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What Do These Common Contractual Words Actually Mean?

This article focuses on reasonable efforts clauses. It is excerpted from an article co-authored by Joyce Mazero that was presented at the International Franchise Association Legal Symposium in May, which can be found [here](#). All footnotes and citations have been removed.

Efforts Standards

Franchise agreements, like most contracts, often feature obligations expressed using “efforts” standards, such as best efforts, reasonable efforts, commercially reasonable efforts, good-faith efforts and even reasonable best efforts. Contracting parties typically use efforts standards when wanting to better ensure the completion of an action or satisfaction of a condition. An example would be ensuring that a contracting party exerts appropriate effort to achieve a goal such as satisfaction of a development quota under a development agreement or promotion of a franchise brand in a franchisee’s market.

All provisions featuring efforts standards are inherently vague, as complying with an efforts obligation is a function of the circumstances. Many practitioners believe that the term “best efforts” includes the obligation to make every possible effort and to use all possible financial resources to achieve the goal. This would mean best efforts “imposes extraordinary duties of assiduity: a very high standard of care, regardless of whether the required efforts might be commercially reasonable.” Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 108 (3d ed. 2011). 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 understanding or agreement, however, as to whether these 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 does “commercially reasonable efforts.”

Although commentators generally accept the idea of a hierarchy of efforts standards, the case law varies depending on the jurisdiction. In the United States, courts (and drafters of the Uniform Commercial Code) have declined to recognize such a hierarchy, whereas courts in England and Canada have endorsed it.

As shown below, courts have articulated in different ways what “best efforts” means, such

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as:

1. Good faith, a standard grounded in honesty and fairness;
2. Something more than good faith;
3. A function of diligence;
4. General reasonableness;
5. That best efforts and reasonable efforts are the same; and
6. That commercially or all in efforts standards are redundant.

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, which might require bad faith — equated with dishonesty — for breach, or it might be grounded in reasonableness.

Specific Cases

1. Best Efforts

The court in *Samica Enterprises, LLC v. Mail Boxes Etc. USA, Inc.* attempted to define best efforts as requiring a party to make such efforts as are reasonable in light of that party's ability and the means at its disposal and the other party's justifiable expectations. Plaintiffs, as franchisees, had entered into franchise agreements to operate UPS Stores with Defendant, as franchisor. The franchise agreements contained a best efforts provision pursuant to which "[Defendant] agree[d] to use best efforts to ensure that its affiliate [UPS] gives Franchisee discounts and incentives on Franchisee's wholesale cost of UPS services." Plaintiffs alleged that Defendant failed to use best efforts in this regard. The court considered the evidence regarding Defendants' efforts and found that the following undertakings satisfied the standard:

1. Defendant had several discussions with UPS about improving "incentives, pricing, and retail rates";
2. Defendant made "numerous requests to UPS to increase [franchisees'] margins and incentives"; and
3. Defendant suggested that UPS simplify the rate structure, providing for "incentives [on the] retail rate."

The court also noted that UPS had, itself, reserved the right to modify Plaintiffs' incentives. This fact, which limited Defendant's abilities and tempered Plaintiffs' justifiable expectations, coupled with Defendant's undisputed efforts, led the court to conclude that Defendant fulfilled its obligations. Another example of a court grappling with the meaning of best efforts is found in *Paccar Inc. v. Elliot Wilson Capitol Trucks LLC*. The relevant franchise agreement provided that:

- DEALER shall give [Plaintiff] notice in writing before undertaking any efforts to sell the dealership.... Upon request, [Plaintiff] agrees to provide assistance to DEALER in locating BUYER candidates acceptable to both [Plaintiff] and DEALER, although DEALER shall independently negotiate any buy/sell agreement. [Plaintiff] also agrees to make best efforts to conditionally approve potential buyers to facilitate DEALER's negotiations. Upon conditionally approving a specific buyer, [Plaintiff] will waive its right of first refusal to that buyer.

Plaintiff here asserted that the best efforts clause was without meaning and that it could approve or disapprove of a potential buyer as it pleased. Defendant dealer disagreed.

The court analyzed the term by reviewing the context. It stated, like the court in *Mail Boxes*, that a best efforts standard has diligence as its essence. The court rejected

Plaintiff's position and reasoned that, at the least, the best efforts provision must be interpreted to require that Plaintiff exercise some diligence in considering a potential buyer — the level of diligence to be determined by the circumstances.

The court then concluded that considering the relevant statutory background, pursuant to which consent to a transfer may not be unreasonably withheld, the necessary diligence to satisfy best efforts "must include an obligation to make reasonable efforts to approve a transfer, or conversely, to not unreasonably reject a transfer." The court went on to reason that "reasonable efforts" implies good faith and reasonable efforts.

Based on allegations that Plaintiff consistently attempted to discourage and frustrate the transaction and informed Defendant that it would only accept a specific other buyer, the court held that Defendant had made out a claim sufficient to survive Plaintiff's motion to dismiss.

Additionally, in *Maestro West Chelsea SPE LLC v. Pradera Realty Inc.*, the parties entered into a contract for the sale of certain air rights from Defendant to Plaintiff. As part of that contract, Defendant was required to use its best efforts to obtain a waiver and subordination from JPMorgan Chase, which held the mortgage on Defendant's property. Defendant failed to obtain the waiver and Plaintiff brought this action, in part, for breach of contract based on Defendant's failure. Defendant argued that the best efforts clause was void because it contained no objective criteria or guidelines against which Defendant's efforts could be measured. The court rejected Defendant's argument, reasoning that: A court must interpret and give effect to an express best efforts clause just as it would any other contractual provision. The court repeated the well established rules for contract interpretation: that the court is to ascertain the intention of the parties at the time they entered into the contract. And if that intent is discernible from the plain meaning of the language of the contract, there is no need to look further.

The court further provided that:

- A best efforts clause imposes an obligation to act with good faith in light of one's own capabilities. Best efforts requires that plaintiffs pursue all reasonable methods... and whether such obligation has been fulfilled will almost invariably... involve a question of fact. Accordingly, the precise meaning of a best efforts provision and whether the provision is breached are factual issues that cannot be resolved on the face of the complaint.

As a result, the court denied Defendant's motion to dismiss. It should, however, be noted that certain courts have also regarded the term "best efforts" with a degree of hostility because the standards applied to the term make compliance "murky."

2. Commercially Reasonable Efforts

In *Takiedine v. 7-Eleven, Inc.*, the court noted that "the term 'commercially reasonable effort' does not have one set of definitions in this jurisdiction; rather, it is a standard of reasonableness" and that the determination of reasonableness is a factual determination based on the totality of the circumstances and includes factors such as economic interests and diligence, among others. In this matter, the court determined that Plaintiff had not presented facts to support a finding that the franchisor failed to make a commercially reasonable effort to obtain the lowest cost for products and services, as was required by the relevant franchise agreements. In large part, the franchisee's complaint was that the franchisor was not actually achieving the lowest price on certain products. The court noted that commercially reasonable effort does not require that the franchisor succeed in obtaining the lowest cost on each product.

In *Russell v. Zimmer*, an inventor sued his distributor for breach of contract, alleging the distributor, Zimmer, failed to use the required commercially reasonable efforts to sell the earnout products. The contract itself defined “commercially reasonable efforts” as:

- [T]he level of efforts, expertise and resources that it would apply in the ordinary and usual course of business to satisfaction of a comparable obligation with respect to another product or technology that is similar to the Earnout Products in terms of commercial potential, development stage and product life. This evaluation is done holistically, looking at the entire business, financial, commercial, scientific, clinical and regulatory context ... including issues such as product safety and efficacy, the competitive environment, market conditions, the product’s proprietary position, the extent to which health care providers would be expected to embrace the product as a desirable and competitive solution, regulatory hurdles, the product’s pricing and potential profitability, and similar factors.

The 7th U.S. Circuit Court of Appeals affirmed the district court’s grant of the distributor’s motion to dismiss for failure to state a claim. Plaintiff alleged the distributor did not fulfill orders, terminated supplier agreements, did not maintain trademark registrations and failed to schedule internal team meetings. The court found that because Plaintiff did not plead how these failures deviated from the distributor’s usual or expected standard of conduct and did not present the alleged failures in the context of the entire business, but only on a one-off basis, Plaintiff did not meet the pleading requirements to support a plausible claim that the distributor did not satisfy the standard of commercially reasonable efforts.

Conversely, *Akorn, Inc. v. Fresenius Kabi AG* provides an example of a court finding a party had failed to use commercially reasonable efforts. The court held that Plaintiff pharmaceutical company’s contractual obligation to use commercially reasonable efforts to operate in the ordinary course of business meant that Plaintiff was required “to take all reasonable steps” to maintain operations in the ordinary course of business. The court found that Plaintiff failed to meet this obligation by, among other things, canceling regular audits, failing to maintain a data integrity system and not having the proper oversight in place to prevent an employee from submitting regulatory filings to the Food and Drug Administration based on fabricated data.

Efforts Conclusion

While there is a variety of case law across multiple jurisdictions that, to varying degrees, attempts either to create or divine objective definitions of phrases such as “best efforts” and “commercially reasonable efforts,” the one constant is that courts interpreting these phrases look to the context — often the accompanying language in the relevant agreement. Accordingly, it is a potentially impossible task to attempt to determine what such terms mean in a vacuum. At best, there are guidelines. However, this reality does not leave practitioners without options. What can be taken from this case law is that if these terms are to be used, one should either expressly define them or provide the conditions to be met to satisfy the standard intended.

For example, 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. Thus, you could supplement an obligation that a franchisee uses reasonable efforts to obtain permits by requiring that by a specified date, e.g., 90 days prior to opening, the franchisee would apply for those permits.

But courts can be unrealistic in what they expect by way of guidelines for efforts

provisions. For example, New York case law refers to the need for “a clear set of guidelines against which to measure a party’s best efforts” to enforce such a provision. This seems to run contrary; to expect drafters to offer much in the way of guidelines for interpreting reasonable efforts provisions may undercut the point of using the term in the first place.