also used in the singular (*effort* and *endeavour*), but much less often than in the plural.

Drafters use adjectives to modify *efforts* provisions. Based on this author’s unscientific survey of contracts on the U.S. Securities and Exchange Commission’s EDGAR online public database, where public companies file their “material” contracts, the most common standards featuring just an adjective are *reasonable efforts* and *best efforts*, with *good-faith efforts* a distant third. A minority of drafters use a bewildering variety of other adjectives to express the level of efforts involved: *diligent*, *extraordinary*, *good*, *persistent*, *practicable*, *prompt*, *prudent*, *substantial*, *utmost*, and perhaps others. Adjectives are also combined in twos (*reasonable best efforts*) and even threes (*best good-faith reasonable efforts*). And adjectives sometimes modify *efforts* separately, as in *reasonable and prudent efforts*.

2. See KLING & NUGENT, *supra* note 1, § 13.06 (“In acquisition transactions, the parties will generally . . . reserve a ‘reasonable best efforts,’ ‘commercially reasonable best efforts,’ or ‘best efforts’ standard for things outside of their control or those dependent upon the actions of third parties, such as, for example obtaining shareholder approval of, or third party or governmental consent to, the transaction.”).

3. See *infra* Part VI.A.

4. But see *infra* Part IX.B.

5. See *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917); RICHARD A. LORD, 15 WILLISTON ON CONTRACTS § 48:3 (4th ed. 1993 & Supp. 2018) [hereinafter WILLISTON ON CONTRACTS].

6. See *infra* note 34 and accompanying text.

7. But see *Jolley v. Carmel Ltd.*, [2000] 3 EGLR 68 (Eng.) (referring to an implied term that a buyer would use reasonable efforts).

8. See *infra* Part IX.I.

Figure 1
Common Components of Efforts Standards in
Traditional Contract Drafting

VERB	DETERMINER	PRONOUN	ADVERB	ADJECTIVE (ONE OR MORE)	NOUN
<i>make</i>	<i>all</i>	<i>her</i>	<i>commercially</i>	<i>best</i>	<i>efforts</i>
<i>exercise</i>					<i>endeavours</i>
<i>exert</i>					
<i>exhaust</i>					
<i>expend</i>	<i>every</i>	<i>their</i>		<i>reasonable</i>	<i>effort</i>
<i>undertake</i>					<i>endeavour</i>
<i>use</i>					

Optional

The adverb *commercially* can be used to modify *reasonable*. (One occasionally sees the adjective *business* used to achieve the same effect.) *Commercially* is also used to modify *best* and *good-faith*, but that doesn't make sense: one describes something as being *commercially reasonable*, but not *commercially best* or *commercially good-faith*. Instead of using *commercially*, some drafters use the adjective *commercial* to modify the noun, as in *reasonable commercial efforts*. That's awkward, as in colloquial English one wouldn't refer to efforts as being commercial.

Another adverb, *very*, is sometimes used to modify *best efforts*.

The determiner *all* is sometimes used to modify *efforts*, usually with an adjective (as in *all reasonable efforts*), but also on its own (*all efforts*). The determiner *every* always modifies *effort*, sometimes on its own (*every effort*) and sometimes with one of the usual adjectives (*every reasonable effort*).

Adding to the variety is the range of verbs used with *efforts*. One can also add a pronoun. Instead of using adjectives, drafters sometimes place a modifier after *efforts*, as in *efforts that are reasonable*, *efforts in good faith*, and *efforts that are consistent with the Servicing Standard*. Another alternative is *on a best-efforts basis*.

Instead of using an *efforts* standard, drafters sometimes try to achieve a similar effect by using a noun (for example, *utmost*), an adverb (for example, *aggressively*), an adverb phrase (*to the best of its ability*, *to the extent it is able to do so*), or a verb (*endeavor*, *seek*, *strive*, *try*). Combining such a verb with an *efforts* standard, as in *use reasonable efforts to endeavor* or *endeavor to use reasonable efforts*, is silly. And instead of requiring that a party use reasonable efforts to stop something, some contracts awkwardly state that the party *shall not negligently permit* the act in question.

III. WHAT PEOPLE THINK *EFFORTS* STANDARDS MEAN

Anecdotal evidence from this author's exchanges with readers, seminar participants, and consulting clients suggests that many who work with contracts believe that *best efforts* obligations are more onerous than are *reasonable efforts* obligations, with other *efforts* standards taking other positions in a hierarchy. Commentary on the subject confirms this belief is widely shared. Much of that commentary is insubstantial, but it gives a sense of the prevailing view.

A. COMMENTARY IN THE UNITED STATES

The ABA Committee on Mergers and Acquisitions has noted that “[t]here is a general sense of a hierarchy of various types of efforts clauses that may be employed” and that “some practitioners ascribe the following meanings” to the following “commonly selected standards”:

- *Best efforts*: the highest standard, requiring a party to do essentially everything in its power to fulfill its obligation (for example, by expending significant amounts or management time to obtain consents).
- *Reasonable best efforts*: somewhat lesser standard, but still may require substantial efforts from a party.
- *Reasonable efforts*: still weaker standard, not requiring any action beyond what is typical under the circumstances.
- *Commercially reasonable efforts*: not requiring a party to take any action that would be commercially detrimental, including the expenditure of material unanticipated amounts of money or management time.
- *Good faith efforts*: the lowest standard, which requires honesty in fact and the observance of reasonable commercial standards of fair dealing. Good faith efforts are implied as a matter of law.⁹

Other commentary has noted that the idea of a hierarchy of *efforts* standards is prevalent among those who work with contracts.¹⁰ And one commentator has

9. See MODEL STOCK PURCHASE AGREEMENT, *supra* note 1, at 212.

10. See CHARLES M. FOX, WORKING WITH CONTRACTS 90 (2d ed. 2008) (“Although the case law on the subject is mixed, most practitioners take the view that an obligation to use best efforts includes the obligation to make every possible effort, and to use all possible financial resources, to achieve the goal.”); BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 108 (3d ed. 2011) (“The orthodox view is that a contractual provision requiring *best efforts* imposes extraordinary duties of assiduity: a very high standard of care, regardless of whether the required efforts might be commercially reasonable.”); KLING & NUGENT, *supra* note 1, § 13.06 (“The Authors of this treatise believe that most practitioners treat ‘reasonable efforts,’ ‘commercially reasonable efforts’ and ‘reasonable best efforts’ as all different from and as imposing less of an obligation than, ‘best efforts.’ There is no universal agreement, however, as to whether these three standards are, as a practical matter, any different from each other, notwithstanding the fact that ‘reasonable best efforts’ sounds as if it imposes more of an obligation than ‘commercially reasonable efforts.’”); NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 612 (Tina L. Stark ed. 2003) (“Although one commentator has suggested that there is little difference between the standards of ‘best efforts’ and ‘reasonable efforts,’ the prevailing view among practitioners is that the ‘best efforts’

stated, without offering any evidence, that “in ordinary English, the phrase *best efforts* denotes a higher degree of assiduity than *reasonable efforts* or *commercially reasonable efforts* or *good-faith efforts*.”¹¹

But this view conflicts with U.S. caselaw rejecting the idea of a hierarchy of *efforts* provisions.¹² Some commentary describes the caselaw incorrectly.¹³ Other commentary appears to play down the discrepancy, describing the U.S. caselaw as “inconsistent”¹⁴ or “mixed.”¹⁵ And yet other commentary acknowledges that U.S. caselaw doesn’t support the idea of a hierarchy of *efforts* provisions but argues that a hierarchy would nevertheless be useful.¹⁶

B. COMMENTARY IN ENGLAND AND CANADA

Given it has withstood caselaw to the contrary in the United States,¹⁷ it is not surprising that the idea of a hierarchy of *efforts* standards is accepted in commen-

standard is much more rigorous.”); Peter A. Atkins & Edward B. Micheletti, “*Reasonable Efforts*” *Clauses in Delaware: One Size Fits All, Unless . . .*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Nov. 22, 2018), <https://corpgov.law.harvard.edu/2018/11/22/reasonable-efforts-clauses-in-delaware-one-size-fits-all-unless/> [<https://perma.cc/G4Q4-X8A7>] (“Among lawyers, businesspersons and advisers in the transactional world, [variations on the ‘efforts’ concept] often have been viewed as reflecting a hierarchy from lowest (good faith efforts) to highest (best efforts) level of commitment.”); Mayer Brown, *Contractual Standards: Distinctions Without a Difference?*, ON POINT (2018), <https://m.mayerbrown.com/files/Publication/1307f3d2-58a1-4f91-ba16-8fd27fdef1f3/Presentation/PublicationAttachment/108a7147-e721-48ac-8fb7-9b0f92d4c6fc/On-point-Contractual-Standards.pdf> (noting that although *efforts* standards are inconsistently interpreted by courts, “practitioners generally understand that ‘best efforts’ is considered the highest of these standards requiring a party to undertake every action, short of bankruptcy, to accomplish the stated objective”).

11. See BRYAN A. GARNER, GARNER’S GUIDELINES FOR DRAFTING & EDITING CONTRACTS 390–91 (2019).

12. See *infra* Part IV.A.

13. See GARNER, *supra* note 10, at 108 (stating incorrectly that “the majority view is for courts to consider *best efforts* as imposing a higher standard than *reasonable efforts*”); NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE, *supra* note 10, at 615 (stating incorrectly that “case law suggest that the ‘best efforts’ standard is much more rigorous than a standard of ‘reasonable efforts’”).

14. See, e.g., MODEL STOCK PURCHASE AGREEMENT, *supra* note 1, at 213 (“Although practitioners may believe there are differences between the various efforts standards, courts have been inconsistent both in interpreting these clauses and in perceiving distinctions between them.”).

15. See FOX, *supra* note 10, at 90.

16. Atkins & Micheletti, *supra* note 10 (“In some cases, contracting parties might expressly select the ‘all reasonable efforts standard’ as the general ‘efforts’ commitment. It is likely, however, that the parties would select ‘commercially reasonable efforts’ or ‘reasonable best efforts’ in many cases, if they believed that the meaning of the selected standard could reliably be discerned and applied and better reflected their intent and risk concerns.”); Stephen Bainbridge, *What Do “Best Efforts” and Variants Mean? A Proposed Set of Definitions*, PROFESSORBAINBRIDGE.COM (Mar. 30, 2017), <https://www.professorbainbridge.com/professorbainbridgecom/2017/03/what-do-best-efforts-and-variants-mean-a-proposed-set-of-definitions.html> [<https://perma.cc/Q567-BCP8>] (“I propose that we draw a basic distinction between ‘best efforts’ and ‘reasonable efforts,’ with the former being regarded as more onerous.”).

17. See *infra* Part IV.A.

tary in England¹⁸ and Canada,¹⁹ where courts have recognized it.²⁰ Commentators speak of a hierarchy of *efforts* standards as if it were an established fact, and they look to caselaw to establish how best to draft *efforts* provisions in contracts. They're also prone to attributing a distinct meaning to each new *efforts* variant—consider for example commentary regarding English caselaw interpreting the phrase *reasonable but commercially prudent endeavours*.²¹

IV. CASLAW ON DIFFERENCES BETWEEN *EFFORTS* STANDARDS

Although commentators generally accept the idea of a hierarchy of *efforts* standards,²² the caselaw varies depending on the jurisdiction. In the United States, courts (and the Uniform Commercial Code) have declined to recognize a hierarchy of *efforts* standards, whereas courts in England and Canada have endorsed the notion. This part summarizes the caselaw; later parts will consider the implications.

18. See, e.g., KIM LEWISON, *THE INTERPRETATION OF CONTRACTS* § 16.07 (6th ed. 2017) (“Although the content of such an obligation is a question of interpretation of the contract in question, it is probable that an obligation to use best endeavours is more onerous than an obligation to use reasonable endeavours.”); Ben Holland, *Doing Your Best: Making the Most of the Muddle of the “Reasonable Endeavours” Undertaking*, 18 INT’L CO. & COM. L. REV. 349 (2007) (summarizing recent caselaw); *Best Endeavours, All Reasonable Endeavours and Reasonable Endeavours*, WALKER MORRIS (Feb. 10, 2014), <https://www.walkermorris.co.uk/publications/brief-february-2014/best-endeavours-all-reasonable-endeavours-and-reasonable-endeavours/> [<https://perma.cc/YH77-GSMP>]; *Best Endeavours v. Reasonable Endeavours What Do They Mean? Do Either Mean Anything*, SLAUGHTER AND MAY (June 29, 2007), https://www.slaughterandmay.com/media/39130/best_endeavours_v_reasonable_endeavours_june_2007.pdf [<https://perma.cc/WFT2-EV33>] (“However it is clear that the obligation [to use reasonable endeavours] is less onerous than that of best endeavours.” (citation omitted)); Rose-Anna Higgins, *Understanding Endeavours Clauses: Best, Reasonable and All Reasonable*, BURGESS SALMON (Apr. 13, 2017), <https://www.burgess-salmon.com/news-and-insight/legal-updates/understanding-endeavours-clauses-best-reasonable-and-all-reasonable/> [<https://perma.cc/4SCH-ZZBY>]; *Interpreting Endeavours Clauses*, ASHURST (June 27, 2017), <https://www.ashurst.com/en/news-and-insights/legal-updates/interpreting-endeavours-clauses/> [<https://perma.cc/RP5X-7265>] (including a chart purporting to show “how the various endeavours terms sit on the spectrum of obligations”); Ashley Pigott & Helen Davenport, *The Basics: Best, Reasonable and All Reasonable Endeavours—What Do They Mean?*, GOWLING WLG (May 29, 2018), <https://gowlingwlg.com/en/insights-resources/articles/2018/best-reasonable-and-all-reasonable-endeavours/> [<https://perma.cc/3QA8-WBDJ>].

19. See, e.g., *Best Efforts and Other Undertakings: What Do They Mean?*, GOWLING WLG (June 29, 2016), <https://gowlingwlg.com/en/insights-resources/articles/2016/best-efforts-and-other-undertakings-what-do-they/> [<https://perma.cc/4LKK-5QUG>]; Geoff R. Hall & Lama Sabbagh, *Reasonable Efforts vs. Best Efforts—Why the Fuss?*, MCCARTHY TETRAULT (Aug. 5, 2014), https://www.mccarthy.ca/en/insights/blogs/canadian-ma-perspectives/reasonable-efforts-vs-best-efforts-why-fuss#_edn1 [<https://perma.cc/49DV-DQ87>]; Jenny Yoo, *Interpreting “Efforts” in Commercial Contracts*, NORTON ROSE FULBRIGHT (Nov. 12, 2015), <https://www.deallawwire.com/2015/11/12/interpreting-efforts-in-commercial-contracts/> [<https://perma.cc/7G4M-LRNQ>].

20. See *infra* Part IV.

21. See *CPC Grp. Ltd. v. Qatari Diar Real Estate Inv. Co.*, [2010] EWHC 1535 (Ch); Matheson, *What Does It Mean to Use All Reasonable But Commercially Prudent Endeavours?*, LEXOLOGY (Dec. 2, 2010), <https://www.lexology.com/library/detail.aspx?g=1359854a-e5b3-4150-abb2-557ac1476f9e> [<https://perma.cc/XV9W-AVYG>].

22. See *supra* Part III.

A. U.S. CASELAW

1. Generally

In the United States, contracts have long used the phrase *best efforts*. One case from 1840 states that a party to the contract at issue “was to use his best efforts” to collect on a note.²³ U.S. contracts have also long used the phrase *reasonable efforts*. Another case quotes a contract from 1876 that uses the phrase.²⁴

Even though the ostensible distinction between *best efforts* and *reasonable efforts* is at the heart of the idea of a hierarchy of *efforts* provisions,²⁵ courts in the United States have rejected the contention that a party’s obligation to use best efforts requires making every conceivable effort to accomplish the goal in question, regardless of the cost or detriment.²⁶

Courts have articulated in different ways what *best efforts* means. Some have held that the appropriate standard is one of good faith,²⁷ a standard grounded in honesty and fairness.²⁸ Some have held that the standard requires something more than good faith.²⁹ Some have held that it’s a function of diligence.³⁰ Some

23. *Kyle v. Hoyle*, 6 Mo. 526, 532 (1840).

24. *Congdon v. Chapman*, 63 Cal. 357, 359 (1883) (“[A]nd said Chapman agrees to use all reasonable efforts to realize on the stock of said company owned or controlled by him without unnecessary delay . . .”).

25. See *supra* Part III.

26. See, e.g., *Coady Corp. v. Toyota Motor Distribs., Inc.*, 361 F.3d 50, 59 (1st Cir. 2004) (“‘Best efforts’ . . . cannot mean everything possible under the sun . . .”); *Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 228 (1st Cir. 1987) (“We have found no cases, and none have been cited, holding that ‘best efforts’ means every conceivable effort.”); *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979) (“The requirement that a party use its best efforts necessarily does not prevent the party from giving reasonable consideration to its own interests.”).

27. See, e.g., *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.”); *Soroo Trading Dev. Co. v. GE Fuel Cell Sys.*, 842 F. Supp. 2d 502, 511 (S.D.N.Y. 2012) (holding that a *best efforts* provision imposes an obligation to act with good faith in light of one’s own capabilities); *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) (an obligation to use best efforts can be met by “active exploitation in good faith”).

28. See BLACK’S LAW DICTIONARY (10th ed. 2014) (giving as the definition of *good faith* “[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”).

29. See *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 234 (3d Cir. 2001) (“Precedent treats ‘best efforts’ as a form of good faith and sound business judgment.”); *Satellite Broad. Cable, Inc. v. Telefonica De Espana, S.A.*, 807 F. Supp. 210, 217 (D.P.R. 1992) (the net effect of the *best efforts* provision at issue was “to expand extra-contractual damages beyond a mere good faith requirement”); *Kroboth v. Brent*, 625 N.Y.S.2d 748, 749 (App. Div. 1995) (“[B]est efforts’ requires more than ‘good faith,’ which is an implied covenant in all contracts . . .”).

30. See *Nat’l Data Payment Sys., Inc. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000); *T.S.I. Holdings, Inc. v. Jenkins*, 924 P.2d 1239, 1250 (Kan. 1996).

have invoked reasonableness.³¹ And some have acknowledged that *best efforts* and *reasonable efforts* mean the same thing.³²

Only two opinions have suggested that *best efforts* represents a more onerous standard than does *reasonable efforts*.³³ But neither court explains its position, and no other courts have followed their lead.

As regards other *efforts* standards, *reasonable efforts* is explicitly a reasonableness standard, but uncertainty returns with *good-faith efforts*. In interpreting a *good-faith efforts* provision, courts are likely to use whatever standard they would use in applying the implied duty of good faith.³⁴ That standard might require bad faith—equated with dishonesty³⁵—for breach, or it might be grounded in reasonableness.³⁶

The potential for uncertainty in interpreting a *good-faith efforts* provision is on display in caselaw on *best efforts*, with some cases holding that the appropriate standard is one of good faith and other cases holding that more than good faith is required.³⁷ That might be a function of uncertainty over the meaning of *best efforts*, but it could equally well be due to fluid notions of what *good faith* means.

31. See, e.g., *Corporate Lodging Consultants, Inc. v. Bombardier Aerospace Corp.*, No. 03-1467-WEB, 2005 WL 1153606, at *6 (D. Kan. May 11, 2005) (“Best efforts does not mean perfection and expectations are only justifiable if they are reasonable.”); *Coady Corp.*, 361 F.3d at 59 (“Best efforts’ is implicitly qualified by a reasonableness test”); *Kroboth*, 625 N.Y.S.2d at 749 (“Best efforts’ requires that plaintiffs pursue all reasonable methods”).

32. See, e.g., *Stewart v. O’Neill*, 225 F. Supp. 2d 6, 14 (D.C. Cir. 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”); *Soroof Trading Dev. Co.*, 842 F. Supp. at 511 (holding that New York courts use the term *reasonable efforts* interchangeably with *best efforts*); see also *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990) (in a case involving an implied rather than express duty, equating an implied *best efforts* obligation with “the exercise of ‘due diligence’ or ‘reasonable efforts’”); *Trecom Bus. Sys., Inc. v. Prasad*, 980 F. Supp. 770, 774 n.1 (D.N.J. 1997) (in a case involving an implied rather than express duty, referring to the distinction between *best efforts* and *reasonable efforts* as “merely an issue of semantics”).

33. See *LTV Aerospace & Def. Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 198 B.R. 848, 854 (S.D.N.Y. 1996) (stating that “[t]he standard imposed by a ‘reasonable efforts’ clause such as that contained in section 7.01 of the Agreement is indisputably less stringent than that imposed by the ‘best efforts’ clauses contained elsewhere in the Agreement,” but going on to note that “a party is entitled to give ‘reasonable consideration to its own interests’ in determining an appropriate course of action to reach the desired result” (quoting *Bloor*, 601 F.2d at 614)); *Krinsky v. Long Beach Wings, LLC*, No. B148698, 2002 WL 31124659, at *8 (Cal. Ct. App. Sept. 26, 2002) (“The term ‘best efforts’ is not defined in the lease. But the plain meaning of the term denotes efforts more than usual or even merely reasonable.” (footnote omitted)).

34. See, e.g., *Barbara v. MarineMax, Inc.*, No. 12-CV-0368 (ARR) (RER), 2013 WL 4507068, at *8 (E.D.N.Y. Aug. 22, 2013) (“Plaintiffs’ breach of contract claim arises not from the implied covenant, but from the express Good Faith Efforts clause of the APA. . . . [B]ecause there is no contract provision defining ‘good faith,’ the term may be construed to have the same meaning it does in the implied covenant context.”), *aff’d*, 577 F. App’x 49 (2d Cir. 2014).

35. See BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *bad faith* as “[d]ishonesty of belief, purpose, or motive”).

36. See 23 WILLISTON ON CONTRACTS, *supra* note 5, § 63:22 (“A breach of the implied obligation of good faith and fair dealing is obviously present where a party acts in bad faith, but it may also be found where the defendant acts in a commercially unreasonable manner while exercising some discretionary power under the contract.”).

37. See *supra* notes 27–29 and accompanying text.

Interpreting a *good-faith efforts* provision is further complicated by whether the implied duty of good faith is an objective standard or a subjective standard, or both.³⁸ That might be a function of whether the court focuses on honesty, which is a function of one's state of mind, or reasonableness, which is not. A court might raise this issue in interpreting an explicit *good-faith efforts* provision.

2. Delaware Caselaw

In the United States, Delaware courts wield outside influence in corporate matters,³⁹ so their decisions interpreting *efforts* standards have been the focus of much of the discussion about *efforts* provisions.

In *Williams Cos. v. Energy Transfer Equity, L.P.*,⁴⁰ the Delaware Supreme Court interpreted a contract that used the phrases “commercially reasonable efforts” and “reasonable best efforts.” Referring to both provisions without distinguishing between them, the court stated that “covenants like the ones involved here impose obligations to take all reasonable steps to solve problems and consummate the transaction.”⁴¹

In *Akorn, Inc. v. Fresenius Kabi AG*,⁴² the Delaware Chancery Court applied the *Williams* standard (“take all reasonable steps”) in construing Akorn’s obligation to use commercially reasonable efforts to operate in the ordinary course of business in all material respects. The court used the same standard in determining whether Fresenius had complied with the obligation of each party to “cooperate with the other parties and use . . . their respective reasonable best efforts to promptly . . . take . . . all actions . . . necessary, proper or advisable to cause the conditions to Closing to be satisfied as promptly as reasonably practicable and to consummate and make effective, in the most expeditious manner reasonably practicable, the [Merger].”⁴³ Consistent with *Williams*, the court drew no distinction between the *commercially reasonable efforts* standard and the *reasonable best efforts* standard.

But Delaware caselaw has also seen a high-profile endorsement of the idea of a hierarchy of *efforts* standards, albeit a nonbinding one. In his dissent in *Williams*, Chief Justice Strine asserted that an obligation to use *commercially reasonable efforts* was “an affirmative covenant and a comparatively strong one.”⁴⁴ As support, he cited the prominent treatise *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* as stating that a *best efforts* obligation can require a party to take “extreme measures” and a *commercially reasonable efforts* obligation is “a strong,

38. See, e.g., *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 727 (Cal. 1992) (“A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable.”).

39. See, e.g., Omari Scott Simmons, *Delaware’s Global Threat*, 41 J. CORP. L. 217, 222 (2015) (“Delaware’s unique specialized court system is perhaps the key factor contributing to the strength of its global reputation.”).

40. 159 A.3d 264 (Del. 2017).

41. *Id.* at 272.

42. No. 2018-0300-JTL, 2018 WL 4719347, at *88 (Del. Ch. Oct. 1, 2018).

43. *Id.* at *91.

44. *Williams*, 159 A.3d at 275.

but slightly more limited, alternative.”⁴⁵ But he cited the 2001 version of the treatise. The current version of the treatise says something different, as did the version in effect when *Williams* was decided⁴⁶:

The Authors of this treatise believe that most practitioners treat “reasonable efforts,” “commercially reasonable efforts” and “reasonable best efforts” as all different from and as imposing less of an obligation than, “best efforts.” There is no universal agreement, however, as to whether these three standards are, as a practical matter, any different from each other, notwithstanding the fact that “reasonable best efforts” sounds as if it imposes more of an obligation than “commercially reasonable efforts.”⁴⁷

That weakens the value of the citation as support for his proposition. The Chief Justice cites no caselaw, presumably because negligible caselaw supports the proposed distinction.⁴⁸

In an earlier opinion that Chief Justice Strine wrote while serving on the Court of Chancery, he recognized that even a *best efforts* obligation “is implicitly qualified by a reasonableness test—it cannot mean everything possible under the sun.”⁴⁹ So even the most prominent American judge to endorse the idea of different levels of onerousness in *efforts* standards has in effect acknowledged that it is difficult to maintain the distinction in practice.

3. The Uniform Commercial Code

Like U.S. courts, the drafters of article 2 of the Uniform Commercial Code evidently saw no distinction between *best efforts* and *reasonable efforts*.

Section 2-306(2) recognizes the following implied obligation in a contract for exclusive dealing:

A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.⁵⁰

Official Comment 5 to section 2-306(2) says that subsection (2) makes explicit the commercial rule under which parties “are held to have impliedly, even when not expressly, bound themselves to use reasonable diligence as well as good faith in their performance of the contract.”⁵¹ Equating *best efforts* with reasonableness, diligence, and good faith in this manner would appear to preclude, for purposes of Article 2, using *best efforts* as a more onerous standard than *reasonable efforts*.

45. *Id.* at 276 n.45.

46. Interview with Lou R. Kling, Co-author of *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* (Dec. 4, 2018).

47. See KLING & NUGENT, *supra* note 1, § 13.06.

48. See *supra* note 33 and accompanying text.

49. *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 763 n.60 (Del. Ch. 2009) (quoting *Coady Corp. v. Toyota Motor Distribs., Inc.*, 361 F.3d 50, 59 (1st Cir. 2004)).

50. U.C.C. § 2-306(2) (2011).

51. *Id.* cmt. 5.

B. ENGLISH CASELAW

As with use of equivalent *efforts* standards in the United States,⁵² English contracts have long used *best endeavours* and *reasonable endeavours*. One case quotes an English contract from 1837 that uses a *best endeavours* standard.⁵³ Another case quotes an English contract from 1841 that uses a *reasonable endeavours* standard.⁵⁴ But it wasn't until the mid-1980s that English courts attributed different meanings to different *endeavours* standards.

An English decision from 1911 equated *best endeavours* with reasonableness, explaining as follows:

We think “best endeavours” means what the words say; they do not mean second-best endeavours. We quite agree with the argument of Mr Balfour Browne that they cannot be construed to mean that the Great Central must give half or any specific proportion of its trade to the Sheffield District. They do not mean that the Great Central must so conduct its business as to offend its traders and drive them to competing routes. They do not mean that the limits of reason must be overstepped with regard to the cost of the service; but short of these qualifications the words mean that the Great Central Company must, broadly speaking, leave no stone unturned to develop traffic on the Sheffield District line.⁵⁵

Strip away the bombast (“they do not mean second-best endeavours”; “leave no stone unturned”) and you're left with reasonableness (“They do not mean that the limits of reason must be overstepped”). Subsequent English cases have interpreted *best endeavours* similarly.⁵⁶

But in a 1986 decision, *UBH (Mechanical Services) Ltd. v. Standard Life Assurance Co.*,⁵⁷ the court suggested that “the phrase ‘all reasonable endeavours’ is probably a middle position somewhere between the other two, implying something more than reasonable endeavours but less than best endeavours.” This case

52. See *supra* notes 23–24 and accompanying text.

53. *Marshall v. Parsons*, (1841) 173 Eng. Rep. 998 (quoting a contract in stating “that the plaintiff was to ‘use his best endeavours and exertions to vend, sell, and dispose of the several goods manufactured’ by the plaintiff”).

54. *Hartley v. Cummings*, (1847) 136 Eng. Rep. 871 (“[T]hat he, the said Thomas Pike, shall and will from time to time, and at all times during the said term, do his best endeavours, and use his utmost care, diligence, and industry . . .” (quoting a contract)).

55. *Sheffield Dist. Ry. Co. v. Great Cent. Ry. Co.*, (1911) 27 TLR 451.

56. See *Midland Land Reclamation Ltd. v. Warren Energy Ltd.*, [1995] ORB No. 254 (an obligation to use best endeavours to keep up to date in technical developments was an obligation to do what was reasonable in the circumstances); *Pips (Leisure Prods.) Ltd. v. Walton*, [1981] 2 EGLR 172, 174 (saying that a *best endeavours* standard required “the doing of all that reasonable persons reasonably could do in the circumstances”); *IBM U.K. Ltd. v. Rockware Glass Ltd.*, [1980] FSR 335, 336 (an obligation to use best endeavours to obtain planning permission obligated the purchaser “to take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission, would have taken”); *Overseas Buyers Ltd. v. Granadex SA*, [1980] 2 Lloyd's Rep. 608, 613 (seeing “no substance at all” in an argument that a *best endeavours* standard required that a party do more than “all that could reasonably be expected of them”); *Terrell v. Mabie Todd & Co.*, [1952] 69 RPC 234 (a company that had agreed to use its best endeavours to promote sales was required to “do what they could reasonably do in the circumstances”).

57. Official Transcripts (1980–1989)/[1986] Lexis Citation 457 (Q.B.) (available at lexisnexis.com); see also *Law Report: Reasonable Endeavours Less Onerous*, *TIMES* (London), Nov. 13, 1986.

in effect both distinguished between *best endeavours* and *reasonable endeavours* and attributed significance to use of *all* with *endeavours*. (This case was decided at roughly the time that *reasonable endeavours* started to be used more in British English.⁵⁸ That increased use might have contributed to the change in how English courts interpret *endeavours* standards; on the other hand, correlation is not causation.)

To the same effect is a decision from 2000, *Jolley v. Carmel Ltd.*:

Where a contract is conditional upon the grant of some permission, the courts often imply terms about obtaining it. There is a spectrum of possible implications. The implication might be one to use best endeavours to obtain it, to use all reasonable efforts to obtain it or to use reasonable efforts to do so. The term alleged in this case [to use reasonable efforts] is at the lowest end of the spectrum.⁵⁹

Three subsequent English cases have taken positions consistent with a hierarchy of *endeavours* standards.⁶⁰

A sixth case, *Rhodia International Holdings Ltd. v. Huntsman International LLC*,⁶¹ decided in 2007, went into greater detail. It involved a dispute over an obligation to use reasonable endeavours. In his decision, Julian Flaux QC (then sitting as a deputy High Court Judge) said that a *best endeavours* obligation is more onerous than a *reasonable endeavours* obligation:

As a matter of language and business common sense, untrammelled by authority, one would surely conclude that [“best endeavours” and “reasonable endeavours” did not mean the same thing]. This is because there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can.⁶²

Because a *reasonable endeavours* standard was at issue, the observations of Mr. Justice Flaux (as he was then) on the relationship between *best endeavours* and *reasonable endeavours* are *obiter dicta*—comments unnecessary to the decision.

In an aside in *Rhodia*, Mr. Justice Flaux said that “it may well be that an obligation to use all reasonable endeavours equates with using best endeavours.”⁶³

58. See *infra* Part VI.C.2.

59. [2000] All ER (D) 771.

60. See *Astor Mgmt. AG v. Atalaya Mining plc*, [2017] EWHC 425, at para. 67 (Comm) (referring to “judging whether the endeavours used were ‘reasonable’, or whether there were other steps which it was reasonable to take so that it cannot be said that ‘all reasonable endeavours’ have been used”); *CPC Grp. Ltd. v. Qatari Diar Real Estate Inv. Co.*, [2010] EWHC 1535 (Ch) (stating that an obligation to use “all reasonable but commercially prudent endeavours” is “not equivalent to a ‘best endeavours’ obligation”); *Hiscox Syndicates v. Pinnacle Ltd.*, [2008] EWHC 145 (Ch) (stating that an obligation to use all reasonable endeavours “is more onerous than an obligation simply to use ‘reasonable endeavours’, and is approaching an obligation to use ‘best endeavours’”).

61. [2007] EWHC (Comm) 292.

62. *Id.* at para. 33.

63. *Id.*

That view conflicts with the decisions in *UBH*⁶⁴ and *Jolley*.⁶⁵ He has also in public remarks equated *all reasonable endeavours* with *reasonable endeavours*⁶⁶—an interpretation that conflicts with his assertion in *Rhodia*.

These six cases represent the entirety of English caselaw distinguishing between different *endeavours* standards. If a case doesn't compare different *endeavours* standards but simply considers whether a party has satisfied an *endeavours* provision,⁶⁷ it isn't directly relevant. But one such case is relevant for what it doesn't say. *Jet2.com Ltd. v. Blackpool Airport Ltd.*,⁶⁸ decided in 2012, suggests that perhaps not all English judges are committed to a hierarchy of *endeavours* standards. It involved a dispute over what an airport operator had to do to comply with a *best endeavours* obligation. The contract used both *best endeavours* and *all reasonable endeavours*. The court said that the "natural meaning of ['all reasonable endeavours'] is that [the appellant] would do *its best* to ensure that charges made for ground services would support Jet2's low-cost pricing model."⁶⁹ The court also noted that the litigants had agreed that the two *endeavours* standards "meant the same thing."⁷⁰ The court didn't mention gradations of *endeavours* provisions and didn't discuss attributing significance to the *all* in "all reasonable endeavours."

C. CANADIAN CASELAW

Like English caselaw, Canadian caselaw recognizes a hierarchy of *efforts* standards. The best-known Canadian case on *best efforts* is *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*,⁷¹ a 1994 decision of the British Columbia Supreme Court. Of its seven-point digest of the caselaw, the first two are relevant:

1. "Best efforts" imposes a higher obligation than a "reasonable effort."
2. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.⁷²

64. See *supra* note 57 and accompanying text.

65. See *supra* note 59 and accompanying text.

66. Remarks by Mr. Justice Flaux during panel discussion, University College London Faculty of Laws, Dysfunction in Contract Drafting, YOUTUBE (Nov. 8, 2016), https://www.youtube.com/watch?time_continue=3939&v=TmLjlw9Us (at 1:04:04) [hereinafter Panel Discussion] ("Speaking for myself, I would have thought that *all reasonable endeavours* was the same thing as *reasonable endeavours*, because I don't think adding the word *all* necessarily means anything.").

67. See, e.g., *Ampurius Nu Homes Holdings Ltd. v. Telford Homes (Creekside) Ltd.*, [2012] EWHC 1820 (Ch) (interpreting an obligation to use "reasonable endeavours to procure completion"); *Yewbelle v. London Green Devs. Ltd.*, [2007] EWCA (Civ) 475 (addressing whether a seller of land had used all reasonable endeavours to obtain planning permission).

68. [2012] EWCA Civ 417.

69. *Id.*

70. *Id.*

71. 89 B.C.L.R. 2d 356 (Can. B.C.).

72. *Id.* at para. 69.

Canadian courts have followed this decision.⁷³ And a court in Quebec, a civil-law jurisdiction, has accepted that a *best efforts* obligation constitutes a promise to do more than what is reasonable.⁷⁴

V. LACK OF EXPLANATION

A remarkable feature of the caselaw and commentary on *efforts* standards is the lack of plausible explanation of positions taken.

A. ATTEMPTS TO REFUTE THE VALIDITY OF A HIERARCHY OF EFFORTS PROVISIONS

In the voluminous U.S. caselaw on *efforts* standards, not a single court has offered a rationale for declining to recognize the idea of a hierarchy of *efforts* standards. Although glaring, that shouldn't be surprising: "Courts often make plain meaning determinations without referencing any evidence other than the contested contractual text."⁷⁵ The lack of explication puts the caselaw in a fragile position, in that any contrary view—notably that of Chief Justice Strine in his dissent in *Williams*⁷⁶—can seem compelling.

Courts in the United States have been sensible in declining to find distinctions between different *efforts* standards.⁷⁷ But the lack of explication puts U.S. courts in the position of the math student who gets the right answer to a problem without showing their work.

Other than this author in his previous writings,⁷⁸ no commentator has attempted to explain why the idea of a hierarchy of *efforts* standards is unfounded.

73. See, e.g., *Diamond Robinson Bldg. Ltd. v. Conn*, 2010 BCSC 76, at para. 82 (Can.) (saying that in *Atmospheric Diving*, "Madam Justice Dorgan concisely summarizes the law on the meaning of 'best efforts'"); *Leacock v. Whalen, Beliveau & Assocs. Inc.*, [1996] B.C.J. No. 2085, at para. 99 (Can. B.C.) (saying that *Atmospheric Diving* "usefully summarizes the law on 'best efforts'").

74. See *Cemar Electro Inc. v. Grob Textile A.G.*, 2014 QCCS 5814 (Can.).

75. Stephen Mouritsen, *Contract Interpretation with Corpus Linguistics*, 94 WASH. L. REV. (forthcoming 2019).

76. See *supra* notes 44–48 and accompanying text.

77. See *supra* Part IV.A.

78. KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING ¶¶ 8.1–83 (4th ed. 2017); Kenneth A. Adams, *Putting an End to "Endeavours" Nonsense*, LAWYER (Oct. 1, 2017), <https://www.thelawyer.com/putting-end-endeavours-nonsense/> [<https://perma.cc/2ZUV-NC5S>]; Kenneth A. Adams, *Beyond Words*, SOLICITORS J., Sept. 30, 2014, at 18; Kenneth A. Adams, *With "Efforts" Provisions, Reasonable Is Better Than Best*, LAW. WKLY. (May 16, 2014), <https://www.adamsdrafting.com/wp/wp-content/uploads/2014/05/TLW-May16-pg13.pdf>; Kenneth A. Adams, *Understanding "Best Efforts" and Its Variants (Including Drafting Recommendations)*, 50 PRAC. LAW., Aug. 2004, at 11; Kenneth A. Adams, *Distinguishing Between Different "Efforts" Standards Makes No Sense*, ADAMS ON CONTRACT DRAFTING (Apr. 4, 2017), <https://www.adamsdrafting.com/distinguishing-between-different-efforts-standards-makes-no-sense/> [<https://perma.cc/S9L4-S4B6>] (one of many blog posts by this author on the subject).

B. ATTEMPTS TO EXPLAIN THE VALIDITY OF A HIERARCHY OF EFFORTS PROVISIONS

Cases that support the idea of a hierarchy of *efforts* standards offer no rationale. Instead, they simply assert that the distinction exists.

Notably, in *Rhodia* Mr. Justice Flaux says that “one would surely conclude that” *best endeavours* and *reasonable endeavours* do not mean the same thing, but by way of explanation he says only that a *reasonable endeavours* obligation “probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use *best endeavours* probably requires a party to take all the reasonable courses he can.”⁷⁹

But that’s not actually an explanation. Mr. Justice Flaux doesn’t say what about the two phrases requires assigning a different meaning to each. And his language is oddly qualified. He uses the booster⁸⁰ *surely*, even though it’s standard advice in legal writing that one avoid boosters like *surely*, *clearly*, and *obviously*.⁸¹ It’s as if Mr. Justice Flaux were trying to convince the reader, or himself, of a proposition that is in fact less than certain.

His use of the hedge⁸² *probably*, twice, in stating the meaning of *best endeavours* and *reasonable endeavours* not only suggests that this proposition, too, is less than certain, it’s also problematic in a more substantive way. Nothing about accepted contract-interpretation doctrine suggests that to establish the intention of the parties, one relies on probability.⁸³ That the 1986 decision in *UBH* also relies on *probably* in a similarly sensitive context⁸⁴ doesn’t make the *Rhodia* decision any less problematic; instead, it brings the *UBH* decision too into question.

There’s also no support for Mr. Justice Flaux’s arbitrary suggestion that complying with a *reasonable endeavours* obligation might require pursuing just one possible course of action and ignoring others. A reasonable approach to achieving a goal might require working on different tasks, either simultaneously or one after the other. Because Mr. Justice Flaux’s remarks were *obiter dicta*,⁸⁵ he was spared any practical implications. It’s not surprising that apparently no court has attempted to apply Mr. Justice Flaux’s construct to the circumstances of an actual dispute.

English caselaw positing that *all reasonable endeavours* occupies a position between *best endeavours* and *reasonable endeavours*⁸⁶ likewise fails to explain why. Canadian caselaw fares no better. According to the court in *Atmospheric Diving*, a *best*

79. See *supra* note 62 and accompanying text.

80. See Richard Nordquist, *Boosting (Language)*, THOUGHTCO., <https://www.thoughtco.com/what-is-boosting-language-1689175> [<https://perma.cc/3GP4-KJBM>] (last visited Feb. 28, 2019).

81. See BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 35 (2d ed. 2002) (“Although lawyers often overqualify and sound timid, they also have a penchant for dogmatic words and phrases. This despite the well-known dictum that words such as *obviously*, *clearly*, and *undoubtedly* are always suspect.”).

82. See Richard Nordquist, *Verbal Hedge: Definition and Examples*, THOUGHTCO., <https://www.thoughtco.com/verbal-hedge-communication-1692585> [<https://perma.cc/43HM-E2SC>] (last visited Feb. 28, 2019).

83. See *infra* Part VIII.

84. See *supra* note 57 and accompanying text.

85. See *supra* Part IV.B.

86. See *supra* notes 60–66 and accompanying text.

efforts obligation represents a more onerous standard than does *reasonable* efforts, but to comply with that obligation all that's required is that you take all reasonable steps.⁸⁷ (The opinion doesn't suggest that by referring to "all reasonable steps" the court was invoking a standard more exacting than reasonableness.) Those two points conflict, so the ostensible distinction collapses. But that hasn't stopped Canadian courts from following it⁸⁸ and commentators from citing it uncritically.⁸⁹

Commentary hasn't done a better job at distinguishing between *efforts* provisions. English law firms produce newsletters that attempt to describe how to comply with various *endeavours* obligations. For example, they propose that a *best endeavours* standard requires that you be prepared to spend money or commence legal proceedings.⁹⁰ But such guidance is unhelpful when divorced from the facts of a dispute.⁹¹ It's the circumstances that the contract parties face that breathe meaning into *endeavours* provisions.⁹²

Furthermore, such guidance tends to be expressed in terms of possibility and matters of degree,⁹³ so it would be rash to rely on it. But those invested in the idea of a hierarchy of *endeavours* standards are prone to thinking in terms of certainty and absolutes.⁹⁴ And such guidance appears to avoid anything inconsistent with the idea of a hierarchy of *endeavours* standards, for example details of the opinion in *Jet2.com*.⁹⁵

U.S. commentary also offers no rationale for the idea of a hierarchy of *efforts* provisions. Instead, it simply reports that practitioners think the distinctions exist or, in the case of one commentator, simply accepts that it's a function of ordinary English.⁹⁶

VI. WHY A HIERARCHY OF EFFORTS STANDARDS IS UNWORKABLE

Caselaw and commentary don't come close to explaining why the idea of a hierarchy of *efforts* standards works or doesn't work. As this part explains, it

87. See *supra* note 72 and accompanying text.

88. See *supra* note 73 and accompanying text.

89. See, e.g., Hall & Sabbagh, *supra* note 19 (citing *Atmospheric Diving* in saying that the distinction between *best efforts* and *reasonable efforts* "has existed for some time in Canadian jurisprudence").

90. See, e.g., ASHURST, *supra* note 18 (under the heading "What practical actions may 'best endeavours' require of the obligor?," saying, "Significant expenditure" and "Litigation or an appeal against a decision if reasonable in the circumstances, i.e. not doomed to fail"); Piggott & Davenport, *supra* note 18 (under the heading "What are the key characteristics of a best endeavours clause?," saying, "Such clauses may require significant expenditure on behalf of the obligor").

91. See RICHARD CALNAN, PRINCIPLES OF CONTRACTUAL INTERPRETATION 90 (2d ed. 2017) ("To a certain extent, these glosses on [*best endeavours*, *reasonable endeavours*, and other expressions used frequently in contracts] can be useful, but they cannot be taken too far. Such words, like any others, take their colour from their context, and previous judicial pronouncements on their meaning are at best presumptions as to the meaning the parties are likely to have intended . . .").

92. See *infra* Part VI.A.

93. See *supra* note 90.

94. See, e.g., Remarks by Kate Gibbons, partner at Clifford Chance, during Panel Discussion, *supra* note 66 (at 1:03:35) ("If [different *endeavours* provisions have] got an understood meaning in the market and one is the difference between expending money and one isn't, you know exactly what you're negotiating.").

95. See *supra* notes 69–70 and accompanying text.

96. See *supra* notes 9–11 and accompanying text.

doesn't work, for three reasons. First, imposing an obligation to act more than reasonably is unreasonable. Second, requiring that a contract party act more than reasonably creates too much uncertainty as to what level of effort is required. And third, for a hierarchy of *efforts* standards to be valid one must attribute to the phrase *best efforts* and to the words *commercially* (and *commercial*) and *all* as used in *efforts* standards a meaning inconsistent with colloquial English.

A. IMPOSING AN OBLIGATION TO ACT MORE THAN REASONABLY IS UNREASONABLE

Vagueness is a function of borderline cases.⁹⁷ The noun *pebble* is vague—how small does a rock have to be to be called a pebble? The adjective *blue* is vague—at what point does blue shade into green or purple? The adverb *promptly* is vague—how fast do you have to act to act promptly? In each case, there's no clear line. And vagueness is relative—whether a vague standard has been met depends on the circumstances⁹⁸ and what is reasonable in those circumstances.⁹⁹

The concept of trying hard is vague, whether it's expressed using the word *efforts* or otherwise, so it's relative. To determine whether someone has tried hard, you have to consider what a reasonable person would have done in the circumstances. That is acknowledged in U.S.¹⁰⁰ and English¹⁰¹ caselaw.

Assume you promise to do your best to run a given distance faster than ever before. What that might involve would depend on who you are. If you're a world-class athlete with generous sponsors, doing your best might involve training at altitude, using a bariatric chamber, hiring coaches, obtaining cutting-edge running shoes, and any number of other extreme measures. If you're a middle-aged person with no history of athletic accomplishment, doing your best would require a substantially less ambitious regimen, one that takes into account your

97. Roy Sorensen, *Vagueness*, STAN. ENCYCLOPEDIA PHIL. (Apr. 5, 2018), <https://plato.stanford.edu/archives/sum2018/entries/vagueness/> [<https://perma.cc/JWK2-BNV7>] (“Vagueness is standardly defined as the possession of borderline cases. For example, ‘tall’ is vague because a man who is 1.8 meters in height is neither clearly tall nor clearly non-tall. No amount of conceptual analysis or empirical investigation can settle whether a 1.8 meter man is tall.”).

98. See *id.* (“‘Tall’ is relative. A 1.8 meter pygmy is tall for a pygmy but a 1.8 meter Masai is not tall for a Masai. Although relativization disambiguates, it does not eliminate borderline cases. There are shorter pygmies who are borderline tall for a pygmy and taller Masai who are borderline tall for a Masai.”); Nikola Kompa, *The Role of Vagueness and Context Sensitivity in Legal Interpretation*, in *VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES* 205, 215–16 (Geert Keil & Ralf Poscher eds., 2016) (“Whom we call rich, tall, interesting, or bald and what we call red, good, important, or evident varies in accordance with our changing interests, concerns, and purposes.”).

99. See Kompa, *supra* note 98, at 216 (“Given certain interests, purposes, concerns, and background assumptions, Joe will reasonably count as being tall; given other interests, etc., he will not. A particular interpretation can be justified if it is shown to be the most reasonable one in light of all relevant contextual features.” (footnote omitted)).

100. See, e.g., *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 233 (3d Cir. 2001) (“‘Best efforts’ depends on the factual circumstances surrounding an agreement.”); *Triple-A Baseball Club Assocs. v. Ne. 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”).

101. See, e.g., *Jet2.com Ltd. v. Blackpool Airport Ltd.*, [2011] EWHC (Comm) 1529, 2011 WL 844005 (“The meaning of the expression [all reasonable endeavours] remains a question of construction not of extrapolation from other cases.”).

age, underwhelming physique, family obligations, work commitments, and other interests.

The same approach applies to any activity. The circumstances determine the level of effort that is appropriate. If the situation is urgent, if a lot is at stake, and if significant resources are available, then greater effort is required. If the situation is less urgent, if less is at stake, or if resources are scarce, then less effort is required. And nothing suggests that trying hard might require conduct that goes beyond what is reasonable—that you might have to try harder than hard.

Similarly, nothing suggests that a reasonableness standard might require conduct that is less than what one would expect from a reasonable person in the circumstances. One meaning of *reasonable* is “moderate,”¹⁰² so *reasonable* might seem wishy-washy for impressing on the other party that it must do its utmost to sell widgets, and the prospect of imposing a more onerous efforts standard might have appeal. But that’s not a real concern, because a *reasonable efforts* standard considers the circumstances.

So if trying hard is a function of reasonableness and an *efforts* provision expressed using *best efforts* is more exacting than one expressed using *reasonable efforts*, a contract party subject to that provision might have to act more than reasonably to comply with that provision. In other words, it might have to act unreasonably. Even if contract law has nothing to say about requiring someone to act more than reasonably, the very idea is counterintuitive. It’s unreasonable.

Because vagueness standards are grounded in reasonableness, in a contract dispute over an *efforts* provision a court might well elect to consider what conduct would have been reasonable in the circumstances, regardless of the *efforts* standard used. If courts accepting the idea of a hierarchy of *efforts* standards hasn’t resulted in more mischief than it has,¹⁰³ that’s likely why.

B. MORE-THAN-REASONABLE *EFFORTS* STANDARDS ARE UNWORKABLE

Accepting a hierarchy of *efforts* standards requires recognizing degrees of effort along a spectrum. In the United States, that approach has been applied to negligence, with the terms *negligent*, *grossly negligent*, *reckless*, *wanton*, and *willful* (and their associated nouns), among others, being used to specify degrees of negligence. So why not have degrees of effort?

Because applying degrees of negligence has proven chaotic. The word *negligent* has a relatively settled meaning,¹⁰⁴ but the related terms have no clear meaning.¹⁰⁵

102. See *Reasonable*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/reasonable> [<https://perma.cc/N8SW-EYME>] (last visited Feb. 28, 2019).

103. See Hall & Sabbagh, *supra* note 19 (“Yet this distinction between efforts clauses has existed for some time in Canadian jurisprudence and Canadian courts have continued to render coherent decisions with very little difficulty in applying the standards of performance to efforts clauses. This leads to the reasonable conclusion that, in fact, there is no crisis and no reason to be overly concerned.” (footnotes omitted)).

104. See BLACK’S LAW DICTIONARY (10th ed. 2014) (giving as a definition of *negligence* “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation”).

105. See Edwin H. Byrd, III, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1387 (1988) (stating, regarding the eleven adjectives pertaining to degrees of negligence

That's to be expected. To the extent they mean anything, the negligence standards other than *negligent* are generally understood as expressing behavior that is worse than negligent—in other words, worse than unreasonable. But one would have no basis for determining where along the worse-than-negligent spectrum a given standard would fall—just how unreasonably would one have to act to meet that standard? So judgments involving different levels of negligence arrayed along that spectrum are necessarily unpredictable, no matter how many jurisdictions have embraced that approach.¹⁰⁶

One faces a similar problem in interpreting different *efforts* standards spread along a spectrum of conduct more onerous than what would be reasonable. How much more than reasonable would conduct have to be to comply with a *best efforts* obligation? Would a company have to be willing to expend all its resources and drive itself to ruin, or would something less be sufficient? There's no basis for deciding. The confusion is aggravated by the many variants of *efforts* terminology and the suggestion that each variant expresses a different meaning.¹⁰⁷

As for a spectrum of conduct less onerous than what would be reasonable, the primary *efforts* standard implicated is *good-faith efforts*. Because the issue would be whether, as compared to *reasonable efforts*, the standard is grounded in reasonableness or honesty, and whether the standard is subjective or objective,¹⁰⁸ much less should be at stake than in the case of how *best efforts* compares to *reasonable efforts*.

used in Louisiana statutes, that “it appears that the choice of words to describe the conduct in each statute was not done as part of any preconceived plan or scheme requiring that each adjective describe a different level of conduct”); Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 115 (2008) (“Yet in spite of its lengthy history, recklessness has remained one of the murkiest standards in tort. It has rarely been the subject of academic analysis. In the courts, the definition of recklessness has remained elusive.” (footnotes omitted)); Olga Voinarevich, *An Overview of the Grossly Inconsistent Definitions of “Gross Negligence” in American Jurisprudence*, 48 J. MARSHALL L. REV. 471, 473 (2015) (“[T]he abundant scholarly commentary shows that various jurisdictions apply a myriad of different tests to determine whether a particular conduct amounts to gross negligence.”).

106. See Byrd, *supra* note 105, at 1388 (“[A] scheme under which each of the terms represents a different level of conduct is unworkable as a practical matter. . . . Each intermediate level of conduct requires its own operative principle for it to receive any consistent treatment. But the difficulties that surround any attempt to articulate an operative principle for ‘wantonness,’ ‘willfulness,’ ‘recklessness,’ and ‘gross negligence,’ even though there are an unlimited number of points on a line of unreasonable conduct which might correspond to these operative principles, make these standards impossible to apply.”); see also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 34, at 211 (5th ed. 1984) (“[I]t is not difficult to understand that there are such things as major or minor departures from reasonable conduct; but the difficulty of classification, because of the very real difficulty of drawing satisfactory lines of demarcation, together with the unhappy history, justifies the rejection of the distinctions in most situations.”).

107. See *infra* Part VII.A.3.

108. See *supra* notes 34–36 and accompanying text.

C. LEGALISTIC MEANINGS ATTRIBUTED TO *EFFORTS* STANDARDS ARE INCONSISTENT WITH COLLOQUIAL ENGLISH

1. In Colloquial English, the Phrase *Best Efforts* Does Not Connote Acting More Than Reasonably

The only basis for distinguishing *best efforts* from *reasonable efforts* is use of the word *best*. For *best efforts* to be a more onerous standard than *reasonable efforts*, the word *best* would have to be given its dictionary meaning, “excelling all others,”¹⁰⁹ so someone’s best efforts exceed all other efforts they might bring to bear on a task.

But when you rely on dictionaries, you strip words of context.¹¹⁰ In the case of *best efforts*, that context is essential.

The root of *best efforts* and *best endeavours* is the phrase *to do one’s endeavour(s)*. *The Oxford English Dictionary* offers as the definition “to exert oneself to the uttermost; to do all one can (in a cause or to an end)” and notes that the phrase is archaic (see figure 2).¹¹¹ It offers quotations using *to do one’s endeavor(s)* from around 1500 to 1873. Some of those quotations feature variants of the phrase using the word *best*. One is a line from Shakespeare’s *Merchant of Venice*, “My best endeouours shall be done heerein.”¹¹²

In this context, the word *best* is a rhetorical flourish that doesn’t change the meaning of the noun it modifies. Instead, using *best* signals a measure of formality, or that the speaker cares. Consistent with this interpretation, the entry for *to do one’s endeavour(s)* in *The Oxford English Dictionary* doesn’t distinguish quotations that use *best* from those that do not.

The role of *best* in the phrase *best efforts* reflects that “[r]ather than choosing each word carefully and independently to convey an intended meaning, the choice of a given word often conditions the choice of the next word.”¹¹³ It follows that words chosen together have a meaning different from their independent meanings.¹¹⁴

In particular, “[t]here is a broad general tendency for frequent words . . . to have less of a clear and independent meaning than less frequent words.”¹¹⁵ This phenomenon is known as “delexicalization,” and a delexicalized word

109. *Best*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/best> [<https://perma.cc/GNC3-RY3U>] (last visited Feb. 28, 2019).

110. See STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 38 (2009) (noting the limitations of using dictionaries to interpret contract terms); Neal Goldfarb, *A Lawyer’s Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. REV. 1359, 1364 (“A dictionary’s structure, with its basic unit being a separate entry for each word, conveys the impression that individual words are similarly the basic units of meaning.”); Mouritsen, *supra* note 75 (“The trouble is that dictionaries simply can’t tell us which meanings are plain in the context of a given contract.”); see also *Deal v. United States*, 508 U.S. 129, 132 (1993) (referring to the fundamental principle that “the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”).

111. *To Do One’s Endeavour(s)*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/61901?rskey=rdubpQ&result=1&isAdvanced=false#eid5599557> (last visited Feb. 28, 2019).

112. *Id.*

113. Mouritsen, *supra* note 75.

114. JOHN SINCLAIR, TRUST THE TEXT: LANGUAGE, CORPUS, AND DISCOURSE 20 (2004).

115. JOHN SINCLAIR, CORPUS, CONCORDANCE, COLLOCATION 113 (1991).

Figure 2

Oxford English Dictionary Definition of *To Do One's Endeavour(s)*

b. to do one's endeavour(s): to exert oneself to the uttermost; to do all one can (in a cause or to an end). *arch.* Thesaurus »
Categories »

α.

c1500 *Luffe Roberte Deuyll* 979 in W. C. Hazlitt *Remains Early Pop. Poetry Eng.* (1864) l. 257 The Emperoure charged euery man to do his endeuer.

1551 R. ROBINSON tr. T. More *Vtopia* sig. Ev. Doinge my endeouour to pluck out of hys mynde the...causes of vice.

1600 SHAKESPEARE *Merchant of Venice* II. ii. 167 My best endeouours shall be done heerein. 🐾

1688 J. EVELYN *Mem.* (1857) II. 284, I did my endeavouir with the Lords of the Treasury to be favourable to him.

1716 LADY M. W. MONTAGU *Let.* 10 Oct. (1965) I. 278, I have done my best endeavours to find out something worth writing to you.

1745 BP. J. BUTLER *Serm.* in *Wks.* (1874) II. 287 We are to do our endeavours to promote virtue and religion amongst men.

1827 J. F. COOPER *Prairie* II. xvi. 255 Yes, lad, yes; you would do your endeavours.

1873 R. BROWNING *Red Cotton Night-cap Country* IV. 271 Do your endeavouir like a man.

β.

1577 H. RHODES *Bk. Nurture* (new ed.) sig. B.iiij. There doe your true indeuour.

1612 J. BRINSLEY *Ludus Lit.* iii. 13 Euery one is to doe his best indeuour, to know how to make it most easie.

(Hide quotations)

makes less of a distinctive contribution to meaning.¹¹⁶ Instead of conveying a meaning attributed to it in dictionaries, the function of a delexicalized adjective is to draw attention to and underline an attribute already embedded in the meaning of the noun.¹¹⁷

In these examples, the adjective has been delexicalized:

- *The officers stood in close [physical] proximity to the victims.*
- *The chemists conducted a [scientific] experiment.*
- *The restaurant was at [full] capacity, so they wouldn't seat us.*¹¹⁸

It's not surprising that *best* is delexicalized in the phrase *best efforts*, as *best* is the 310th most common word in modern English.¹¹⁹ The word *best* is delexicalized in other phrases too:

- *it's in your [best] interests*
- *to [the best of] my knowledge*
- *use your [best] judgment*

116. *Id.*

117. Brief for Scholars of Corpus Linguistics as Amici Curiae Supporting Petitioners at 5, Rimini Street, Inc. v. Oracle USA, Inc., No. 17-1625 (U.S. Mar. 4, 2019), 2018 WL 6078447 (providing an overview of delexicalization in the context of the role of the word *full* in the phrase "full costs").

118. See Mouritsen, *supra* note 75.

119. See Mark Davies, WORD FREQUENCY DATA, <https://www.wordfrequency.info/free.asp?s=y> [<https://perma.cc/PWJ3-MGP6>] (last visited Feb. 28, 2019).

of *best endeavours* peaked around 1815 then gradually decreased, presumably due to increased use of more modern alternatives. By contrast, *reasonable endeavours* is essentially absent from the Ngram graph until after 1980, when its use gradually increased. But even by 2000, *best endeavours* still occurs much more often than *reasonable endeavours*.

The Ngram graph suggests that *reasonable endeavours* has never been used in colloquial English. That would explain why we now use the shortened version of *to do one's best endeavours*, namely *to do one's best*. We don't say *to do one's reasonable*. The links to Google Books associated with that Ngram graph suggest that whereas *best endeavours* occurs in a variety of publications, *reasonable endeavours* occurs primarily in legal and governmental publications.

It seems that *reasonable endeavours* developed as an alternative way to express the meaning of *best endeavours*. Presumably, when interpreting the phrase *best endeavours* lawyers were prone to ignoring the delexicalization of *best*,¹²³ so writers of legal texts thought it prudent to come up with an alternative to *best endeavours*, one that could not be interpreted as suggesting that a somehow superior level of efforts might be required.

An Ngram graph of occurrence of *best efforts* and *reasonable efforts* in Google's American-English corpus¹²⁴ (figure 4) shows a similar pattern. Use of *best efforts* gradually increased over the two hundred years covered by the Ngram. (The principal difference between the British-English Ngram graph and the American-English Ngram graph is decreasing use of *best endeavours* in the former and increasing use of *best efforts* in the latter. That's presumably a function of *endeavours* becoming less popular and *efforts* becoming more popular.)¹²⁵ *Reasonable efforts* is essentially absent for the first fifty years and thereafter increases only gradually until 1960. From then on it increases markedly. But in 2000, *best efforts* still occurs much more often than *reasonable efforts*.

Another source of evidence on use of *best efforts* and *reasonable efforts* is the Corpus of Contemporary American English, or COCA. The COCA is "the largest freely-available corpus of English, and the only large and balanced corpus of American English."¹²⁶ It contains "more than 560 million words of text (20 million words each year 1990–2017) and it is equally divided among spoken, fiction, popular magazines, newspapers, and academic texts."¹²⁷

A search on the COCA for the phrases *best efforts* and *reasonable efforts* yielded 755 examples and 44 examples, respectively, after eliminating multiple examples

2Creasonable%20endeavours%3B%2Cc0 (last visited Feb. 28, 2019) (search of *best endeavours* and *reasonable endeavours* in the British English corpus).

123. See *supra* note 109 and accompanying text.

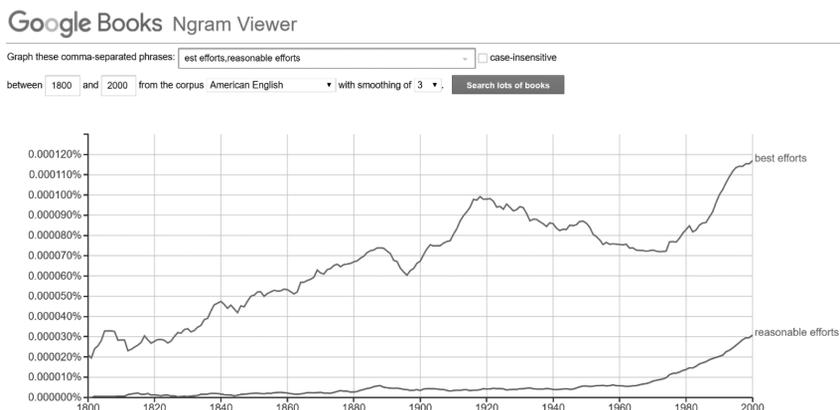
124. See Ngram Viewer, GOOGLE BOOKS, https://books.google.com/ngrams/graph?content=best+efforts%2Creasonable+efforts&year_start=1800&year_end=2000&corpus=17&smoothing=3&share=&direct_url=t1%3B%2Cbest%20efforts%3B%2Cc0%3B.t1%3B%2Creasonable%20efforts%3B%2Cc0 (last visited Feb. 28, 2019) (search of *best efforts* and *reasonable efforts* in the American English corpus).

125. See *infra* note 224 and accompanying text.

126. See CORPUS OF CONTEMP. AM. ENGLISH, <https://corpus.byu.edu/coca/> (last visited Feb. 28, 2019).

127. *Id.*

Figure 4
Ngram Viewer Search of Best Efforts and Reasonable Efforts in the American-English Corpus



from any single article and multiple examples containing the same incidental stock phrase.¹²⁸ In a randomly selected sample of 100 of the *best efforts* examples, none were from a legal context. By contrast, 28 out of 44 of the *reasonable efforts* examples, or 67 percent, involved discussion of statutes, regulations, legal rights, litigation, or policies relating to legal matters. The evidence from the COCA backs up the evidence of the Ngram Viewer: the phrase *reasonable efforts* is a legal construct with a marginal presence in colloquial English.

So it's not the case that *reasonable efforts* is geared to reasonableness whereas *best efforts* goes beyond reasonableness. Instead, *best efforts* is geared to reasonableness, with a rhetorical flourish thrown in, and *reasonable efforts* is a neologism absent from colloquial English. *Reasonable efforts* is best understood as a response to the legal profession's concern that judges and lawyers would be inclined to disregard the idiomatic meaning of *best efforts*.

3. Nothing Suggests That Adding *Commercially* or *All* to an *Efforts* Standard Changes Its Meaning

Many who work with contracts attribute significance to adding *commercially* (or *commercial*) or *all*, or both, to an *efforts* standard.¹²⁹ But neither can be counted on to change meaning.

128. See Kenneth A. Adams, *Instances of "Best Efforts" and "Reasonable Efforts" in the Corpus of Contemporary American English*, ADAMS ON CONTRACT DRAFTING (July 1, 2019), <https://www.adamsdrafting.com/instances-of-best-efforts-and-reasonable-efforts-in-the-coca/> (containing links to spreadsheets containing COCA examples of *best efforts* and *reasonable efforts*).

129. See *supra* note 9 and accompanying text.

If in this context you give the word *commercially* its plain meaning,¹³⁰ it's redundant. Determining whether someone has tried hard involves considering the circumstances,¹³¹ and in the case of a business transaction, that necessarily involves acknowledging that the parties are engaged in the world of commerce. That would be the case whether or not the word *commercially* is used in the *efforts* standard.¹³² It would be reckless for anyone to rely on *commercially reasonable efforts* to express some other meaning. Instead, make that other meaning explicit.

Nothing in caselaw suggests that in this context courts have attributed to the word *commercially* a meaning inconsistent with its colloquial meaning. In the one decision this author is aware of in which a court interpreted just the word *commercially* or *commercial* in the context of an *efforts* provision, as opposed to considering the *efforts* provision as a whole, an Ontario court attributed to *commercial* its colloquial meaning.¹³³

Despite caselaw suggesting otherwise,¹³⁴ in the phrase *all reasonable efforts* the word *all* is a rhetorical flourish. Like the word *best* in *best efforts*,¹³⁵ the word *all* is delexicalized in *all reasonable efforts* and so does not affect meaning. The same is true of use of *all* in *with all due respect* and *all best wishes*. When the U.S. Supreme Court used the phrase “all deliberate speed” in *Brown v. Board of Education*¹³⁶ to direct how quickly schools had to integrate, no one suggested that the word *all* affected its meaning. It's not surprising that *all* is prone to being delexicalized—it's the 43rd most common word in modern English.¹³⁷

No one has attempted to explain how use of *all* results in a more onerous *efforts* standard. Anyone tempted to do so might offer an interpretation comparable to that offered by Mr. Justice Flaux in *Rhodia* regarding *best endeavours*—that it “probably requires a party to take all the reasonable courses he can”¹³⁸—but this article has argued that that interpretation is untenable.¹³⁹ One could invent other explanations, but because none would be generally accepted they would be useless for interpreting *efforts* provisions.

130. See *Commercial*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/reasonable> [<https://perma.cc/4XP3-LUDV>] (last visited Feb. 28, 2019) (giving as one definition of *commercial* “characteristic of commerce”).

131. See *supra* Part VI.A.

132. See TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 25 (2d ed. 2014) (“[T]he standard is that the Seller must have tried to obtain consent and must have used commercially reasonable efforts in that endeavor. That is, the Seller must do what the reasonable businessperson would do.”).

133. See, e.g., 364511 Ontario Ltd. v. Darena Holdings Ltd., [1998] O.J. No. 603, at para. 59 (Can. Ont. Gen. Div.) (“I rely upon the normal dictionary meaning of [the phrase *reasonable commercial efforts*] Commercial means having profit or financial gain as opposed to loss as a primary aim or object.”).

134. See *supra* notes 57–63 and accompanying text.

135. See *supra* notes 113–19 and accompanying text.

136. 349 U.S. 294, 301 (1955).

137. See Davies, *supra* note 119.

138. See *supra* note 62 and accompanying text.

139. See *supra* notes 82–86 and accompanying text.

Using *commercially* or *all* in *efforts* standards is more than simply redundant. Like use of *best* in *best efforts*,¹⁴⁰ it creates confusion, as it encourages those with a legalistic mentality to argue for meanings inconsistent with colloquial English.

VII. THE ELEMENTS OF MISINTERPRETATION

A handful of people exposed to this author's views on *efforts* standards, including readers of drafts of this article, have explained to this author their justification for a hierarchy of *efforts* standards. Also, Mr. Justice Flaux's opinion in *Rhodia*¹⁴¹ is an exception to the dearth of attempted explication in the commentary and caselaw on *efforts* standards. Considered together, these fragments suggest that two elements go into explaining the distinction between *efforts* standards in a manner that conflicts with the empirical evidence. Anyone involved in interpreting *efforts* provisions should be alert to this kind of misinterpretation.

A. THE CONCEPTUAL EXPLANATION

One element of such explanations consists of a way to make credible on its face, without exploring the merits of the idea, the notion that *best efforts* imposes a more onerous obligation than does *reasonable efforts*.

1. It's Valid Because Many People Think It's Valid

One such conceptual explanation is that many people accept the idea of a hierarchy of *efforts* standards, so it must be valid.

For example, consider what Mr. Justice Flaux said at a 2016 panel discussion: "I think English lawyers generally would say that *reasonable endeavours* and *best endeavours* are two different concepts."¹⁴² Another example is from an email to this author: "The solicitors I work with all understand that it matters to a client whether it undertakes to use 'reasonable efforts' or 'best efforts.'"¹⁴³ Such statements rely on sweeping and often exaggerated generalization (*Everyone would agree that . . .*). That's because the speaker is trying to express that this view is the conventional wisdom, and what level of support an idea must have to constitute conventional wisdom is necessarily nebulous.

But a bigger problem is that such statements rely on *argumentum ad populum* (also known as "appeal to common belief" and other names), the logical fallacy that a proposition must be true because many or most people believe it.¹⁴⁴ How many people ascribe to an idea is not proof that it's valid. Relying on *argumentum ad populum* is a sure sign one has lost an argument.

140. See *supra* Part VI.C.1.

141. See *supra* note 61 and accompanying text.

142. See, e.g., Flaux, Panel Discussion, *supra* note 66 (at 1:01:26).

143. Because this view was expressed in a private email message, this article doesn't identify the sender.

144. See Austin Cline, *Argumentum ad Populum (Appeal to Numbers)*, THOUGHTCO. (Mar. 6, 2019), <https://www.thoughtco.com/argumentum-ad-populum-250340> [https://perma.cc/B4UG-HZQ2].

2. Words Mean What People Think They Mean

Another conceptual explanation, one proposed to this author by readers of drafts of this article,¹⁴⁵ is that words mean what people think they mean, so an *efforts* standard in a contract means whatever someone drafting or negotiating that contract thinks it means. But that explanation doesn't apply to interpreting contracts.

The idea that words mean whatever people think they mean features in debate over the changing meaning of words and phrases.¹⁴⁶ On one side you have those who bemoan the tendency of speakers and writers to debase a word by extending it beyond some ostensible proper meaning. On the other side you have those who think it futile and wrongheaded to stand in the way of changes in language. Saying that words mean what people think they mean is one way of acknowledging that the latter camp has a point. (This sort of debate is part of broader skirmishing between “prescriptivists” and “descriptivists.”)¹⁴⁷

Such debate takes place because the meaning the speaker attributes to the usage in question—whether it's *fulsome*, *literally*, or some other contentious word or phrase—is clear. If someone says, “I'm so hungry I could literally eat a horse,” it's clear that they're using the word *literally* to add emphasis, as opposed to using it to emphasize the exact truth of the statement. To anyone inclined to quibble, the issue isn't that the meaning is unclear, it's whether it hews to some orthodoxy.

This sense of words meaning whatever someone thinks it means doesn't apply to disputes over confusing contract usages. In a dispute, the question is not whether a clear meaning inappropriately fails to follow convention, but what meaning the parties attributed to a given contract usage.

This article considers below a different issue, the implications of both parties to a contract attributing an unreasonable meaning to an *efforts* standard.¹⁴⁸

3. Different Words Convey Different Meanings

A third conceptual explanation for ostensible distinctions between *efforts* standards is that using different words results in different meanings. This is at the root of the lawyer reputation for splitting hairs—what Judge Richard Posner has called “the lawyer's exaggerated faith in the Word.”¹⁴⁹ It's an extension of

145. Those readers offered their views privately, so this article doesn't identify those readers or quote their comments.

146. See, e.g., Mark Liberman, *The Future and the Past*, LANGUAGE LOG (Sept. 13, 2011), <http://languagelog.ldc.upenn.edu/nll/?p=3427> [<https://perma.cc/56WQ-KU5G>] (quoting, in a discussion of the word *fulsome*, an English journalist as saying “Etymology is all very well and good, but the only final arbiter of what a word means is what people understand it to mean”); teece, Comment to “Literally” Is Its Own Antonym, How Can This Be?, ASK METAFILTER (Mar. 28, 2006, 1:39 PM), <https://ask.metafilter.com/35249/Literally-is-its-own-antonym-How-can-this-be#548786> [<https://perma.cc/PLK3-L8FU>] (saying, in a discussion of the word *inflammable*, “Words mean what people think they mean. They do not have an intrinsic meaning.”).

147. See BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE xxxiii–xlvi (4th ed. 2016).

148. See *infra* Part VIII.A.3.

149. *United States v. McKinney*, 919 F.2d 405, 423 (7th Cir. 1990) (Posner, J., concurring).

the principle of interpretation that if different terms are used in a document, they're presumed to express different meanings.¹⁵⁰

The U.S. treatise *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* hints at this explanation, saying that “reasonable best efforts’ sounds as if it imposes more of an obligation than ‘commercially reasonable efforts.’”¹⁵¹ And when Mr. Justice Flaux says in *Rhodia*¹⁵² that as a matter of language “one would surely conclude that” *best endeavours* and *reasonable endeavours* do not mean the same thing, it’s hard to imagine what he’s relying on, other than the two phrases being different. But a reader of a draft of this article made this point to this author explicitly.¹⁵³

One problem with this explanation is that it doesn’t say what meaning is attributed to *best endeavours* and *reasonable endeavours*. But more fundamentally, seeking to attribute different meanings to different words quickly becomes unworkable. If one assumes that *best efforts* and *reasonable efforts* have different meanings and that adding *all* or *commercially* before *reasonable efforts* results in yet further meanings, what about *extraordinary efforts*, *very best efforts*, *all best efforts*, *to the best of its ability*, and the many other *efforts* variants and alternatives?¹⁵⁴ What if you combine different *efforts* standards? It would be impossible to attribute a distinct meaning to each variant. And the principle that use of different words requires different meanings is a presumption. Reasoned interpretation requires taking other considerations into account.¹⁵⁵

B. THE SEMANTICS EXPLANATION

Given that the conceptual explanations are weak, anyone seeking to convince others of a distinction between *reasonable efforts* and *best efforts* might well offer in addition their own semantics analysis as to why, for example, in *reasonable efforts* the word *reasonable* in effect means “moderate.”¹⁵⁶ Or why in *best efforts* the word *best* in effect means “excelling all others.”¹⁵⁷ But any such analysis will be based not on empirical evidence—empirical evidence doesn’t support these distinctions¹⁵⁸—but on intuition. That’s something judges are prone to,¹⁵⁹

150. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012) (with respect to “the presumption of consistent usage,” saying that “where the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea”).

151. See KLING & NUGENT, *supra* note 1, § 13.06.

152. See *supra* note 62 and accompanying text.

153. This reader offered their views privately, so this article doesn’t identify this reader or quote their comments.

154. See *supra* Part II.

155. See SCALIA & GARNER, *supra* note 149, at 51 (stating that canons of construction “are not ‘rules’ of interpretation in any strict sense but presumptions about what an intelligently produced text conveys”).

156. See *supra* note 102 and accompanying text.

157. See *supra* note 109 and accompanying text.

158. See *supra* Part VI.

159. See Mouritsen, *supra* note 75 (“Courts, for example, often rely on their own linguistic intuitions or general-use dictionaries when making claims about plain meaning.”).

even though writing judicial opinions is no more a guaranty of semantic acuity than driving a car makes you a mechanic.

The one public example we have of this is Mr. Justice Flaux's suggestion in *Rhodia* that *reasonable endeavours* probably only requires a party to take one reasonable course whereas *best endeavours* probably requires a party to take all the reasonable courses.¹⁶⁰ That distinction is unfounded,¹⁶¹ as will be all other improvised distinctions that are inconsistent with empirical evidence.

VIII. HOW TO INTERPRET *EFFORTS* PROVISIONS

What should a court do when asked to interpret a *best efforts* provision? The starting point in any such inquiry is the three tasks that make up contract interpretation:

First, an interpreter identifies the terms to be interpreted. Second, the interpreter determines whether the terms are ambiguous and encompass the rival interpretations favored by the parties. Third, if the terms are ambiguous in a contested respect, an interpreter resolves that ambiguity by choosing between the rival interpretations.¹⁶²

Three theories of contract interpretation are available to guide those performing these three tasks—the literal, objective, and subjective theories.¹⁶³ Most U.S. courts follow the objective theory of contract interpretation,¹⁶⁴ as do English courts¹⁶⁵ and courts in the common-law jurisdictions of Canada.¹⁶⁶ Here's how one English commentator has expressed the objective theory: "The purpose of contractual interpretation is to establish the intention of the parties to the contract. This is done objectively: what would a reasonable person understand their common intention to be from what they have written, said, and done?"¹⁶⁷

A. INTERPRETING *BEST EFFORTS* PROVISIONS

1. Only *Best Efforts*

With that in mind, consider the following scenario: The parties to a contract disagree what kind of performance is required by a *best efforts* provision; the contract contains no other *efforts* standards. Leaving aside whether a court would consider any such information, assume there are no prior oral or written

160. See *supra* note 62 and accompanying text.

161. See *supra* notes 80–82 and accompanying text.

162. BURTON, *supra* note 110, at xi.

163. See *id.* at xiii.

164. See 11 WILLISTON ON CONTRACTS, *supra* note 5, § 31:1 (stating that objective standards of interpretation "are adopted by the vast majority of courts applying the traditional approach to contractual interpretation").

165. See CALNAN, *supra* note 91, at 14 ("In common law jurisdictions (unlike many civil law ones), the intention of the parties is established objectively.")

166. See, e.g., *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at para. 41 (Can. S.C.C.) (referring to "the 'primary' rule of interpretation—the objective analysis of the actual words used by the parties").

167. See CALNAN, *supra* note 91, at 13.

agreements and no contemporaneous oral agreements and that nothing from the course of negotiations or other extrinsic evidence suggests what the parties thought *best efforts* means.

For purposes of contract interpretation, the key characteristic of *efforts* standards is that there's nothing deal-specific about them: those who draft and read contracts apply their own meaning to *efforts* standards. Anecdotal evidence suggests that many who work with contracts accept that a *best efforts* standard imposes a more onerous obligation than does a *reasonable efforts* standard, and that others don't accept that meaning.¹⁶⁸ And given that contract drafting involves much copying on faith from precedent contracts and relying on questionable conventional wisdom,¹⁶⁹ those drafting and negotiating a contract might have no occasion to consider what exactly a given *efforts* standard means, or they might be confused on the subject.

So a court would have no way of knowing from the text of a contract what meaning, if any, someone attached to an *efforts* standard in that contract. The collaborative nature of drafting, reviewing, and negotiating contracts further complicates determining what a given *efforts* standard means.

In this context, one would expect a court "to use the objective context to give an apt meaning to the text in line with the parties' manifested intention, understood as a reasonable person familiar with the objective circumstances would understand them."¹⁷⁰ Lack of any indication what the parties had actually intended need not interfere with that:

[M]any of the issues from which disputes arise will simply not have been considered by the parties when they were drafting the contract. And, in order to get the deal done, the parties may have agreed on the words to be used without necessarily agreeing what they mean. One practical way around these problems is to ask what a reasonable person would have understood the parties to have intended from what they have said and done.¹⁷¹

It would be consistent with the objective theory for a court to explore the issues discussed in this article, namely the implications of requiring a party to act more than reasonably,¹⁷² the implications of a vague standard that might require conduct that goes beyond what is reasonable,¹⁷³ and the meaning of *best efforts* and other *efforts* variants in colloquial English.¹⁷⁴ That would contribute to a pragmatic assessment of what a reasonable interpretation would be, and it would be a welcome alternative to the current absence of reasoned inquiry.¹⁷⁵

168. See *supra* Part III.

169. See *infra* Part X.B.

170. BURTON, *supra* note 110, at 156.

171. CALNAN, *supra* note 91, at 18 (footnote omitted); see also ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 280 (3d ed. 2014) (stating that the objective approach to interpretation "measures a party's language and conduct against the test of reasonableness and sanctions careless, reckless, or purposeful misleading language by finding an obligation even if the promisor did not intend one").

172. See *supra* Part VI.A.

173. See *supra* Part VI.B.

174. See *supra* Part VI.C.

175. See *supra* Part V.

It so happens that the Delaware Court of Chancery offers a model for how courts should handle a dispute over the meaning of *best efforts*.

In *Majkowski v. American Imaging Management, LLC*,¹⁷⁶ the meaning of the phrase *indemnify and hold harmless* was at issue. Some caselaw¹⁷⁷ and much commentary¹⁷⁸ stands for the proposition that each component of the phrase expresses a distinct meaning, and this author's experience suggests that many who work with contracts share that view. But much evidence suggests that they mean the same thing.¹⁷⁹ So the circumstances are analogous to those that characterize dispute over interpretation of *efforts* provisions: on the one hand, dubious conventional wisdom; on the other hand, reasoned inquiry.

In *Majkowski*, then-Vice Chancellor Strine—he of the *Williams* dissent regarding *efforts* standards¹⁸⁰—suggested that many transactional lawyers would be quite surprised to learn that by adding *hold harmless* to *indemnify* they had been creating additional rights. He continued, “As a result of traditional usage, the phrase ‘indemnify and hold harmless’ just naturally rolls off the tongue (and out of the word processors) of American commercial lawyers. The two terms almost always go together. Indeed, modern authorities confirm that ‘hold harmless’ has little, if any, different meaning than the word ‘indemnify.’”

Majkowski rejects a widely held but legalistic interpretation of *indemnify and hold harmless* in favor of reasoned interpretation. Besides the merits of that approach for resolving disputes, it has the benefit of giving traditionalist drafters an incentive to change their ways. To avoid not only confusion but also the risk of an adverse outcome in court, drafters should spurn the conventional wisdom and not use *hold harmless*.¹⁸¹

176. 913 A.2d 572, 588–89 (Del. Ch. 2006).

177. See, e.g., *United States v. Contract Mgmt., Inc.*, 912 F.2d 1045, 1048 (9th Cir. 1990) (noting in dicta that “the terms ‘indemnify’ and ‘hold harmless’ refer to slightly different legal remedies”); *Queen Villas Homeowners Ass’n v. TCB Prop. Mgmt.*, 56 Cal. Rptr. 3d 528, 534 (Ct. App. 2007) (holding that *indemnify* is an “offensive” right allowing an indemnified party to seek indemnification whereas *hold harmless* is a “defensive” right allowing an indemnified party not to be bothered by the other party’s seeking indemnification itself); *Stewart Title Guar. Co. v. Zeppleri*, [2009] O.J. No. 322 (Can. Ont. Sup. Ct. J.) (an opinion of the Ontario Superior Court of Justice holding that “the contractual obligation to save harmless, in my view, is broader than that of indemnification”).

178. See, e.g., DAVID MELLINKOFF, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE 286 (1992) (saying that “hold harmless is understood to protect another against the risk of loss as well as actual loss” and that *indemnify* is sometimes used as a synonym of *hold harmless*, but that *indemnify* can also mean “reimburse for any damage,” a narrower meaning than that of *hold harmless*); Michael Hamilton, *A Marriage of Words: What It Means to Indemnify, Defend and Hold Harmless*, COM. PROP. EXECUTIVE 50 (Aug. 2014), <https://www.dlapiper.com/~media/files/people/hamilton-michael/cpexecutive-indemnify-defend-hold-harmless-august-2014.pdf?la=en&hash=81F54567C2ABDAEA7CE1EC2794DEEC937354E166> [<https://perma.cc/3C2U-BBV2>] (“To ‘indemnify’ and to ‘hold harmless’ are distinctly different obligations.”); Eric Lambert, *Defend, Indemnify and Hold Harmless: What They Mean and How to Use Them*, LINKEDIN (Jan. 28, 2019), <https://www.linkedin.com/pulse/defend-indemnify-hold-harmless-what-mean-how-use-them-eric-lambert/> [<https://perma.cc/C5U2-AM47>] (referring to *indemnify*, *defend*, and *hold harmless* as “three separate and distinct concepts”).

179. See, e.g., GARNER, *supra* note 10, at 443–44 (“The evidence is overwhelming that *indemnify* and *hold harmless* are perfectly synonymous.”).

180. See *supra* note 44 and accompanying text.

181. See ADAMS, *supra* note 78, ¶¶ 13.419–429.

Courts should give *best efforts* the *Majkowski* treatment and hold that it simply requires that the party in question do whatever is reasonable under the circumstances to accomplish the goal. For justification, a court could call on empirical evidence on the use of and meaning of *efforts* standards. A possible alternative approach would be to hold that because a party had attributed an unreasonable meaning to *best efforts* the contract had failed due to lack of mutual assent, but that seems a less likely option.¹⁸²

2. Best Efforts with Other Efforts Standards

What should a court do if a contract contains both a *best efforts* standard and a *reasonable efforts* standard? It might conclude that in considering the contract as a whole, the parties had used the two different *efforts* standards to express obligations of different levels of onerousness. But the better choice would be for the court to treat the two *efforts* standards as meaning the same thing. That's the course the *Williams* court chose, although without offering any explanation, when asked to interpret "commercially reasonable efforts" and "reasonable best efforts."¹⁸³

A pragmatic reason for that approach is that multiple *efforts* standards in one contract are usually the result of promiscuous copy-and-pasting without taking the trouble to make sure that usages are consistent across the contract.¹⁸⁴ A sign of that is when you have not only multiple *efforts* standards but also inconsistent ancillary usages, notably the verb used, whether pronouns are used, and whether *all* is used.¹⁸⁵

But it might be clear that the parties had intended to invoke different *efforts* standards, as in this example:

Guarantors shall use reasonable best efforts to file, and shall use commercially reasonable efforts to have become effective

Use of different *efforts* standards in this example couldn't be attributed to careless copy-and-pasting. But because what's behind it is the unreasonable idea of a hierarchy of *efforts* standards, unthinkingly accepted by the parties, a court should consider applying the *Majkowski* approach and interpreting both provisions using a reasonableness standard.

3. Evidence of Previous Negotiations

What if the parties to a contract had in fact intended that a *best efforts* provision might require performance beyond that required by a *reasonable efforts* standard?

182. See BURTON, *supra* note 110, at 61–62 (“The language of contracts of even moderate complexity governs many disputes that the parties (and their lawyers, if any) did not think about. . . . [T]he courts generally do not dismiss such cases due to a failure of mutual assent; rather, most courts apply the contract’s language, interpreting it in light of the relevant elements.”).

183. See *supra* note 41 and accompanying text.

184. See *supra* Part X.B.

185. See *supra* Part II.

Evidence to that effect might be available in the form of email messages and drafts reflecting negotiations over what *efforts* standard was appropriate.

Courts have generally held that if the parties have “integrated” their agreement into a contract, then by operation of the parol evidence rule all previous negotiations and agreements, whether oral or written, regarding the subject matter of that contract are excluded when interpreting that contract.¹⁸⁶ But even if the contract in question was integrated, in the United States an exception to the parol evidence rule is available if contract language is ambiguous.¹⁸⁷ In this instance, though, a court would be entitled to conclude that the *best efforts* provision at issue isn’t ambiguous—of the two possible meanings, the more-than-reasonable meaning is unreasonable and so should be ignored.

If a court were to nevertheless consider the evidence from negotiations, one could argue that if the evidence shows that the parties both understood a *best efforts* standard as imposing an obligation more onerous than one imposed by a *reasonable efforts* standard, then that’s the meaning that applies. In the United States, that outcome could be achieved through the exception to objective interpretation offered in section 201 of the Restatement (Second) of Contracts, which says, “Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”¹⁸⁸

But this scenario doesn’t involve a private code, with, for example, the parties agreeing that “buy” in the contract in fact means “sell.”¹⁸⁹ Instead, the meaning the parties have agreed on is unworkable, the result of the parties unthinkingly accepting conventional wisdom. A court should consider ignoring the extrinsic evidence.

B. INTERPRETING OTHER *EFFORTS* STANDARDS

If a court is willing to treat *best efforts* as meaning the same thing as *reasonable efforts*, it should also decline to treat *commercially* and *all* as affecting the meaning of an *efforts* provision.¹⁹⁰ And it should be skeptical of giving other *efforts* variants distinctive meanings.

But a court wouldn’t make much mischief by distinguishing between *reasonable efforts* and *good-faith efforts*. Good faith and reasonableness are established legal standards,¹⁹¹ not the result of legalistic hair-splitting. And applying a

186. See CALNAN, *supra* note 91, at 63 (“In England, and in some other common law jurisdictions, evidence of the negotiations between the parties in the period running up to the execution of the contract is not generally admissible as part of the background facts.”); HILLMAN, *supra* note 171, at 270–71; 11 WILLISTON ON CONTRACTS, *supra* note 5, § 33:26.

187. See HILLMAN, *supra* note 171, at 272 (“The idea behind the ambiguity exception is that a court must admit parol evidence if a writing is unclear, even if the parties intended the writing to be complete.”); see also *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223 (3d Cir. 2001) (holding that agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible to establish the meaning of ambiguous terms in the writing, whether or not the writing is integrated).

188. RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (AM. LAW INST. 1981); see also HILLMAN, *supra* note 171, at 288.

189. See BURTON, *supra* note 110, at 28.

190. See *supra* Part VI.C.3.

191. See *supra* notes 34–36 and accompanying text.

good faith standard instead of a reasonableness standard would likely have only modest practical consequences (if the court construes good faith as grounded in honesty) or none (if the court construes good faith as being a function of reasonableness). But that doesn't mean it's a good idea to use a *good-faith efforts* standard.¹⁹²

C. EXPLAINING *EFFORTS* STANDARDS

Courts are prone to thinking they can talk their way out of the uncertainty inherent in vagueness. Instead, they should simply say that the *efforts* standard in question required that the party in question do whatever was reasonable under the circumstances to accomplish the goal.

So courts should not engage in circular reasoning, in the manner of the English court that accepted that an *all reasonable endeavours* obligation “requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted.”¹⁹³ They should not explain an *efforts* standard by invoking other vague standards, such as good faith or diligence,¹⁹⁴ as it risks greater confusion. Invoking a metaphor—notably, “leave no stone unturned”¹⁹⁵—is also unhelpful. They shouldn't even use the word *all*, as in “take all reasonable steps,”¹⁹⁶ as *efforts* traditionalists might pounce on the word *all* as sign that the *efforts* standard requires more than reasonableness.¹⁹⁷

IX. HOW TO DRAFT *EFFORTS* PROVISIONS

A. TAKING CONTROL OF *EFFORTS* STANDARDS

Handling *efforts* standards effectively requires choosing reason and clarity over the legalistic hair-splitting that underlies the idea of a hierarchy of *efforts* standards.¹⁹⁸

In England and Canada, that requires resisting the lawyer urge to defer to caselaw, assuming that once courts have been asked to interpret confusing contract language, that language has been “tested” and so is safe to use in contracts.¹⁹⁹ Instead, express the deal so the parties can understand it: if contract language has been tested by the courts, that's because it's confusing. Courts are a valuable source of cautionary tales for how not to draft contracts, but they're not authorities on how to draft clearly: don't follow English or Canadian courts off an *efforts* cliff.

192. See *infra* Part IX.C.

193. *Yewbelle Ltd. v. London Green Devs. Ltd.*, [2006] EWHC 3166 (Ch).

194. See *supra* notes 27–30 and accompanying text.

195. See *supra* notes 55 and 72 and accompanying text.

196. See *supra* notes 41 and 72 and accompanying text.

197. See *supra* notes 57–66 and accompanying text.

198. See *supra* note 149 and accompanying text.

199. See ADAMS, *supra* note 78, at xxxvii.

It would be bizarre for drafters to sit on their hands waiting for courts to somehow bring order to *efforts* standards.²⁰⁰ Drafters have the power and responsibility to do that themselves.

B. WHENEVER POSSIBLE, BE PRECISE INSTEAD OF VAGUE

Because *efforts* standards are vague,²⁰¹ they can lead to a dispute and unpredictable outcomes at trial. Ideally, use *efforts* provisions only if the party in question doesn't have complete control over whether it can achieve the required goal. Be cautious about using them as an expedient alternative to being specific.²⁰²

C. USE ONLY REASONABLE EFFORTS

Although it's clear from the evidence that there's no basis for thinking that *reasonable efforts*, *best efforts*, and other *efforts* standards require anything other than what is reasonable, judges (depending on the jurisdiction) and many who work with contracts will doubtless remain inclined to claim that a party under an obligation to use *best efforts* must be willing to take extraordinary measures. So using *efforts* standards other than *reasonable efforts* will always entail a significant risk of confusion, and you can't rely on them to deliver what many think they promise. To avoid that, use only *reasonable efforts*.

You could use something more colloquial, such as *shall try*, but the concept of *efforts* is entrenched in contracts. In a precedent-driven part of a conservative profession, it's best not to try to teach old dogs new tricks unless the benefits are meaningful—stick with *efforts*.

To reduce the vagueness inherent in a *reasonable efforts* obligation, make it an unqualified obligation of the party in question to perform in addition any tasks that are related to the desired goal and that the party does have control over. For example, you could supplement an obligation that Acme use reasonable efforts to obtain a permit by requiring that by a specified date Acme apply for the permit.

If the other side of a transaction balks at using *reasonable efforts*, tell them that the notion that *best efforts* is more onerous than *reasonable efforts* doesn't make sense and that caselaw doesn't support it (in the United States) or is confusing (elsewhere). If the other side nevertheless insists on *best efforts* and your client wishes to do the deal, consider telling the other side that your client is prepared to sign but doesn't accept their view of the implications of *best efforts* and is prepared to litigate if that ever becomes an issue.

200. See, e.g., Petitioner's Motion for Rehearing at 10, *Whataburger of Alice, Ltd. v. Whataburger, Inc.*, No. 17-0732 (Tex. Oct. 26, 2018), <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=1a43c21b-bfbf-4fff-a125-f468f8aa4398&coa=cossup&DT=REHEARING&MediaID=f4010fa2-21be-4862-9ada-9f6d3ecce72c> [<https://perma.cc/R2N4-QCZM>] (including the heading "Practitioners are Pleading for Guidance on the Meaning of 'Efforts Clauses'").

201. See *supra* Part VI.A.

202. See *supra* Part I.

You might be tempted to use *best efforts* in a contract because the other side isn't aware of the U.S. caselaw on *best efforts* and as a result might exert itself more than it would have if the contract had contained a *reasonable efforts* standard. But it would be more conducive to healthy contract relations if you sought a meeting of the minds.

D. SET STANDARDS FOR MEASURING PERFORMANCE

Imposing an obligation to use reasonable efforts to sell widgets doesn't make sense unless you indicate how many widgets must be sold, and how quickly. And imposing an obligation to use reasonable efforts to file a registration statement doesn't make sense unless you include an indication of how soon it has to be filed.

So always incorporate in an obligation to use *reasonable efforts* a standard for measuring performance. A vague standard—for example, one using *promptly*—would be sufficient.

Caselaw offers examples of this. In *Kevin M. Ehringer Enterprises, Inc. v. McData Services Corp.*,²⁰³ the U.S. Court of Appeals for the Fifth Circuit, applying Texas law, held that McData's promise to use "best efforts" to promote, market, and sell products during the three-year term wasn't an enforceable promise and so couldn't support a fraudulent-inducement claim. According to the court, that's because "a best efforts contract must set some kind of goal or guideline against which best efforts may be measured."

Another Fifth Circuit case applying Texas Law, *Herrmann Holdings Ltd. v. Lucent Technologies Inc.*,²⁰⁴ involved "best efforts" provisions that required the defendant to file a registration statement and cause it to become effective "as promptly as practicable" and "in the most expeditious manner practicable." The court held that the latter two phrases established an objective goal, rendering the "best efforts" provision enforceable.

But courts can be unrealistic in what they expect by way of guidelines for *efforts* provisions. For example, New York caselaw refers to the need for "a clear set of guidelines against which to measure a party's best efforts" to enforce such a provision.²⁰⁵ It doesn't make sense to expect drafters to offer much in the way of guidelines for interpreting *reasonable efforts* provisions: the whole point of *reasonable efforts* provisions is that drafters use them when they can't or don't want to be specific.

Instead of creating a new standard for measuring performance, one could use as a reference some other benchmark, as courts have done. The following benchmarks have been invoked in caselaw:

- Past performance.²⁰⁶

203. 646 F.3d 321, 327 (5th Cir. 2011).

204. 302 F.3d 552, 561 (5th Cir. 2002).

205. See *TPITCC NY v. Radiation Therapy Servs.*, 784 F. Supp. 2d 485, 506–07 (S.D.N.Y. 2011) (quoting *Mocca Lounge v. Misak*, 94 A.D.2d 761, 763 (N.Y. App. Div. 1983)).

206. See, e.g., *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979) (in assessing compliance with a provision requiring the purchaser of assets relating to Ballantine beer to "use its

- Promises made during contract negotiations for guidance on what efforts had been expected.²⁰⁷
- Industry practice.²⁰⁸
- Efforts used by the promisor in connection with other contracts imposing an efforts standard.²⁰⁹
- How the promisor would have acted if the promisor and promisee had been united in the same entity.²¹⁰

The less specific the standards incorporated in an *efforts* provision, the greater the likelihood that the obligation in question would be balanced against the broader constraints faced by the promisor in conducting its business.²¹¹ Without this balancing, the promisor could be forced to expend resources at a level that renders the contract uneconomic.

E. HOW *EFFORTS* STANDARDS RELATE TO OTHER PROVISIONS

Understand how other provisions might affect a court's notions of what performance is expected under an *efforts* provision. Suppose you have prepared a contract that imposes on Acme an obligation to use reasonable efforts to sell widgets. If you leave it at that, a fight could arise at any time over whether Acme has used reasonable efforts.

You could add to the contract a provision saying you may terminate if Acme doesn't reach stated sales targets. That would give you an exit you wouldn't have

best efforts to promote and maintain a high volume of sales," the court considered, among other things, sales figures over several years).

207. See, e.g., *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' implied 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.").

208. See, e.g., *Zilg v. Prentice-Hall Inc.*, 717 F.2d 671, 681 (2d Cir. 1983) (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'l Bank v. Steele Software Sys. 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").

209. See, e.g., *Olympia Hotels Corp.*, 908 F.2d at 1373 (holding that if 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").

210. See, e.g., *Petroleum Mktg. Corp. v. Metro. Petroleum Corp.*, 151 A.2d 616, 619 (Pa. 1959) (noting, 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, 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 possession of them").

211. See *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 235 (3d Cir. 2001) (holding that in agreeing to use best efforts, the defendant did not compromise its right to exercise sound business judgment).

to fight over. But the trade-off is that if Acme achieves those targets, you might well have a harder time convincing a court that Acme hasn't used reasonable efforts, even though the one isn't necessarily related to the other. Perhaps because of unexpected market conditions Acme reached those targets easily, and since doing so it has twiddled its thumbs. But you couldn't blame a court for assuming that any target you set for termination constitutes your minimum notion of acceptable performance by Acme.

And for two reasons, using sales targets in a termination provision wouldn't eliminate the need for a *reasonable efforts* obligation. First, you would retain the possibility of an action for breach, even if it might be challenging to recover if Acme meets the targets. Second, and more importantly, retaining a *reasonable efforts* obligation would give you a basis for terminating the contract for breach (depending on how the termination provisions are worded) instead of having to wait until Acme fails to meet the targets.

F. ELIMINATE CLUTTER AND INCONSISTENCY

Of the verbs used with *efforts*,²¹² the best option is *use*. If contracts filed with the U.S. Securities and Exchange Commission are at all representative, *use* is the most popular option. Using *make* would be more colloquial, but no one would mistake for colloquial English provisions using the phrase *reasonable efforts*, and there's no point pretending otherwise.

Omit *all*, to thwart anyone who might be inclined to attribute meaning to it.²¹³ And don't use a pronoun—they are unnecessary.²¹⁴

Instead of *every effort*,²¹⁵ use *efforts* in the plural. Consistency favors using only one or the other, and *efforts* is the more widely used.

Some contracts require a party to use efforts to accomplish something *to the extent possible* (or words to that effect). That notion is redundant, because it's implicit in an *efforts* provision that the party under the obligation might be unable to comply, even after making the required effort. The phrase can be deleted, as in this example:

Acme shall use reasonable efforts to cancel or mitigate, ~~to the extent possible~~, each obligation that would cause Acme to incur expenses

Don't refer to good faith or diligence in a *reasonable efforts* provision, as in *Each party shall use reasonable efforts, undertaken diligently and in good faith, to obtain all Consents before Closing*. Mixing different standards would only muddy the waters. And don't place the modifier after *efforts* in any other way.²¹⁶

212. See *supra* Part II.

213. See *supra* notes 57–63 and accompanying text.

214. See *supra* Part II.

215. See *supra* Part II.

216. See *supra* Part II.

G. DON'T USE MORE THAN ONE *EFFORTS* STANDARD IN A CONTRACT

Because the notion that different *efforts* standards convey different meanings is unworkable, using two or more different *efforts* standards in a single contract invites confusion.

H. DEFINING *REASONABLE EFFORTS*

Even though the phrase *reasonable efforts* doesn't pose the same risk of confusion as *best efforts*, consider using it as a defined term. Doing so might assist a court and might help the parties better understand the implications of using *reasonable efforts*. And in the definition the parties could fine-tune their understanding of what *reasonable efforts* means.

1. The Core Definition

A definition of *reasonable efforts* should specify what the core meaning is—it will necessarily be vague—and specify anything that's to be excluded from the definition. Here is the recommended core definition:

"Reasonable Efforts" means, regarding conduct by a party, the efforts that a reasonable person in the position of that party would use to engage in that conduct competently and promptly.

For a definition to apply in all contexts, it must reflect that *reasonable efforts* isn't used exclusively in obligations—it could also be used in a conditional clause (*If Acme fails to use reasonable efforts . . .*) or even in a statement of fact (*Acme states that it has used reasonable efforts to . . .*).

Use of *reasonable efforts* isn't just about getting something done competently and promptly. It might not even relate to accomplishing a specific task. Instead, it might be a matter of maintaining a status, or stopping something from happening. It would make sense to elucidate in the *reasonable efforts* provision the parties' expectations regarding the activity in question.

And the definition could incorporate standards for performance.²¹⁷

Otherwise, the core definition could be customized to reflect that, for example, *reasonable efforts* is used only in obligations, or that all instances of *reasonable efforts* apply to only one party.

Sometimes a definition of *reasonable efforts* will specify actions that a party must take for its efforts to constitute reasonable efforts. For example, 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, the contract typically uses as a definition of *reasonable efforts* something like this:

"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

217. See *supra* Part IX.D.

particular Registration Statement will be made by the staff of the SEC or that the staff has no further comments on the Registration Statement, as the case may be, a request for acceleration of effectiveness of the Registration Statement to a time and date not later than 48 hours after submission of that request.

Don't use such definitions: A *reasonable efforts* standard captures what the parties can't or don't want to address in detail when they enter into the contract.²¹⁸ If you're able to express in an absolute obligation something that a party must accomplish, state it as a freestanding obligation rather than in a definition of *reasonable efforts*. And more generally, don't use in autonomous definitions language of obligation and other language suited to substantive provisions.²¹⁹

2. Carve-Outs

A concern of a party subject to a *reasonable efforts* standard would be to avoid having to take actions out of proportion to the benefits to it under the contract. That's a legitimate concern: although it's the meaning of *best efforts* that has most perplexed those who work with contracts, *reasonable efforts* has potential for mischief.

Consider two New York cases. In *Rex Med. L.P. v. Angiotech Pharmaceuticals (US)*,²²⁰ the court decided that a party's financial hardship was irrelevant in determining whether it had complied with an obligation to use commercially reasonable efforts to achieve an objective—instead, that was an argument that the party in question should, in the memorable words of the court, “save for a bankruptcy court.” By contrast, in *MBIA Ins. v. Patriarch Partners VIII*,²²¹ the court held that acting in a commercially reasonable manner “does not require a party to act against its own business interests.”

It make no sense to attempt to determine the reasonableness of a party's actions without considering its financial resources. Once you eliminate the need for a rational relationship between efforts expended and the return on those efforts, anything that leads to progress toward achieving the objective becomes mandatory, no matter what it costs.

But the role of the contract drafter isn't to complain about how a court was irrational in interpreting a contract. And although the approach of the court in *Rex Med* appears to be something of an anomaly, other courts might adopt a similar approach. So the task facing anyone drafting or reviewing a contract is to word *reasonable efforts* provisions to limit the scope for extreme interpretations. The simplest way to achieve that is by using carve-outs to exclude matters from a *reasonable efforts* provision.

One issue in negotiating carve-outs 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*

218. See *supra* Part I.

219. See ADAMS, *supra* note 78, ¶¶ 6.52–.58.

220. 754 F. Supp. 2d 616, 626 (S.D.N.Y. 2010).

221. 950 F. Supp. 2d 568, 616 (S.D.N.Y. 2013).

promisor to But given the shortcomings of the traditional proviso,²²² a clearer and more economical way to introduce carve-outs in definitions is by using *but does not include*.²²³

Because carve-outs are intended to provide certainty to offset the vagueness of the core definition, they should be specific. For example, one could exclude from the definition of *reasonable efforts* any one or more of the following (revising the wording to include any defined terms):

- incurring expenses [over \$X individually and \$Y in the aggregate] other than as provided in this agreement
- incurring liabilities
- changing that party's business strategy
- disposing of significant assets of that party
- taking actions that would violate any law or order to which that party is subject
- taking actions that would imperil that party's existence or solvency
- initiating any litigation or arbitration

Some commonly used carve-outs would likely fall outside the scope of *reasonable efforts* anyway, but a party might nevertheless wish to make doubly sure of avoiding any dispute over what kind of efforts are required. An example of such a carve-out would be to exclude taking actions that would, individually or in the aggregate, result in a material adverse change in that party.

3. Add-Ins

If you have in mind that complying with a given *reasonable efforts* obligation might require conduct that goes beyond what would be considered reasonable, you could make that clear by supplementing a definition, or the provision itself, with something like the following, which takes an extreme approach broadly consistent with what many think *best efforts* means:

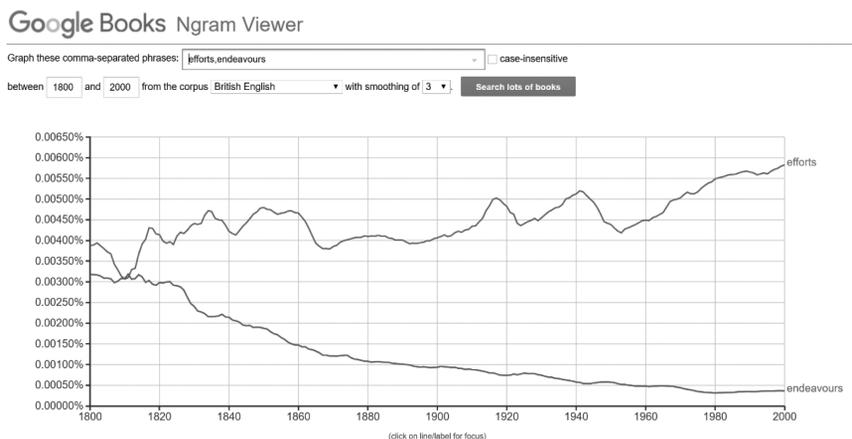
Acme acknowledges that the money that a reasonable person in Acme's position would be willing to expend on, and the personnel that a reasonable person in Acme's position would be willing to devote to, complying with its obligations under this section 11 are unlimited.

But it would be hard to imagine anyone accepting such a standard.

222. See ADAMS, *supra* note 78, ¶¶ 13.663–.666.

223. *Id.* ¶ 6.41.

Figure 5
Ngram Viewer Search of *Endeavours* and *Efforts*
in the British-English Corpus



I. CONSIDER USING *REASONABLE EFFORTS* INSTEAD OF *REASONABLE ENDEAVOURS*

Those who use *endeavours* instead of *efforts*—they’re mostly in England and Australia—might want to consider using *efforts*. The word *endeavours* is dated. A Google Ngram graph of use of *efforts* and *endeavours* in Google’s British-English corpus of digitized books²²⁴ (see figure 5) shows that use of *efforts* has overall increased, whereas from 1800 to 2000 *endeavours* experienced a long decline that suggests it’s headed for oblivion, even in Great Britain. The modern choice is *efforts*. And nothing suggests that English judges and lawyers would seek to make English caselaw on *endeavours* more problematic than it already is by deciding that use of *efforts* instead of *endeavours* affects meaning.

X. EFFECTING CHANGE

A. CHANGE IN THE COURTS

U.S. courts have largely stayed out of trouble in addressing *efforts* standards,²²⁵ but reaching a sensible conclusion in a contract dispute is only part

224. See *Ngram Viewer*, GOOGLE BOOKS, https://books.google.com/ngrams/graph?content=efforts%2Cendeavours&year_start=1800&year_end=2000&corpus=18&smoothing=3&share=&direct_url=t1%3B%2Cefforts%3B%2Cc0%3B.t1%3B%2Cendeavours%3B%2Cc0 (last visited Feb. 28, 2019) (search of *endeavours* and *efforts* in the British-English corpus).

225. See *supra* Part IV.A.

of the battle—it's best if courts are also able to offer a coherent rationale. Regarding *efforts* standards, so far U.S. courts have not done so.

Perhaps that's because in interpreting confusing contract language, many judges are satisfied with relying on their own linguistic intuition or reaching for a dictionary.²²⁶ Also, judges have had no real scholarship on the subject to consult. Whatever the reason, judges would now do well to make use of empirical evidence of the sort considered in this article.

English and Canadian courts face a greater challenge. Their handling of *endeavours* standards suggests a propensity for legalistic hair-splitting.²²⁷

As regards English courts, that propensity isn't limited to *endeavours* standards. It's also on display in caselaw relating to the phrase *represents and warrants*,²²⁸ in the fact that under English law nominal consideration is enough to support a contract,²²⁹ and in the unhelpful distinction between promissory conditions and warranties.²³⁰ Other examples might exist—this author's observation of the English legal profession has been limited to study of a handful of contract usages. Even if it's prompted only by the inclination of legal minds to do what they've been trained to do, this tendency to split hairs is at the expense of reason and justice.

In England the idea of a hierarchy of *endeavours* provisions appears generally accepted,²³¹ but the offending caselaw is recent and insubstantial. And if the judge responsible for the opinion in *Rhodia* has offered two conflicting meanings of *all reasonable endeavours*,²³² that suggests it would be unreasonable to expect people to keep straight in their mind what currently passes as the conventional wisdom. Change would be beneficial.

226. See *supra* note 159.

227. See *supra* Part IV.B (English caselaw), Part IV.C (Canadian caselaw), and Part V.B.

228. See Kenneth A. Adams, *Eliminating the Phrase Represents and Warrants from Contracts*, 16 TENN. J. BUS. L. 203, 216–18 (2015).

229. See CHITTY ON CONTRACTS ¶ 4-018 (Hugh Beale ed., 33d ed. 2018) (“The rule that consideration need not be adequate makes it possible to evade the doctrine of consideration in the sense that a gratuitous promise can be made binding by giving a nominal consideration, e.g. £1 for the promise of valuable property, or a peppercorn for a substantial sum of money. Such cases are merely extreme examples of the rule that the courts will not judge the adequacy of consideration.”); Kenneth A. Adams, *Nominal Consideration Under English Law*, ADAMS ON CONTRACT DRAFTING (Jan. 31, 2016), <https://www.adamsdrafting.com/nominal-consideration-under-english-law/> [<https://perma.cc/H86H-V8GK>].

230. See Kenneth A. Adams, *Promissory Conditions and Warranties: More Unhelpful English Terminology*, ADAMS ON CONTRACT DRAFTING (Nov. 26, 2018), <https://www.adamsdrafting.com/promissory-conditions-and-warranties-more-unhelpful-english-terminology/> [<https://perma.cc/T8XX-6N5M>].

231. See *supra* Part III.B; see also *Interpretation of Contracts Under English Law*, ASHURST (Dec. 15, 2017), <https://www.ashurst.com/en/news-and-insights/legal-updates/interpretation-of-contracts-under-english-law/> [<https://perma.cc/VD8Y-8W9V>] (“Some words and phrases have come to acquire an accepted legal sense through decided cases. Good examples of this are phrases such as ‘best endeavours’ or ‘reasonable endeavours’”).

232. See *supra* notes 63–66 and accompanying text.

B. CHANGE IN CONTRACT DRAFTING

The details of the confusion surrounding interpretation and use of *efforts* standards are unique, but considered more generally, it's a depressingly familiar story.

Drafting contracts is a precedent-driven activity—any new transaction will likely resemble previous transactions, so the universal practice is to base the contract for any new transaction on one or more contracts used in previous transactions. That should be a source of efficiency, but generally people don't have the time, expertise, or authority to scrutinize closely any contract they happen to be copying to make sure it's clear, concise, and suited to the needs of the new transaction. As a result, contract drafting has long consisted largely of copying, on faith, from precedent contracts of questionable quality and relevance, often relying on threadbare conventional wisdom.

So there's a disconnect between what's in a contract and what people think is in the contract. The traditional prose of contracts is full of archaisms, redundancy, chaotic verb structures, misbegotten conventional wisdom, overlong sentences, and other defects. This author's *A Manual of Style for Contract Drafting* explores these shortcomings.²³³ Widespread acceptance of a hierarchy of *efforts* standards is just one instance of dysfunction. All that distinguishes it from countless other problematic usages is that in this case, the conventional wisdom is particularly misbegotten and has the potential to do serious mischief.

A sweeping fix would require a multi-faceted program of training in how to draft using clear and modern prose. It would also require an alternative to copy-and-pasting from precedent contracts of questionable quality and relevance. A solution would be a subscription-based library of automated templates, one that features content compiled with the help of subject-matter experts and uses clear and consistent language.²³⁴

But the saving grace of contract drafting is that you can make progress without waiting for the world to change. For a contract to reflect optimal usages, all that's required is for both sides of a transaction to accept them. In the case of *efforts* standards, this article proposes a simple and unobtrusive fix—use only *reasonable efforts*²³⁵ and to the extent possible structure *efforts* provisions to minimize the vagueness.²³⁶

233. See *id.*

234. See Chris Lemens & Kenneth A. Adams, *Fixing Your Contracts: What Training in Contract Drafting Can and Can't Do*, ACC DOCKET (Sept. 22, 2015), <https://www.accdocket.com/articles/fixing-your-contracts.cfm> [<https://perma.cc/4C2Y-2K9D>].

235. See *supra* Part IX.C.

236. See *supra* Part IX.D.

