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Analyzing Conventional Wisdom: The 'Best Efforts' Standard

by Shawn Helms

Most lawyers, representing a promisor, will fight hard to remove a "best efforts" standard from a contract in favor of the more palatable "reasonable efforts" standard. The conventional wisdom is that "best efforts" is a term-of-art that imposes an unreasonably high standard on the obligated party. It seems straightforward that reasonable efforts would be a lower standard than best efforts. In everyday language, "reasonable" does not mean "best."

However, this simple understanding breaks down upon an analysis of the case law on the subject of best versus reasonable efforts. In fact, the courts find no meaningful distinction between the standards.

What Contract Lawyers Believe

When specifying the level of diligence or effort a party needs to exert in order to meet a contractual obligation, contract drafters will use numerous "effort" standards -- best efforts, reasonable efforts, commercially-reasonable efforts, commercial-best efforts, all-reasonable efforts and all efforts, to name a few.

Lawyers generally place a great deal of emphasis on the standard they choose to employ. The common belief among contract lawyers is that the best efforts standard is the most onerous of the effort standards, and reasonable efforts is the most lenient. Interestingly, this understanding has almost no support in case law.

Analyzing Case Law

The courts have not held that an agreement to use best efforts imposes an exceedingly high obligation. In fact, courts have routinely used the reasonableness standard as a measure for best efforts. A leading example is the case of *Bloor v. Falstaff Brewing Corp*. In this case, Falstaff agreed to use its best efforts to maintain a high sales volume of Ballantine Ale and maximize the payout to Bloor.

But when sales slipped, Falstaff did little to stop the slide. The Second Circuit, upon examining the term "best efforts" in the contract, declared, "[t]he requirement that a party use its best efforts necessarily does not prevent the party from giving reasonable consideration to its own interests." The court imposed an obligation on Falstaff to perform "as well as the average" comparable performer.

Similarly the 5th U.S. Circuit Court of Appeals has stated that when evaluating whether a party has met the best efforts standard, the court "measure[s] the party's efforts ... by comparing the party's performance with that of an average, prudent, comparable operator." *Herrmann Holdings Ltd., v. Lucent Technologies Inc., (5th Cir. 2002)*.

Some recent case law has gone so far as to equate best efforts and reasonable efforts. The Federal District Court for the Western District of Wisconsin said, "the duty to use best efforts requires [a party] to use reasonable efforts and due diligence."

The Federal District Court of Kansas examined a recent contract that called for best efforts, and said, "best efforts does not mean perfection and expectations are only justifiable if they are reasonable."

The Federal District Court for the Southern District of New York has even gone a step further, declaring, "New York courts use the term 'reasonable efforts' interchangeably with 'best efforts.'"

Even the drafters of the Uniform Commercial Code, Article 2, draw no distinction between best and reasonable efforts. In Section 2-306(2), the code states:

"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."

Though consistent within the provision, the Official Comment on 2-306(2) calls for the parties to "use a reasonable effort." This linguistic inconsistency has led one Ohio court to say, "[t]he test for best efforts is one of reasonableness."

The Federal District Court for the District of New Jersey may have summed up the non-distinction best by saying that the difference between best efforts and reasonable efforts is "merely an issue of semantics."

Where This Leaves The Contract Drafter

What options exist for a contract drafter who wants to distinguish best efforts from reasonable efforts or wants to define the best efforts standard?

The answer is to spell out exactly what efforts are required by setting forth specific goals, activities or providing examples. In fact, to be enforceable under Texas law, a best efforts standard *must* set some kind of goal or guideline. Establishing a goal begins to remove the uncertainty and vagueness surrounding a naked efforts clause. Many times, efforts clauses are included because expected performance is difficult or impossible to define at the time the contract is drafted. However, even if individual activities cannot be specified, it might be possible to define best efforts in a flexible, yet quantifiable, fashion.

For example, a contract could provide that the obligation to use best efforts is satisfied when a party has made efforts comparable to efforts made in previous dealings or consistent with industry standards. Such a definition provides the court some guidance in the event of a dispute. **HN**

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