"*BUT I'LL TRY REALLY, REALLY HARD!*": USING "BEST EFFORTS" CLAUSES

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"Best efforts." These two simple words can cause many headaches and a great deal of litigation. It's a common standard used in many different contexts, such as in licensing, sales, IT development, marketing, consulting, franchising, and other agreements. It's an important term that can and should be subject to a great deal of thought and negotiation by the parties. Unfortunately, this is often not the case.

For example, in contracts where exclusive rights are granted, the other party is often required to use its "best efforts" when performing its obligation, whatever it may be. This might be what the contract says, but what does it really mean? What does it actually obligate the other party (or you) to do? I'll use—dare I say—my best efforts to try and answer this question. I'll also offer some tips on how to perhaps use these clauses more effectively.

Keep in mind that contract law is state specific. What a Massachusetts court considers to be "best efforts" may be rejected by a judge in California. Different states emphasize different principles. Still, despite these disparities, certain concepts have emerged that can provide some general guidance. "General" is the key term. As noted by one court, the best efforts standard "cannot be defined in terms of a fixed formula; it varies with the facts and the field of law involved."[1] Thus, each case is unique and could yield different results. Nevertheless, there are some principles of which to be aware:

Energy, Exploitation, Good Faith, or Diligence . . . or Not. In Massachusetts and elsewhere, some courts have construed best efforts as requiring a higher degree of affirmative conduct from the promisor. In other words, doing the bare minimum or making "reasonable efforts" (a common legal standard) is generally not sufficient.

In one Massachusetts case, the court noted that "best efforts" should be construed "in the natural sense of the words as requiring that the party put its muscles to work to perform with full energy and fairness the relevant express promises and reasonable implications therefrom."[2] So what's "full energy and fairness?" This is a question of fact for the court to decide in the context of the case. The reasoning implies, however, that efforts where "some" or "reasonable" energy is expended would be insufficient to meet the standard. The efforts need to be more vigorous. Another court construed the phrase, "to use its best efforts" as requiring "active exploitation in good faith."[3] Again, what constitutes "active exploitation" is a question of fact. The implication is that the promisor can't sit back passively and hope for the best. It must be proactive.

Some courts have focused entirely on a promisor's "good faith" and have held this to be essentially equivalent to best efforts.[4] Yet others don't consider good faith to be enough and have focused on a "more exacting" standard of "diligence as its essence."[5] Best efforts have also been held to sometimes mean exclusive efforts, such that the promisor cannot sell a competing product line.[6] At a very minimum, one court (as discussed below) noted that best efforts "means, at the very least, some effort. It certainly does not mean zero effort."[7]

No matter how best efforts are defined, be aware that there are many different views. It's essential to know what state law applies to your contract, although this is only a starting point, not an end in itself. No one knows what a court will actually do once it looks at the issue in the specific context of your case. The idea is to try and make sure your contract never makes it this far, but if it does, then at least you can make a persuasive argument that your interpretation is the correct one.

Available Resources. As noted above, best efforts cases are very fact-specific. One factor that a court will

analyze is the capability and resources of the promisor. This is only common sense. The best efforts of a company like Microsoft will likely be viewed much differently than a small software company in Boston with far fewer and more limited resources.

If you expect all companies to be held to a single universal standard, you're being unrealistic as to how a court will view the situation. Best efforts require a party to behave in a particular manner "in light of one's own capabilities."[8] Consequently, this requires careful evaluation by the parties of each other's capabilities, resources, and expertise in the negotiation phase and prior to consummating the deal. As I've often told many clients, doing so after you've signed the contract is too late.

Best Efforts ... Every Effort. Several years ago a client called me about a potential lawsuit against a Boston IT developer who failed to deliver working software. The contract required the developer to use his best efforts. When I asked what he expected, he said that the developer wasn't devoting all of his attention to the project and should have done "whatever it took." I told him that—absent contract language to the contrary—a best efforts clause doesn't require a party to devote every moment to fulfilling its obligations. He wasn't happy with what I had to say, but he listened.

Indeed, many courts have found that using best efforts doesn't mean that a party has to drop everything. One court stated: "We have found no cases . . . holding that 'best efforts' means every conceivable effort."[9] Another court noted that a best efforts clause does not eliminate a party's "right to give reasonable consideration to its own interests."[10] This is common sense. No party would ever enter into any contract if it was required to take every imaginable course of action and couldn't factor in its financial self-interest. A company isn't required to spend itself into bankruptcy.[11]

Success is Not Required. Best efforts are just that: Efforts. While it may mean that the promisor has to try harder, it doesn't mean that it must actually be successful. Best efforts are not equivalent to a guarantee. For example, in one case the promisor encountered difficult problems fulfilling its obligations under the contract. The court found, however, that there was no breach and that the company had attempted to fulfill its best efforts obligation in good faith.[12]

In another Massachusetts case, the court (interpreting language similar to best efforts) noted that these efforts mean "such effort as in the exercise of sound judgment would be likely to produce the most profitable results to the [promisee] . . . ."[13] "Likely to produce" doesn't mean "will produce." Even likely courses of action can and do fail. If the promisor can document its efforts while trying to fulfill its obligations to the other party, it could easily prevail in a contract dispute.

"That's great, but what should MY company do?" Given the varying interpretations courts give these clauses, it's always best to go back to the basics: Focus on using precise contract language at the outset. Ambiguity, which is an inherent part of best efforts language, should be eliminated as much as possible. If a party obligated to use best efforts is required to take certain actions or reach particular goals, these need to be stated specifically in the contract. Don't assume you'll have legal recourse just because the other side has to use its best efforts. Maybe you will, but maybe not. Write it all down just to be sure.

If, for example, you expect the other party to spend a certain amount of money to fulfill its obligations, try to specify how much. If a party is supposed to market your products with its best efforts and you believe that they should spend at least $50,000, say so. While the other party may refuse to include a specific amount and want its best efforts to purposely remain ambiguous, this in itself will help you gauge exactly what the other side's intentions are and what resources they're willing to commit. This will then allow you to further evaluate whether this is a party with whom you want to do business. Managing expectations is, after all, a key component of any business deal.

Of course, even in the absence of a specific dollar amount, a best efforts clause could still obligate a party to spend money. As noted above, it depends on the case and the jurisdiction. Thus, why not eliminate

the uncertainty as much as possible? While some may argue that defining a party's efforts could actually limit the impact of a best efforts provision, the alternative of not doing so injects a great deal of ambiguity into the process and could force both parties into expensive and time-consuming litigation. Consider what happened in one case when the court was faced with a vague best efforts provision:

The defendant agreed to use its "best efforts" to market the plaintiff's product "in a manner that seems appropriate."[14] While the court found that the contract was enforceable, it noted that the language was "obviously indefinite and could mean different things to different people."[15] Had the parties agreed to specific actions that were to be taken rather than leaving it open-ended, litigation might have been avoided. If, for example, the contract stated that the company had to use its best efforts to market the products: (1) in trade publications; (2) at trade shows; (3) on the internet; and (4) with vendors, then both parties would have been better able to manage their expectations from the outset. In fact, the court's decision that best efforts "means, at the very least, some effort" and that it "certainly does not mean zero effort"[16] offers little useful guidance. It may reflect the court's frustration with the parties' poor choice of language.

Finally, keep in mind that even a well-defined best efforts clause has limits. This term does—for better or worse—give a party discretion in the decision-making process, which is why most parties agree to it in the first place.[17] This discretionary element is not only difficult to remove completely, but perhaps more importantly, it could be detrimental to the negotiation to even try. Nevertheless, no matter how carefully you define it, as is often the case in the law, nothing is certain. However, by having a better understanding of how courts interpret this provision, a thorough knowledge of your company's business model, and a willingness to define your contract terms with greater precision, you'll be in a much better position to evaluate if a particular opportunity is right for your business. And that's best for everyone's efforts.

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ENDNOTES:

1. *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987).
2. *Macksey v. Egan*, 36 Mass. App. Ct. 463, 472 (1994).
3. *Western Geophysical Co. of America v. Bolt Assoc.*, 584 F.2d 1164, 1169-70 (2d Cir. 1978).
4. *Triple-A Baseball Club Assoc., supra,* 832 F.2d at 225 (1st Cir. 1987).
5. *National Data Payment Sys., Inc. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000).
6. *Joyce Beverages of New York, Inc. v. The Seven-Up Co.*, 555 F. Supp. 271, 277 (S.D.N.Y. 1983).

7. *Hinc v. Lime-O-Sol Co.*, 382 F.3d 716, 721 (7th Cir. 2004).

8. *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 613 (2d Cir. 1979).

9. *Triple-A Baseball Club Assoc., supra,* 832 F.2d at 228.

10. *Bloor*, *supra*, 601 F.2d at 614.

11. *Id.*

12. *Western Geophysical Co. of America, supra,* 584 F.2d at 1171.

13. *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 374 (1912) (emphasis added).

14. *Hinc, supra,* 382 F.3d at 718.

15. *Id.* at 721.

16. *Id.*

17. *See generally Western Geophysical Co. of America*, *supra*, 584 F.2d at 1171.