

NOTE

Is This Really the Best We Can Do? American Courts' Irrational Efforts Clause Jurisprudence and How We Can Start to Fix It

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* Georgetown University Law Center, J.D. 2020; Washington University in St. Louis, B.A. 2017. © 2021, Charles Thau. Special thanks to Professors Frances DeLaurentis and Greg Klass for their thoughtful commentary. Thank you to my Senior Writing Fellow colleagues, and particularly Claire Fischer, for their thoughts on an early draft. Thank you to all of my incredible colleagues on the *The Georgetown Law Journal*, especially Orion de Nevers, Anna Stacey, Hannah Flesch, Adam Mitchell, and Nick Meccas-Faxon for their diligent efforts to see this Note through to publication. Thank you to Professor Diana Donahoe for teaching me how to become a legal researcher and writer. To Matt Gerson, Susan Kaplan, Alex Gerson, and Lucy Gerson: I am eternally grateful for all of your love and support throughout the COVID-19 pandemic. To Jessie Gerson: I love you, and you are the best partner I could ever ask for. To my family—Jackie Weiss, Jon Thau, Rebecca Thau, and Warren Weiss—you mean everything to me. I dedicate this Note to my late grandfather, Herbert B. Thau, the original Thau family lawyer.

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INTRODUCTION

“My best endeavours shall be done herein.”¹

Imagine the following scenario: Jon is a bright, but lazy high school junior. He received straight As in middle school and loved all of his classes, but teenage malaise and angst have overtaken him during the last few years. His grades have suffered, and Jon’s mother, Jackie, is extremely concerned—after all, the dreaded college process is just around the corner. Jackie knows that her son responds only to incentives at this point, so she offers him a deal: pick up your grades, and we will buy you a puppy. Now this draws Jon’s attention; he’s wanted a dog for years, but Jackie has always balked at the idea.

Though only seventeen, Jon is litigious, and he wants to negotiate terms so his mom can’t pull the rug out from under him. Jackie—a lawyer herself—is amused and agrees. They’re both fully convinced that Jon is smart enough to earn straight As again if he simply tries harder in his classes, but they want to control for exogenous factors. So, Jackie tells him to select one of two terms: (1) Jon shall receive a puppy only if he puts forward his “best efforts” to receive straight As during the next year; or (2) Jon shall receive a puppy only if he puts forward his “reasonable

1. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 2 (Lerner Publ’g Grp. 2003) (1605).

efforts” to receive straight As during the next year. Which option should Jon choose?

I suspect that most people—nonlawyers and lawyers alike—would argue that Jon should pick the latter term. Why? Because it seems intuitively easier to put forth one’s “reasonable” efforts than one’s “best” efforts. Jon would likely be surprised to learn, however, that the majority of courts in the United States do not perceive a difference between these two standards.²

Parties use efforts provisions—like those proposed by Jackie—to specify contractual obligations when performance is contingent on nonparties or outside events.³ In my example, Jon does not completely control his GPA; a teacher could grade his work arbitrarily or he might become sick before the semester ends, among other possibilities. Jackie therefore included an efforts clause to guard against those variables and ensure that Jon’s industriousness alone determines his performance. By qualifying and clarifying parties’ obligations, efforts clauses thus help parties avoid costly litigation and liability for breach while also encouraging dealmaking.⁴

Lawyers utilize myriad linguistic formulae in drafting these clauses—“best efforts,” “reasonable efforts,” “commercially reasonable efforts,” and “diligent efforts,” to name a few.⁵ Many practitioners perceive efforts provisions as operating on a sliding scale of onerousness, with “best efforts” imposing more burdensome obligations than “reasonable efforts,” for example.⁶ The majority of American jurisdictions, however, have rejected that notion, notably including New York and Delaware.⁷ This Note argues that the approach of these courts is incorrect; efforts standards should instead be interpreted hierarchically, both to increase linguistic coherence and to better represent the intent of contracting parties.

Why does this seemingly mundane linguistic question matter? It’s significant because efforts clauses permeate contracts throughout commercial industries:

2. See, e.g., Kenneth A. Adams, *Interpreting and Drafting Efforts Provisions: From Unreason to Reason*, 74 BUS. LAW. 677, 684–85 (2019); Shawn C. Helms, *The Fallacy of the “Best Efforts” Standard*, 42 LES NOUVELLES 432, 433 (2007); see also *infra* Section II.B (reviewing different standards employed by courts).

3. See Adams, *supra* note 2; see also *infra* Section I.A.

4. See *infra* notes 26–27 and accompanying text.

5. See *infra* Section I.B. For a comprehensive discussion of many of these standards, see generally Ryan Aaron Salem, Comment, *An Effort to Untangle Efforts Standards Under Delaware Law*, 122 PENN ST. L. REV. 793 (2018).

6. See, e.g., Helms, *supra* note 2, at 432; *infra* Section I.C.

7. See *infra* Section II.B.1. New York and Delaware courts maintain outsized importance within American corporate law. See *About the Division of Corporations*, DEL. DIVISION CORPS., <https://corp.delaware.gov/aboutagency> [<https://perma.cc/PVP9-YUFL>] (last visited Dec. 13, 2020) (“More than 1,000,000 business entities have made Delaware their legal home. More than 66% of the Fortune 500 have chosen Delaware as their legal home.”); *Business & Headquarters: Top 25 Largest Companies Headquartered in New York City (NYC) 2019 Report - Ranked by Revenue*, BARUCH C., <https://www.baruch.cuny.edu/nycdata/business-headquarters/headquarters.htm> [<https://perma.cc/74GE-KW5Q>] (last visited Dec. 13, 2020) (listing major companies headquartered in New York City).

licensing,⁸ real estate,⁹ mergers and acquisitions,¹⁰ advertising,¹¹ bankruptcy,¹² and goods and services,¹³ among many others. And contentious negotiations over variations in these clauses are not just theoretical; lawyers really do spend meaningful billable hours haggling over whether to insert “best” or “reasonable.”¹⁴ Therefore, a disconnect between practitioners and the courts is consequential, as is a current judicial interpretation that makes little sense.

This Note proceeds as follows: Part I describes what efforts clauses are, explains why they exist, and introduces the linguistic landscape of efforts formulations. It also describes the general consensus of legal commentators and practitioners—namely, that there is a hierarchy of “efforts language.” Part II explains why that consensus is incorrect by surveying prevailing case law, emphasizing decisions from New York and Delaware. Part III argues that—contrary to the current judicial landscape—efforts language *should* be viewed hierarchically, reasoning on both a formalist linguistic basis and functionalist prudential grounds. Part IV rebuts the most prominent counterarguments against the workability and reasonableness of a hierarchical schema. Part V offers recommendations for contract drafters navigating the current system, including model contract language for lawyers who want to differentiate between the three most common efforts standards: “best efforts,” “commercially reasonable efforts,” and “reasonable efforts.” Finally, this Note offers a brief conclusion.

I. AN INTRODUCTION TO EFFORTS CLAUSES

To understand why efforts clauses should be interpreted hierarchically, it is necessary to understand: (A) their purpose; (B) the linguistic variety employed by contract drafters; and (C) how practitioners and commentators perceive them.

A. WHAT ARE EFFORTS CLAUSES, AND WHY DO THEY EXIST?

In general, “as every first-year law student learns, contract liability is absolute liability In the law of contracts, trying is not enough.”¹⁵ In its most uncompromising form, this notion can lead to draconian results. For example, in *Steas v. Leonard*, a builder entered into a contract to erect a building, but the landowner’s lot was “composed of quicksand” and any structure built upon such ground was destined to collapse.¹⁶ The Minnesota Supreme Court nonetheless held that the builder breached his contract when he was unable to build on the landowner’s lot, writing:

8. See, e.g., *Citri-Lite Co. v. Cott Beverages, Inc.*, 721 F. Supp. 2d 912, 915 (E.D. Cal. 2010).

9. See, e.g., *Grossman v. Melinda Lowell, Attorney at Law, P.A.*, 703 F. Supp. 282, 283 (S.D.N.Y. 1989).

10. See, e.g., *Williams Cos. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 266–67 (Del. 2017).

11. See, e.g., *Pinpoint Consumer Targeting Servs., Inc. v. United States*, 59 Fed. Cl. 74, 74–75 (2003).

12. See, e.g., *In re Fortunoff Fine Jewelry & Silverware, LLC*, No. 08-10353 (JMP), 2008 Bankr. LEXIS 682, at *114–16 (Bankr. S.D.N.Y. Feb. 15, 2008).

13. See, e.g., *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 610 (2d Cir. 1979).

14. See *infra* notes 41–43 and accompanying text.

15. 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).

16. 20 Minn. 494, 494 (1874).

If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. . . . This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified, liability.¹⁷

However, the concept of contractual liability as purely strict liability is “one of the most imprecise generalizations ever made about the common law of contract,”¹⁸ in part because parties can include “pockets of fault” within their agreements.¹⁹ In other words, drafters can include “[f]ault-like notions” to “ensure that obligations are reasonable rather than absolute.”²⁰

Efforts clauses—like “best efforts,” “reasonable efforts,” and “commercially reasonable efforts”²¹—help clarify fault.²² For example, if a contract between Jones and Smith stipulates that “Jones shall promote the sale of Widgets,” both “parties might end up arguing over whether the performance required is negligible or all-consuming.”²³ May Jones satisfy the contract by merely spending one minute and a few dollars promoting Widgets? Or, must Jones do everything possible to promote Widgets, including going into bankruptcy? Instead of this extreme ambiguity, Jones and Smith can qualify Jones’s obligations by specifying that Jones shall “use *reasonable efforts* to promote the sale of Widgets.”²⁴ Efforts clauses are thus particularly useful when parties are concerned about the effect of exogenous factors on performance. As one prominent Delaware decision noted: “[P]arties will generally bind themselves to achieve specified results with respect to

17. *Id.* at 503.

18. Robert E. Scott, *In (Partial) Defense of Strict Liability in Contract*, 107 MICH. L. REV. 1381, 1381 (2009).

19. Eric A. Posner, *Fault in Contract Law*, 107 MICH. L. REV. 1431, 1431 (2009).

20. *Id.*

21. For a fuller picture of the variety of efforts clauses employed by practitioners, see *infra* Figure 1.

22. See Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 1000 (1992) (“Best efforts clauses . . . are obviously like a negligence rule.”).

23. Adams, *supra* note 2 (emphasis omitted).

24. See *id.* (“The parties might instead agree to use a *reasonable efforts* standard . . .”). Using an efforts standard may merely mask this ambiguity problem; parties will still dispute what constitutes “reasonable efforts” or “best efforts.” As Professor Gregory Klass astutely notes, an efforts clause may be difficult to define not only because it is not “explicitly defined within the four corners of a contract,” but also because the meaning of an efforts clause is inherently vague and perhaps intentionally so. E-mail from Gregory Klass, Professor of Law, Georgetown Univ. Law Ctr., to author (May 8, 2020, 19:25 EST) (on file with author). He argues that, for instance:

When parties use the words “on or before December 31,” that’s exact whether or not they defined it. The reason “reasonable efforts” etc is fluid is that parties are using words that, in everyday usage, are fluid.

In other words, parties themselves are choosing to employ a standard, as distinguished from a rule.

Id.; see also *infra* Section II.A (illustrating how courts have struggled in defining “best efforts”); *infra* notes 209–12 and accompanying text (explaining how practitioners can help avoid the inherent ambiguities in vague terms like “best efforts”).

activities that are within their control . . . and reserve [an efforts] standard for things outside of their control or those dependent upon the actions of third parties.”²⁵

Efforts provisions may also help reduce the front-end transaction costs of forming a contract, such as time spent negotiating, opportunity costs (for lawyers and business professionals alike), and money.²⁶ Vague terms—like “best efforts” or “reasonable efforts”—can facilitate dealmaking by simply “letting the enforcing court complete the contract” if the parties ever resort to litigation.²⁷ Smith and Jones therefore do not have to spend valuable hours meticulously defining each precise step Jones needs to take to “promote Widgets.” Rather, they can simply agree that Jones will use her “reasonable efforts,” and let the courts decide whether Jones has met that obligation if Smith is unsatisfied and decides to sue.²⁸

B. THE LINGUISTIC VARIETY

Practically, how do contract drafters employ efforts clauses? Parties employ a slew of adjectives, adverbs, verbs, and determiners to modify the noun “effort,” “efforts,” or “endeavours.” [Figure 1](#) presents a representative landscape.²⁹

Verb	Determiner	Adverb	Adjective (one or more)	Noun
Make Exercise Exert Exhaust Expend Undertake Use	All Every	Commercially Very	Best Reasonable Good Faith Diligent Extraordinary Prudent Substantial Utmost Practicable Customary	Efforts Effort Endeavors Endeavours

Figure 1

25. *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *86 (Del. Ch. Oct. 1, 2018) (alteration in original) (quoting 2 LOU R. KLING & EILEEN T. NUGENT NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 13.06 (2018)), *aff’d*, 198 A.3d 724 (Del. 2018). The court in *Akorn* was referring specifically to acquisition transactions, but the logic applies to efforts clauses in all contexts.

26. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 835 (2006).

27. *Id.*

28. There is still ambiguity in using an efforts clause without specifying what that clause means in the context of a specific contract. Indeed, some courts will consider a contract containing an efforts clause unenforceable if there are no objective criteria with which to judge whether that level of effort has been expended. See *infra* note 50 and accompanying text; see also *infra* note 209 and accompanying text (examining cases requiring a clear set of guidelines to enforce efforts clauses). In addition, even assuming some time or money is saved on the front end by avoiding lengthy negotiations, the inherent ambiguity of efforts clauses may reduce the possibility of settlement, increase the likelihood of litigation, and heighten the uncertainty of that litigation’s outcome. See *infra* notes 155–63 and accompanying text.

29. This table was adapted from Adams, *supra* note 2, at 680 fig.1, but modified to reflect a slightly more comprehensive set of terms.

These terms may be mixed and mingled in various ways. The most common formulations featuring a single adjective are “best efforts” and “reasonable efforts,”³⁰ but adjectives can also be combined in twos³¹ or threes,³² and adverbs and determiners may be introduced.³³

C. HOW MOST PRACTITIONERS AND COMMENTATORS VIEW EFFORTS CLAUSES

Commentators and practitioners widely believe that efforts clauses operate hierarchically, typically with “best efforts” imposing the highest obligation on a contracting party.³⁴ Incorporating the phrase “best efforts,” one practitioner writes, “includes the obligation to make every possible effort, and to use all possible financial resources, to achieve the desired goal.”³⁵ Below “best efforts” are thought to be a series of less onerous standards, such as “reasonable efforts” and “commercially reasonable efforts.”³⁶ Indeed, the ABA Committee on Mergers and Acquisitions has ascribed distinct meanings to five different efforts 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.

30. See *id.* at 679 (basing this determination on an unscientific survey of contracts on the SEC’s Electronic Data Gathering, Analysis, and Retrieval (EDGAR) public database); see also Kenneth A. Adams, *Understanding “Best Efforts” and Its Variants (Including Drafting Recommendations)*, 50 PRAC. LAW. 11, 12 (2004) (reaching the same conclusion with an earlier dataset).

31. See Adams, *supra* note 2, at 679 (noting phrases like “reasonable best efforts”); see also Adams, *supra* note 30, at 12 (same).

32. See Adams, *supra* note 2, at 679 (noting phrases like “best good-faith reasonable efforts”).

33. See *id.* at 680 (explaining that “all” or “commercially” may modify “reasonable”).

34. See *id.* at 681.

35. CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN’T TEACH YOU 90 (2d ed. 2008); see, e.g., 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 unreasonable.”); Adams, *supra* note 30, at 12–13 (“The conventional wisdom among corporate lawyers is that *best efforts* is the most onerous of the *efforts* standards—that the promisor is required to do everything in its power to accomplish the goal, even if it bankrupts itself in the process”); Helms, *supra* note 2, at 432 (“The common belief is that ‘best efforts’ is a term-of-art that imposes an unreasonably high standard on the obligated party.”). For further elaboration on this point, see Adams, *supra* note 2, at 681–82.

36. See, e.g., Adams, *supra* note 2, at 681–82; D.C. Toedt III, *Commercially Reasonable Efforts: A Recent Delaware Supreme Court Holding Might Motivate Contract Drafters to Define the Term for Themselves.*, 81 TEX. B.J. 338, 338 (2018).

- *Commercially reasonable efforts*: not requiring a party to take any action that would be commercially detrimental, including the expenditure of material unanticipated amounts 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.³⁷

Further, *Black's Law Dictionary* implies that there is a hierarchy between these clauses, defining “best efforts” as “all actions rationally calculated to achieve a . . . stated objective, to the point of leaving no possible route to success untried,”³⁸ while defining “reasonable efforts” as “[o]ne or more actions rationally calculated to achieve a . . . stated objective, but not necessarily with the expectation that all possibilities are to be exhausted.”³⁹ Similarly, the Uniform Commercial Code (UCC) suggests that there is a distinction between “best efforts” and “reasonable efforts.”⁴⁰

As a result, “most negotiators and lawyers, in an effort to protect a client, will fight hard to remove a ‘best efforts’ standard from a contract in favor of the more palatable ‘commercially reasonable efforts’ or ‘reasonable efforts’ standard.”⁴¹ Thus, although efforts clauses can be used to reduce front-end transaction costs,⁴² they nonetheless often become “the subject of extended negotiations, including negotiation over seemingly minor linguistic variations.”⁴³

According to American courts, however, the widespread belief that a hierarchy of efforts clauses exists is incorrect.⁴⁴ Part II explores how judges actually

37. 1 ABA MERGERS & ACQUISITIONS COMM., MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 212 (2d ed. 2010) (citations omitted); see Toedt, *supra* note 36 (ascribing similarly distinct, hierarchical meanings to “best efforts,” “reasonable efforts,” and “commercially reasonable efforts”).

38. *Best Efforts*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. *Reasonable Efforts*, BLACK'S LAW DICTIONARY (11th ed. 2019). Interestingly, however, *Black's Law* defines “commercially reasonable efforts” on the same page as “reasonable efforts,” with somewhat amorphous language, as “[r]easonable efforts that a business person, exercising sound judgment, would expect to have carried out in a given situation.” *Commercially Reasonable Efforts*, BLACK'S LAW DICTIONARY (11th ed. 2019).

40. See U.C.C. § 2-306 cmt. 5 (AM. LAW INST. & UNIF. LAW COMM'N 1977). The UCC defines a party's “best efforts” obligation under an exclusive-dealings agreement as binding itself to “use reasonable diligence as well as good faith in their performance of the contract.” *Id.* This commitment also requires the exclusive agent “to use reasonable effort and due diligence in the expansion of the market or the promotion of the product.” *Id.* The UCC therefore contemplates that “best efforts” not only includes an obligation to employ “reasonable efforts,” but also an additional obligation, here “due diligence.” See *id.* It can therefore be argued that the drafters of the UCC did not consider “best efforts” and “reasonable efforts” to be equivalent. The author thanks Professor Gregory Klass for this point.

41. Helms, *supra* note 2, at 432.

42. See Scott & Triantis, *supra* note 26.

43. *Id.*

44. See *infra* Section II.B (surveying the prevailing case law, which does not differentiate between efforts standards); see also *infra* Section II.C (offering explanations for why practitioners continue to negotiate for different efforts standards despite the prevailing case law).

interpret efforts clauses, paying particular attention to case law in New York and Delaware.

II. WHAT THE CASE LAW ACTUALLY SAYS

Contrary to many practitioners' and commentators' beliefs, courts have found "no meaningful distinction between the various efforts standards."⁴⁵ This Part proceeds in three Sections. First, Section II.A surveys how courts define "best efforts," concluding that judges "have rejected the contention that a party's obligation to use best efforts requires making every conceivable effort to accomplish the goal in question."⁴⁶ Rather, the least onerous judicial interpretation of "best efforts" treats the clause as coextensive with the implied obligation of good faith in all contracts, while the most burdensome definition of "best efforts" incorporates a reasonableness component.⁴⁷ Exploring how judges actually define "best efforts" in practice is vital to understanding why courts have equated efforts variants; if "best efforts" itself only imposes a moderate burden on contracting parties, judges may feel that prevailing case law obligates them to conflate "best efforts" with other, seemingly lesser obligations like "reasonable efforts" and "commercially reasonable efforts."

Second, Section II.B illustrates that the vast majority of courts do not actually recognize a hierarchical approach to efforts clauses, but rather collapse all efforts clause formulations under a single "reasonableness" umbrella.

Finally, Section II.C offers some possible explanations for why, despite this case law, there remains a disconnect between practitioners and the courts.

A. HOW DO COURTS DEFINE "BEST EFFORTS"?

A party's obligations under a "best efforts" clause are unsettled, fluid, and highly fact-dependent.⁴⁸ Indeed, "[a]lthough courts apply different standards to determine whether a party has met its best efforts obligation, one general notion applies: when the contract does not expressly contain a definition of best efforts, courts will look to the circumstances of the agreement to determine the meaning of the clause."⁴⁹ Some courts even conclude that "absent any objective criteria

45. Helms, *supra* note 2, at 432.

46. Adams, *supra* note 2, at 684.

47. See *infra* Sections II.A.1–3.

48. See, e.g., *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 233 (3d Cir. 2001) ("Best efforts" has been widely held to be an ambiguous contract term . . . [and] depends on the factual circumstances surrounding an agreement."); *First Nat'l Bank of Lake Park v. Gay*, 694 So. 2d 784, 788 (Fla. Dist. Ct. App. 1997) ("The definition of 'best efforts' may vary depending upon the factual circumstances surrounding the transaction and the intent of the parties in entering into the transaction."); *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.*, 809 S.W.2d 577, 581 (Tex. App. 1991) ("Best efforts is a nebulous standard.").

49. Zachary Miller, Note, *Best Efforts?: Differing Judicial Interpretations of a Familiar Term*, 48 ARIZ. L. REV. 615, 618 (2006); see also Victor P. Goldberg, *In Search of Best Efforts: Reinterpreting Bloor v. Falstaff*, 44 ST. LOUIS U. L.J. 1465, 1465 (2000) ("Best efforts' can only be defined contextually.").

with which to judge whether best efforts have been expended, such a standard is too vague to be enforceable.”⁵⁰

This extreme context dependency has led to notable judicial confusion. A prominent example is *Bloor v. Falstaff Brewing Corp.*, a 1979 Second Circuit decision.⁵¹ In that case, Falstaff purchased a certain type of ale from Bloor and agreed to pay Bloor a percentage of profits from its sale, using “its best efforts to promote and maintain a high volume of sales.”⁵² Bloor sued successfully after sales dropped, but Judge Friendly wrestled in frustration with the meaning of “best efforts,” writing that the law in New York on this subject was “far from clear and it is unfortunate that a federal court must have to apply it.”⁵³

However, there is one area of efforts clause jurisprudence in which there is abundant, widespread agreement among the judiciary: “best efforts” does not mean “every conceivable effort.” In *Bloor*, for instance, Judge Friendly also wrote that Falstaff did not need to bankrupt itself to satisfy its efforts clause and maintained a “right to give reasonable consideration to its own interests.”⁵⁴ “Best efforts,” the First Circuit has written, “cannot mean everything possible under the sun.”⁵⁵

With that overarching, limiting factor as a rare commonality among courts, this Section classifies the various definitions that judges employ to interpret “best efforts” clauses into three groups, ranging from the least onerous obligation to the most onerous: (1) a duty of good faith; (2) diligence; and (3) a reasonableness standard.⁵⁶ This Section concludes with a brief comparison of these different approaches.

50. 2 LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 13.06 (2018); *see, e.g.*, *Heritage Remediation/Eng'g, Inc. v. Wendnagel*, No. 89 C 413, 1989 WL 153373, at *6 (N.D. Ill. Nov. 9, 1989) (“[S]imply because a party promises to use his ‘best efforts’ is not sufficient if no criteria exist by which to measure the effort.”); *Mocca Lounge, Inc. v. Misak*, 462 N.Y.S.2d 704, 707 (App. Div. 1983) (“[A] clear set of guidelines against which to measure a party’s best efforts is essential to the enforcement of such a clause . . .”). However, “probably the overwhelming majority [of decisions] have upheld ‘best efforts’ obligations [when an agreement lacks objective criteria], but have not interpreted them uniformly.” 2 KLING & NUGENT, *supra* note 50.

51. 601 F.2d 609 (2d Cir. 1979) (Friendly, J.).

52. *Id.* at 610.

53. *Id.* at 613 n.7. This lack of judicial consensus has not abated during the past forty years. *See, e.g.*, *Ashokan Water Servs., Inc. v. New Start, LLC*, 807 N.Y.S.2d 550, 555 (Civ. Ct. 2006) (“[T]he verbal formulae that courts use when applying a ‘best efforts’ obligation often confuse rather than clarify.”). And this uncertainty is, unfortunately, not limited to New York jurisprudence. *See, e.g.*, *First Nat'l Bank of Lake Park*, 694 So. 2d at 787 (“We can locate no definition of ‘best efforts’ in Florida law.”); Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 1066 (1992) (“[T]he standard of ‘best efforts’ is poorly defined.”).

54. *Bloor*, 601 F.2d at 614.

55. *Coady Corp. v. Toyota Motor Distribs., Inc.*, 361 F.3d 50, 59 (1st Cir. 2004); *see also 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 . . .”); *All. Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 763 n.60 (Del. Ch. 2009) (noting that “reasonable best efforts” is “clearly understood by transactional lawyers to be less than an unconditional commitment”).

56. This classification is my own. One New York court has described six different categories: “due diligence,” “all reasonable methods,” “reasonable efforts,” “good-faith business judgment,” “genuine

1. Duty of Good Faith

A minority of courts have held that “best efforts” is equivalent to the duty of good faith implied in every contract.⁵⁷ For example, in *Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.*, the Second Circuit upheld a district court’s ruling that “best efforts” merely required “active exploitation in good faith.”⁵⁸ Similarly, an Illinois state court,⁵⁹ an Illinois district court,⁶⁰ and the First Circuit (on one occasion)⁶¹ have all taken great pains to use “best efforts” and “good faith” interchangeably.

Only a minority of courts equate the two terms, however. This makes sense because the duty of good faith is a mandatory feature of all contracts.⁶² Thus, “[b]y equating best efforts and good faith, the authority of the best efforts clause is removed entirely, and the agreement is interpreted as if the best efforts

effort,” and “active exploitation in good faith.” *Ashokan Water Servs.*, 807 N.Y.S.2d at 555. A district court in Puerto Rico has also described a “best efforts” obligation as “requir[ing] parties to take affirmative steps towards the fulfillment of the condition.” *Satellite Broad. Cable, Inc. v. Telefónica de España*, 807 F. Supp. 210, 213 (D.P.R. 1992) (emphasis added). Although some judges seem to define “best efforts” at differing levels of onerousness, this does not contradict the argument—made in Section II.B—that the vast majority of judges do not view efforts clauses hierarchically. The vast majority of judges do not differentiate *between* efforts standards regardless of how they define “best efforts.” In other words, whatever standard a judge uses to determine whether a party has met its “best efforts” obligations will be the standard that judge uses to evaluate whether that party has met any other efforts obligation—“reasonable efforts,” for example. The author thanks Anna Stacey for helping to clarify this point.

57. See Miller, *supra* note 49.

58. 584 F.2d 1164, 1171 (2d Cir. 1978); see also *Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, 842 F. Supp. 2d 502, 511 (S.D.N.Y. 2012) (noting that “a ‘best efforts’ clause imposes an obligation to act with good faith in light of one’s own capabilities”); *Scott-Macon Sec., Inc. v. Zoltek Cos., No. 04Civ.2124MBM*, 2005 WL 1138476, at *14 (S.D.N.Y. May 12, 2005) *aff’d*, No. 06-2711-cv, 2007 WL 2914873 (2d Cir. Oct. 4, 2007) (describing “best efforts” as permitting discretion within a company’s “good faith business judgment”). A few Massachusetts courts have equated “best efforts” with good faith, which they colorfully interpret as “requiring . . . the party [to] put its muscles to work to perform with full energy and fairness the relevant express promises and reasonable implications therefrom.” *Stabile v. Stabile*, 774 N.E.2d 673, 676 (Mass. App. Ct. 2002) (quoting *Macksey v. Egan*, 633 N.E.2d 408, 414 (Mass. App. Ct. 1994)); *accord Astrolabe, Inc. v. Esoteric Techs. Pty, Ltd.*, No. 01-11352-PBS, 2002 U.S. Dist. LEXIS 5764, at *7 (D. Mass. Mar. 29, 2002).

59. See *Grant v. Bd. of Educ.*, 668 N.E.2d 1188, 1197 (Ill. App. Ct. 1996) (“A best efforts undertaking has been likened to the exercise of good faith implied in all contracts . . .”).

60. See *Autotech Techs. Ltd. P’ship v. Automationdirect.com, Inc.*, 249 F.R.D. 530, 533 (N.D. Ill. 2008) (“[A]ny best efforts clause can be satisfied by any of a wide range of possible levels and types of performance that comport with the exercise of ‘good faith’ by the obligor.”).

61. See *Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987) (declaring that “the ‘best efforts’ standard has been held to be equivalent to that of good faith”). The court in *Triple-A* curiously noted that it was “unable to find any case in which a court found . . . that a party acted in good faith but did not use its best efforts.” *Id.* Yet multiple pre-1987 cases conflict with the notion that “good faith” and “best efforts” are coextensive. See, e.g., *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ’g Co.*, 281 N.E.2d 142, 145 (N.Y. 1972) (holding that a publisher did not breach its implicit duty of good faith but breached its best efforts obligations).

62. See U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM’N 1977) (“Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.” (alteration in original)); RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

language was not in the contract at all.”⁶³ In other words, if “best efforts” is simply equivalent to the duty of good faith, a contract’s “best efforts” clause carries no meaning and renders the parties’ intent to include an additional term irrelevant. Numerous scholars and courts have therefore dismissed this approach.⁶⁴

2. Diligence

Other courts have held that “best efforts,” while imposing a greater obligation than “good faith,” is merely a function of the parties’ diligence. Professor E. Allan Farnsworth was a proponent of this approach, writing that “[b]est efforts is a standard that has diligence at its essence.”⁶⁵ Many courts have since followed his formulation. For instance, the Third Circuit, in *National Data Payment Systems, Inc. v. Meridian Bank*, quoted Professor Farnsworth and held that diligence presented a “more exacting” standard than the duty of good faith.⁶⁶ Similarly, in *Paccar Inc. v. Elliot Wilson Capitol Trucks LLC*, the District of Maryland wrote:

At the least, the best efforts clause in [the contract] requires that [one party] exercise some diligence in considering a potential buyer for [the other party’s] franchises. What exactly this diligence necessarily entails must be determined from all the circumstances. . . . [But] a promise to exercise best or reasonable efforts, whether express or implied, contains two separate requirements of “good faith” and “reasonable diligence” in pursuing the stated goal.⁶⁷

The problem with this classification is its imprecision in relation to the general duty of good faith. *Black’s Law* defines “diligence” as “[t]he attention and care

63. Miller, *supra* note 49.

64. See, e.g., *Allen v. Williamsburgh Sav. Bank*, 69 N.Y. 314, 314 (1877) (“[D]efendant had obligated itself to exercise more than ordinary care, i.e., its ‘best efforts.’”); *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”); *Ashokan Water Servs., Inc. v. New Start, LLC*, 807 N.Y.S.2d 550, 555 (Civ. Ct. 2006) (same); 14 MICHAEL P. ZWEIG & TAL E. DICKSTEIN, AM. BAR ASS’N SECTION OF LITIG., INTERPRETING BEST. EFFORTS, BUS. & COM. LITIG. FED. CTS. § 148:20 (4th ed. 2019) (“‘[B]est efforts’ is clearly more than merely ‘good faith’”); Farnsworth, *supra* note 15, at 8 (writing that best efforts and the duty of good faith “are distinct and that of best efforts is the more exacting”); Miller, *supra* note 49, at 635 (“By equating good faith and best efforts, courts remove all meaning from the best efforts provision. This stands in stark contrast to the canon that ‘every word, phrase or term of a contract must be given effect’ whenever possible.” (quoting 11 SAMUEL J. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:5 (4th ed. 1990))).

65. Farnsworth, *supra* note 15, at 8.

66. 212 F.3d 849, 854 (3d Cir. 2000) (quoting 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS 383–84 (2d ed. 1998)). Other courts have held similarly while quoting Professor Farnsworth. See, e.g., *White v. Nat’l Football League*, 766 F. Supp. 2d 941, 950 (D. Minn. 2011); *T.S.I. Holdings, Inc. v. Jenkins*, 924 P.2d 1239, 1250 (Kan. 1996).

67. 905 F. Supp. 2d 675, 689 (D. Md. 2012) (internal quotation marks omitted). Other courts, without quoting Professor Farnsworth, still equate “best efforts” to “diligence.” See, e.g., *Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research*, No. 15-CV-2044 (AJN), 2016 WL 205445, at *7 (S.D.N.Y. Jan. 15, 2016). *But see* *Mark Techs. Corp. v. Utah Res. Int’l, Inc.*, 147 P.3d 509, 513 (Utah Ct. App. 2006) (“There is no requirement that the word ‘diligence’ be recited as part of the test used by the trier of fact.”).

required from a person in a given situation,”⁶⁸ and the Second Restatement of Contracts defines “good faith” as “emphasiz[ing] faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”⁶⁹ In other words, for courts utilizing Professor Farnsworth’s approach, it is extremely difficult to decipher where “good faith” ends and “diligence” begins, even if one accepts the premise that “diligence” necessitates a greater obligation than mere “good faith.”⁷⁰ Indeed, one judge has glibly described the difference between “good faith” and “due diligence” as a “semantic quibble.”⁷¹

3. All Reasonable Efforts

Many courts have held that “best efforts,” while imposing a greater obligation than good faith, is tempered by a reasonableness component. In *Coady Corp. v. Toyota Motor Distributors, Inc.*, the First Circuit stated: “‘Best efforts’ is implicitly qualified by a reasonableness test—it cannot mean everything possible under the sun.”⁷² Other courts specify that “best efforts” requires parties pursue “all reasonable efforts” to satisfy their obligations.⁷³ For instance, in *Stewart v. O’Neill*, the U.S. District Court for the District of Columbia wrote that the agency at issue “was obligated to use its best efforts—that is, *all reasonable efforts*—to comply with all terms of the settlement agreement.”⁷⁴ Similarly, in *Town of Roxbury v. Rodrigues*, a New York court interpreted a real estate purchase agreement containing a “best efforts” clause as requiring plaintiffs to “‘pursue all reasonable methods’ for satisfying the necessary contingencies.”⁷⁵

68. *Diligence*, BLACK’S LAW DICTIONARY (11th ed. 2019).

69. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 1981).

70. Courts sometimes also imprecisely conflate “good faith” and “diligence” and use them interchangeably. See *infra* note 77 and accompanying text.

71. *Paramount Lithographic Plate Serv., Inc. v. Hughes Printing Co.*, 2 Pa. D. & C.3d 677, 691 (Ct. Com. Pl.), *aff’d*, 377 A.2d 1001 (Pa. Super. Ct. 1977).

72. 361 F.3d 50, 59 (1st Cir. 2004); *accord* *Miami Packaging, Inc. v. Processing Sys., Inc.*, 792 F. Supp. 560, 565 (S.D. Ohio 1991). That the First Circuit also equated “best efforts” with the duty of good faith in *Triple-A Baseball Club Associates v. Northeastern Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987) illustrates the confusion within this area of the law. See *supra* note 61 and accompanying text.

73. Although it may appear that this definition of “best efforts” is merely equivalent to “reasonable efforts,” it can still be distinguished from—should be distinguished from—mere “reasonable efforts.” See *infra* Parts III–IV.

74. 225 F. Supp. 2d 6, 11 (D.D.C. 2002) (emphasis added); see also *United Telecomms., Inc. v. Am. Television & Commc’ns Corp.*, 536 F.2d 1310, 1318 n.7 (10th Cir. 1976) (stating “best efforts” requires exercising “all reasonable efforts”); *US Airways Grp. v. British Airways PLC*, 989 F. Supp. 482, 491 (S.D.N.Y. 1997) (quoting *Kroboth v. Brent*, 625 N.Y.S.2d 748, 749–50 (App. Div. 1995)) (same). Notably, the same dynamic exists in when judges interpret an “every efforts provision” as encompassing “every reasonable effort.” See, e.g., *Aeronautical Indus. Dist. Lodge 91 of the Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. United Techs. Corp.*, 230 F.3d 569, 578 (2d Cir. 2000) (equating “every effort” with “every reasonable effort”); *Collier v. Metro. St. Louis Sewer Dist.*, 706 S.W.2d 894, 897 (Mo. Ct. App. 1986) (same); *Shandy v. Portland Sch. Dist. No. 1*, 634 P.2d 1377, 1381 (Or. Ct. App. 1981) (same).

75. 716 N.Y.S.2d 814, 815 (App. Div. 2000) (quoting *Kroboth*, 625 N.Y.S.2d at 749).

4. Comparing the Predominant Approaches

One can begin to see why interpreting a “best efforts” standard—both on its own and in relation to other efforts standards—is confusing. First, not only do courts define “best efforts” imprecisely, but the language that they employ may also conflate multiple definitions. For instance, some courts have combined “reasonableness” and “diligence,” with one judge writing: “Best efforts does not mean perfection and expectations are only justifiable if they are reasonable. The number of complaints are reasonable . . . and they do not reflect a breach of best efforts or lack of diligence.”⁷⁶ Another court combined reasonableness, diligence, and good faith, holding: “The ‘best efforts’ obligation required that [the holding company] and its board of directors make a reasonable, diligent, and good faith effort to accomplish a given objective”⁷⁷

Second, all three standards fall short of the ABA’s definition of “best efforts,” which requires “a party to do essentially everything in its power to fulfill its obligation.”⁷⁸ All three are also arguably less onerous than the definition of “best efforts” provided in *Black’s Law*: “all actions rationally calculated to achieve a . . . stated objective, to the point of leaving no possible route to success untried.”⁷⁹ In other words, many lawyers do not recognize that, in practice, even the most onerous jurisprudential construction of “best efforts” does not equate to “every conceivable effort.”⁸⁰ On one hand, this misunderstanding is significant because it may contribute to—or reinforce—the additional misconception that there is a jurisprudential hierarchy of efforts standards; if practitioners incorrectly believe that judges will construe “best efforts” as “every conceivable effort,” then they may not understand how or why courts equate “best efforts” and other efforts standards, particularly “reasonable efforts.”⁸¹ On the other hand, because courts understand “best efforts”—even at its most onerous—to impose a reasonableness constraint on contracting parties,⁸² judges may, upon surveying relevant case law, feel as though there is little practical difference between “best efforts” and other,

76. *Corp. Lodging Consultants, Inc. v. Bombardier Aerospace Corp.*, No. 03-1467-WEB, 2005 WL 1153606, at *6 (D. Kan. May 11, 2005); see also *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990) (“A more accurate description of the obligation owed [under a ‘best efforts’ clause] would be the exercise of ‘due diligence’ or ‘reasonable efforts.’”); *Gilson v. Rainin Instrument, LLC*, No. 04-C-852-S, 2005 WL 1899471, at *5 (W.D. Wis. Aug. 9, 2005) (“The duty to use best efforts requires [the defendant] to use reasonable efforts and due diligence in the promotion of [the plaintiff’s] pipettes.”). The UCC has added to this confusion by defining “best efforts” as “reasonable diligence as well as good faith in [the] performance of the contract.” U.C.C. § 2-306 cmt. 5 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

77. *Great W. Producers Coop. v. Great W. United Corp.*, 613 P.2d 873, 878 (Colo. 1980) (en banc); see also *United Telecomms., Inc.*, 536 F.2d at 1318 n.7 (stating “best efforts” requires “a diligent, reasonable and good faith effort to accomplish [an] objective”).

78. 1 ABA MERGERS & ACQUISITIONS COMM., *supra* note 37.

79. *Best Efforts*, *supra* note 38.

80. See *supra* note 56 (explaining why differing definitions of “best efforts” do not negate the argument that judges decline to interpret efforts clauses hierarchically).

81. See *infra* Section II.C (providing this as one of many potential reasons why there is a disconnect between commentators, practitioners, and the courts).

82. See *supra* Section II.A.3.

seemingly lesser obligations such as “reasonable efforts” and “commercially reasonable efforts.”⁸³

B. “BEST EFFORTS” IN RELATION TO OTHER EFFORTS STANDARDS

Contrary to the perceptions of many practitioners and commentators, “case law on the meaning of best efforts suggests that instead of representing different standards, other efforts standards mean the same thing as best efforts, unless a contract definition provides otherwise.”⁸⁴ This Section surveys how courts have established an equality of efforts provisions, focusing on “best efforts,” “reasonable efforts,” and “commercially reasonable efforts.” It then discusses a few cases that have outlined the minority position—that there is a hierarchy of efforts standards.

1. The Majority Position

The majority of courts that have examined the issue use the terms “reasonable efforts” interchangeably with “best efforts.”⁸⁵ For example, one Sixth Circuit judge has noted that the term “‘best efforts’ . . . has properly been termed an ‘extravagant’ phrase,” and “[a] more accurate description of the obligation owed would be the exercise of . . . ‘reasonable efforts.’”⁸⁶ One district court has explicitly stated that the distinction between these two standards is “merely an issue of semantics.”⁸⁷

Similarly, although “[t]here is no settled or universally accepted definition of the term ‘commercially reasonable efforts,’”⁸⁸ courts have impliedly equated “best efforts” and “commercially reasonable efforts” obligations.⁸⁹

83. *But see infra* Part IV (explaining how “best efforts” can be distinguished from “reasonable efforts” while still incorporating a reasonableness hook).

84. Adams, *supra* note 30, at 14 (emphasis omitted).

85. *Id.*

86. *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990); *accord* *Reyelt v. Danzell*, 509 F. Supp. 2d 156, 165 (D.R.I. 2007); *see also* *Baron Fin. Corp. v. Natanzon*, 509 F. Supp. 2d 501, 514 (D. Md. 2007) (“Undertaking one’s ‘best efforts’ to achieve a contractual goal has been described in terms of reasonableness.”); *Union Square Southbury, LLC v. Accommodations Unlimited, Inc.*, No. UWYCV126013487S, 2013 WL 6133047, at *3 (Conn. Super. Ct. Oct. 31, 2013) (“In Connecticut, ‘best efforts’ has been used interchangeably with the term ‘reasonable efforts.’”); *Kubik v. J & R Foods of Or., Inc.*, 577 P.2d 518, 521 (Or. 1978) (“[I]t is your duty to decide whether the defendant used best efforts to promote and market the plaintiff’s sauce. . . . [Y]ou are to imply . . . a promise [to use reasonable efforts] under the terms of the agreement.” (first alteration in original) (quoting trial judge’s jury instructions)).

87. *Trecom Bus. Sys., Inc. v. Prasad*, 980 F. Supp. 770, 774 n.1 (D.N.J. 1997). As previously mentioned, a similar dynamic exists with many courts when they interpret an “every efforts provision” as encompassing “every reasonable effort.” *See supra* note 74.

88. *Citri-Lite Co. v. Cott Beverages, Inc.*, 721 F. Supp. 2d 912, 926 (E.D. Cal. 2010).

89. *See, e.g.*, *VDF FutureCeuticals, Inc. v. Stiefel Labs., Inc.*, 792 F.3d 842, 844 (7th Cir. 2015); *JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 463 (4th Cir. 2001); *Chen v. Cayman Arts, Inc.*, No. 10-80236-CIV, 2011 WL 3903158, at *10 (S.D. Fla. Sept. 6, 2011); *cf.* *Plexicoat Am. LLC v. PPG Architectural Finishes, Inc.*, No. 13-cv-3887, 2015 U.S. Dist. LEXIS 4190, at *8 (E.D. Pa. Jan. 14, 2015) (“Courts have not offered a clear definition of what constitutes ‘commercially reasonable efforts,’ or the extent to which such clauses may differ from the default ‘best efforts’ standard.”).

Notably, case law in New York and Delaware—states that maintain outsized importance in corporate law⁹⁰—blend the meaning of “best efforts,” “reasonable efforts,” and “commercially reasonable efforts.”

a. New York

The vast majority of courts in New York have explicitly dissolved any distinction between “best efforts” and “reasonable efforts.” For instance, in *Soroof Trading Development Co. v. GE Fuel Cell Systems, LLC*, Judge Swain of the Southern District of New York observed that “New York courts use the term ‘reasonable efforts’ interchangeably with ‘best efforts.’”⁹¹ Myriad case law is in accord.⁹² Similarly, in *Timberline Development LLC v. Kronman*, a New York appellate court discussed a “requirement to employ ‘reasonable efforts or ‘best efforts’, as it is generally expressed,” indicating that the two are coextensive.⁹³

A parallel dynamic exists between “best efforts” and “commercially reasonable efforts” clauses in New York, though an equivalence has been drawn less explicitly between the two due to a relative dearth of applicable case law. In *Holland Loader Co. v. FLSmidth A/S*, Judge Woods of the Southern District of New York noted: “While much case law has been dedicated to interpreting, albeit without much clarity, ‘best efforts’ and ‘reasonable efforts’ provisions under New York law, the opposite is true with respect to ‘commercially reasonable efforts’ obligations.”⁹⁴

Although case law interpreting the phrase is scant,⁹⁵ one lower court in New York has explicitly equated “best efforts” with “commercially reasonable efforts.”⁹⁶ The court in *Holland Loader* has also implied a fairly clear logical equivalence.⁹⁷ Notably, one commonality seems to exist among courts seeking to define “commercially reasonable efforts”: the clause “does not require a party to act against its own business interests.”⁹⁸ After surveying relevant New York

90. See *supra* note 7.

91. 842 F. Supp. 2d 502, 511 (S.D.N.Y. 2012) (quoting *Monex Fin. Servs. Ltd. v. Nova Info. Sys., Inc.*, 657 F. Supp. 2d 447, 454 (S.D.N.Y. 2009)).

92. See, e.g., *Holland Loader Co. v. FLSmidth A/S*, 313 F. Supp. 3d 447, 470 n.5 (S.D.N.Y. 2018), *aff'd*, 769 F. App'x 40 (2d Cir. 2019); *Scott-Macon Sec., Inc. v. Zoltek Cos.*, No. 04Civ.2124MBM, 2005 WL 1138476, at *14 (S.D.N.Y. May 12, 2005), *aff'd*, No. 06-2711-cv, 2007 WL 2914873 (2d Cir. Oct. 4, 2007); *Liu v. Beth Israel Med. Ctr.*, No. 02 Civ.2034(DLC), 2003 WL 21488081, at *4 (S.D.N.Y. June 26, 2003).

93. 702 N.Y.S.2d 237, 239 (App. Div. 2000).

94. 313 F. Supp. 3d at 471.

95. See *id.* at 473.

96. See *Samson Lift Tech., LLC v. Jerr-Dan Corp.*, No. 653586/2011, 2014 N.Y. Misc. LEXIS 5864, at *15 (Sup. Ct. Nov. 24, 2014). One Virginia court, interpreting New York case law, equated “best efforts,” “reasonable efforts,” and “commercially reasonable efforts.” See *E. Claiborne Robins Co. v. Teva Pharm. Indus.*, No. 3:18cv827, 2019 U.S. Dist. LEXIS 160489, at *9 (E.D. Va. Sept. 18, 2019).

97. See 313 F. Supp. 3d at 470 n.5.

98. *Holland Loader*, 313 F. Supp. 3d at 472 (quoting *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 950 F. Supp. 2d 568, 618 (S.D.N.Y. 2013)). This shared characteristic is also reflected in national case law. See, e.g., *Citri-Lite Co. v. Cott Beverages, Inc.*, 721 F. Supp. 2d 912, 926 (E.D. Cal. 2010); see also *Microboard Processing, Inc. v. Crestron Elec., Inc.*, No. 3:09cv708 (JBA), 2011 WL 1213177, at *3

jurisprudence, Judge Woods defined “commercially reasonable efforts” as “requir[ing] at the very least some conscious exertion to accomplish the agreed goal, but something less than a degree of efforts that jeopardizes one’s business interests.”⁹⁹ Yet this is also exactly how New York courts describe a party’s obligations under “best efforts” and “reasonable efforts” clauses. For instance, in *Scott-Macon Securities, Inc. v. Zoltek Cos.*, then-Chief Judge Mukasey wrote that under “best efforts” and “reasonable efforts” clauses, “a party is entitled to give ‘reasonable consideration to its own interests’ in determining an appropriate course of action to reach the desired result.”¹⁰⁰ By logical implication, therefore, New York courts do not recognize any meaningful distinctions between “best efforts” and “commercially reasonable efforts.”¹⁰¹

b. Delaware

Recent developments in Delaware case law directly support the notion that all three efforts standards are so intertwined that distinctions between them are essentially nonexistent.¹⁰² Delaware courts have “dealt—indeed wrestled—with contractual obligations in merger agreements made subject to varying ‘efforts clauses’ imposed on the acquiring party.”¹⁰³ For instance, in *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, the Delaware Chancery Court cited a First Circuit decision for the proposition that “reasonable best efforts” may be

(D. Conn. Mar. 29, 2011) (“[W]hether and how compliance with the ‘industry standards’ . . . relates to the ‘commercial reasonableness’ [the promisor] agreed to must also take into account factors such as the skills and costs associated with [performing under the contract] in accordance with the industry standards compared to the costs to [the promisor] of how it [performed under the contract].”); *LeMond Cycling, Inc. v. PTI Holding, Inc.*, No. Civ.03-5441 PAM/RLE, 2005 WL 102969, at *5 (D. Minn. Jan. 14, 2005) (“No business would agree to perform to its detriment, and therefore whether or not [the defendant] performed with commercial reasonableness also depends on the financial resources, business expertise, and practices of [the defendant].”).

99. *Holland Loader*, 313 F. Supp. 3d at 473.

100. No. 04Civ.2124MBM, 2005 WL 1138476, at *14 (S.D.N.Y. May 12, 2005) (internal quotation marks omitted), *aff’d*, No. 06-2711-cv, 2007 WL 2914873 (2d Cir. Oct. 4, 2007); *see also* *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979) (noting that under a “best efforts” clause, a party may “give reasonable consideration to its own interests”); *Serdarevic v. Centex Homes, LLC*, No. 08 CV 5563(VB), 2012 WL 4054161, at *15 (S.D.N.Y. Sept. 5, 2012) (same). Case law outside of New York coheres with this principle. *See, e.g.*, *White v. Nat’l Football League*, 766 F. Supp. 2d 941, 952 (D. Minn. 2011); *Autotech Techs. Ltd. P’ship v. Automationdirect.com, Inc.*, 249 F.R.D. 530, 533–34 (N.D. Ill. 2008); *Television Events & Mktg., Inc. v. AMCON Distrib. Co.*, 484 F. Supp. 2d 1124, 1133 (D. Haw. 2006); *Shaull Equip. & Supply Co. v. Rand*, No. Civ. 1:CV020686, 2004 WL 3406088, at *7 (M.D. Pa. Nov. 4, 2004); *NCNB Nat’l Bank of N.C. v. Bridgewater Steam Power Co.*, 740 F. Supp. 1140, 1152 (W.D.N.C. 1990); *Grant v. Bd. of Educ.*, 668 N.E.2d 1188, 1197 (Ill. App. Ct. 1996); *First Union Nat’l Bank v. Steele Software Sys. Corp.*, 838 A.2d 404, 429 (Md. Ct. Spec. App. 2003).

101. Because New York courts consider “best efforts” and “reasonable efforts” to be interchangeable, *see supra* notes 91–93 and accompanying text, the transitive property dictates that any equivalence between “best efforts” and “commercially reasonable efforts” also extends to “reasonable efforts.”

102. For an interesting summary of these developments, *see generally* Gregg L. Weiner, *Delaware Supreme Court Clarifies Meaning of ‘Best Efforts’ Merger Provisions*, 32 No. 1 WESTLAW J. DEL. CORP. 1 (2017).

103. *Himawan v. Cephalon, Inc.*, C.A. No. 2018-0075-SG, 2018 WL 6822708, at *7 (Del. Ch. Dec. 28, 2018).

coextensive with the duty of good faith.¹⁰⁴ Almost a decade later, in *Williams Cos. v. Energy Transfer Equity, L.P.*, the Delaware Supreme Court did not directly address the issue but refused to distinguish between the phrase “commercially reasonable efforts” and “reasonable best efforts” in a contract that utilized both terms in different sections, writing that each required the parties to take “all reasonable steps” to complete the transaction.¹⁰⁵ Finally, in *Akorn, Inc. v. Fresenius Kabi AG*,¹⁰⁶ the Delaware Chancery Court openly tackled the question within a lengthy opinion. The court first summarized the disconnect between practitioners and courts, stating: “Commentators who have surveyed the case law find little support for the distinctions that transactional lawyers draw.”¹⁰⁷ It then cited *Williams* and *Hexion* as support for the proposition that no distinction should be drawn between separate “commercially reasonable efforts” and “reasonable best efforts” clauses.¹⁰⁸ The Delaware Supreme Court affirmed, albeit without commenting specifically on the Chancery Court’s summation of efforts clause jurisprudence.¹⁰⁹

2. The Small but Vocal Minority

There is some “negligible caselaw” supporting a hierarchy of efforts standards.¹¹⁰ In *In re Chateaugay Corp.*, Judge Keenan of the Southern District of New York wrote: “The standard imposed by a ‘reasonable efforts’ clause . . . is indisputably less stringent than that imposed by the ‘best efforts’ clauses contained elsewhere in the Agreement.”¹¹¹ Yet in *Holland Loader Co. v. FLSmidth A/S*, Judge Woods rejected the defendant’s reliance on *In re Chateaugay Corp.*, noting: “It is unclear that, as a general rule, a ‘reasonable efforts’ clause imposes a less stringent obligation than a ‘best efforts’ clause under New York case law. Rather, the New York courts tend to treat the two terms interchangeably, suggesting that they each impose a similar performance obligation.”¹¹²

104. 965 A.2d 715, 755 (Del. Ch. 2008) (quoting *Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987)).

105. 159 A.3d 264, 273 (Del. 2017).

106. C.A. No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff’d*, 198 A.3d 724 (Del. 2018).

107. *Id.* at *87; *accord* *Neurvana Med., LLC v. Balt USA, LLC*, C.A. No. 2019-0034-KSJM, 2020 Del. Ch. LEXIS 77, at *37 (Del. Ch. Feb. 27, 2020); *Channel Medsystems, Inc. v. Bos. Sci. Corp.*, No. 2018-0673-AGB, 2019 Del. Ch. LEXIS 1394, at *95 n.410 (Del. Ch. Dec. 18, 2019).

108. *Akorn*, 2018 WL 4719347, at *87; *accord* *Williams Cos.*, 159 A.3d at 273; *Hexion Specialty Chemicals, Inc.*, 965 A.2d at 755.

109. *See* *Akorn, Inc. v. Fresenius Kabi AG*, 198 A.3d 724, 724 n.4 (Del. 2018) (“The record supports the Court of Chancery’s finding that [Defendant] did not breach its Reasonable Best Efforts Covenants . . .”).

110. *See* *Adams*, *supra* note 2, at 687.

111. 198 B.R. 848, 854 (S.D.N.Y. 1996). Curiously—and confusingly—the court then went 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.” *Id.* (quoting *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979)).

112. 313 F. Supp. 3d 447, 470 n.5 (S.D.N.Y. 2018), *aff’d*, 769 F. App’x 40 (2d Cir. 2019). In addition, one commentator has noted that the precedential value of bankruptcy cases (like *In re Chateaugay Corp.*) is “obviously limited” in the context of interpreting efforts clauses. *See* David Shine,

Likewise, in *Krinsky v. Long Beach Wings, LLC*, a California state appeals court concluded that “the plain meaning of [‘best efforts’] denotes efforts more than usual or even merely reasonable.”¹¹³ However, a leading commentator, Kenneth Adams, notes that “neither [the *Krinsky* nor *In re Chateaugay Corp.*] court explains its position, and no other courts have followed their lead.”¹¹⁴ Adams’s statement is overbroad; a small group of other courts have considered a best efforts obligation more stringent than a reasonable efforts obligation.¹¹⁵ Another court has alluded to a difference between “best efforts” and “reasonable best efforts,”¹¹⁶ and a third has implied a distinction between “best efforts” and “commercially reasonable efforts.”¹¹⁷ Yet Adams is undoubtedly correct that judges who recognize a sliding scale of efforts standards are in the minority.

Notably, one prominent Delaware judge—the former Chief Justice of the Delaware Supreme Court—has agreed with the hierarchy theory. Chief Justice Strine, dissenting in *Williams*, cited a prominent treatise in support of the proposition that an obligation to use “‘commercially reasonable’ efforts” was “an affirmative covenant and a comparatively strong one,” while still less onerous than a “best efforts” obligation.¹¹⁸

“Best Efforts” Standards Under New York Law: Legal and Practical Issues, 7 M & A LAW. 15, 16 (2004). It is not clear, however, why Shine believes the case’s subject matter should necessarily limit its precedential value as it relates to efforts clauses.

113. No. B148698, 2002 WL 31124659, at *8 (Cal. Ct. App. Sept. 26, 2002).

114. Adams, *supra* note 2, at 685.

115. See, e.g., *Nat’l Hous. P’ship v. Mun. Capital Appreciation Partners I, L.P.*, 935 A.2d 300, 316 (D.C. 2007) (“[A] reasonableness standard connotes greater flexibility than a best efforts standard . . .”); see also *Emerson Radio Corp. v. Orion Sales, Inc.*, 253 F.3d 159, 163 n.1, 166 n.2 (3d Cir. 2001) (implying that there is a distinction between “best efforts” and “reasonable efforts”); *In re Hyman Cos.*, 440 B.R. 390, 409 (Bankr. E.D. Pa. 2010) (“[I]t is particularly important that the parties had amended the language of Section 11, changing the duty of Marriott Copley from using simply reasonable efforts to the higher standard of using best efforts.”).

116. See *All. Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 763 n.60 (Del. Ch. 2009) (explaining that “best efforts . . . is a more rigorous standard than reasonable efforts” (citing LOU R. KLING & EILEEN T. NUGENT, *NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS* §13.06 (2001))).

117. See *Fortis Advisors LLC v. Dialog Semiconductor PLC*, C.A. No. 9522-CB, 2015 WL 401371, at *5 n.22 (Del. Ch. Jan. 30, 2015) (implying a difference between “best efforts” and “commercially reasonable best efforts”). Similarly, one New York case has considered a party’s financial hardship irrelevant in determining whether it complied with a “commercially reasonable efforts” clause. See *Rex Med. L.P. v. Angiotech Pharm. (US), Inc.*, 754 F. Supp. 2d 616, 625 (S.D.N.Y. 2010) (“Angiotech supports its attempt to circumvent its contractual obligations by arguing that performance of the Agreement is a severe hardship on the company. This is an argument Angiotech should save for a bankruptcy court . . .”).

118. *Williams Cos. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 276 & n.45 (Del. 2017) (Strine, J., dissenting) (citing LOU R. KLING & EILEEN T. NUGENT, *NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS* § 13.06 (2001)). Kenneth Adams writes that Chief Justice Strine’s logic is “weaken[ed]” because the treatise the Chief Justice cited explicitly states that “[t]here is no universal agreement . . . as to whether [‘reasonable efforts,’ ‘reasonable best efforts,’ and ‘commercially reasonable efforts’] 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.’” Adams, *supra* note 2, at 687 (quoting 2 KLING & NUGENT, *supra* note 50). In an interview with Kenneth Adams, Lou Kling—one of the treatise’s authors—stated that, although Chief Justice Strine cited the 2001 edition of his treatise, that edition stated the same conclusion as the current version

In summation, the majority of courts support a nonhierarchical approach to efforts standards, and judicial support for the contrary position is scant.

C. WHY IS THERE A DISCONNECT BETWEEN PRACTITIONERS AND THE COURTS?

Why do many practitioners and commentators share a misunderstanding of efforts clause jurisprudence when the prevailing case law is relatively clear? After all, the law should dictate common perceptions and practices among lawyers, not linguistic intuition. This misconception is likely the result of multiple contributing, intertwining factors.

First, “best efforts” simply *sounds* more onerous than “reasonable efforts.” In other words, lawyers believe that the two terms’ plain, everyday meaning should preclude their conflation.¹¹⁹

Second, as previously mentioned, some practitioners and commentators may believe that “best efforts” creates a greater obligation than “reasonable efforts” because they inaccurately assume that judges define “best efforts” as “every conceivable effort.”¹²⁰ The phrase “every conceivable effort” does not seem as though it contains a reasonableness constraint, so practitioners may not understand why courts would equate “best efforts” and other efforts standards—particularly “reasonable efforts.”¹²¹

Third, the vast majority of commercial contracts are executed without dispute,¹²² so it may never become necessary for contract drafters to understand how courts actually interpret efforts clauses.

Fourth, and relatedly, most disputes that do reach some stage of litigation settle,¹²³ perhaps rendering a true understanding of efforts clause jurisprudence unnecessary.

regarding efforts standards. See Adams, *supra* note 2, at 686–87. Chief Justice Strine’s endorsement of an efforts hierarchy is nonetheless a bit muddled. See Adams, *supra* note 2, at 687 (describing that Chief Justice Strine’s hierarchical approach as “difficult to maintain . . . in practice”). Notably, Chief Justice Strine stated in a prior case that a “best efforts” obligation is “implicitly qualified by a reasonableness test.” See *All. Data Sys. Corp.*, 963 A.2d at 763 n.60 (quoting *Coady Corp. v. Toyota Motor Distribs., Inc.*, 361 F.3d 50, 59 (1st Cir. 2004)).

119. See *infra* Section III.A.

120. The American Bar Association’s definition supports this interpretation, thus potentially leading practitioners astray. See 1 ABA MERGERS & ACQUISITIONS COMM., *supra* note 37; *supra* notes 78–81.

121. Of course, this argument may suffer from a direction of causality problem; practitioners may conversely start with the belief that “best efforts” creates a greater obligation than “reasonable efforts” and therefore consider “best efforts” to mean “every conceivable effort,” rather than the other way around.

122. See PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT’L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF LITIGATION IN STATE COURTS, at iii (2013) (“High-value tort and commercial contract disputes are the predominant focus of contemporary debates, but collectively they comprised only a small proportion of the [empirical study’s] caseload.”).

123. See, e.g., Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 111 (2009); Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), <https://www.nytimes.com/2008/08/08/business/08law.html>.

Fifth, although the vast majority of courts maintain that there is no practical difference between efforts variants,¹²⁴ a minority of judges have entertained a hierarchical construction.¹²⁵ Some lawyers may therefore be aware of the current consensus but nonetheless hope to persuade a court that the clause or clauses included in *their* contract—“best efforts,” for example—should be interpreted at a greater level of onerousness than the predominant jurisprudence dictates.¹²⁶

Sixth, because many law firms—and particularly large law firms—separate their practice groups into discrete transactional and litigation departments,¹²⁷ lawyers who draft their clients’ contracts may not necessarily understand the back-end interpretations of the terms they are inserting into them.

Seventh, language that appears on its face to be more onerous than “reasonable efforts” may still serve as a guidepost for parties’ performance obligations despite the prevailing case law. Parties haggle over efforts language not only because they are arguing over legal liability but also because they are negotiating over what each side needs to do, practically, to satisfy their responsibilities. In other words, although contract language exists, in part, to influence courts if litigation arises between parties, it is also included to guide the parties in their own actions. Parties may, therefore, include a “best efforts” clause—or another variant that they consider more onerous than “reasonable efforts”—to underscore the seriousness of their commitments to each other.¹²⁸

Last, misperception begets misperception. If both sides make the same false assumptions, then neither corrects the other. Likewise, a supervising attorney may impart an incorrect understanding of the law to a less senior attorney, and that attorney may repeat the mistaken impression to their colleagues, and so on.

Again, none of these individual explanations are particularly satisfying, and most—if not all—rely on the implicit, admittedly uncomfortable assumption that many lawyers are not as diligent, meticulous, or knowledgeable as they should be. Nonetheless, this misunderstanding persists among many practicing attorneys.¹²⁹

The next Part explains why courts should adopt an understanding closer to that of practitioners and interpret efforts clauses on a sliding scale, reasoning on linguistic, functionalist, and prudential grounds.

III. WHY COURTS SHOULD INTERPRET EFFORTS CLAUSES HIERARCHICALLY

Rather than interpreting efforts standards as nondistinguishable, judges should recognize a hierarchy of efforts standards, but one that is tempered by logic to avoid absurd results. Both form and function justify this shift; acknowledging

124. See *supra* Section II.B.1.

125. See *supra* Section II.B.2.

126. The author thanks Professor Gregory Klass for this potential explanation.

127. See *Legal Practice Groups*, CHAMBERS ASSOCIATE, <http://www.chambers-associate.com/practice-areas> [<https://perma.cc/B99G-W3FQ>] (last visited Dec. 19, 2020).

128. The author again thanks Professor Gregory Klass for this potential explanation.

129. See *supra* Section I.C.

and ratifying variation in efforts terminology would increase (A) linguistic coherence and (B) prudential efficiency, among both lawyers and the judicial system writ large.

A. LINGUISTIC COHERENCE

Different words should mean different things, *especially* when a party's contractual obligations are contingent on the adoption of one particular meaning over another. One does not have to be a strict textualist to come to this conclusion.¹³⁰ Moreover, a reliance on the precision of language is particularly important in the context of contractual interpretation, where words legally bind parties to specific obligations.¹³¹ Indeed, the Second Restatement of Contracts, in its Rules in Aid of Interpretation, states that “[u]nless a different intention is manifested, [] where language has a generally prevailing meaning, it is interpreted in accordance with that meaning.”¹³²

Courts explicitly look to plain meaning when deciphering efforts obligations.¹³³ And when a provision is not explicitly defined within a contract, judges turn to dictionary definitions to help determine plain meaning because “dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract.”¹³⁴

130. Cf. Harvard Law Sch., *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>, at 08:29 (“We’re all textualists now.”).

131. See, e.g., *Network Publ’g Corp. v. Shapiro*, 895 F.2d 97, 99 (2d Cir. 1990) (“[T]he words . . . themselves . . . are always the most important evidence of the parties’ intention.” (quoting *Eddy v. Prudence Bonds Corp.*, 165 F.2d 157, 161 (2d Cir. 1947))).

132. RESTATEMENT (SECOND) OF CONTRACTS § 202(3) (AM. LAW INST. 1981); see also 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, § 32:3 (4th ed. 2012) [hereinafter 11 WILLISTON ON CONTRACTS] (“The plain, common, or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to them.” (footnote omitted)).

133. See, e.g., *Holland Loader Co., LLC v. FLSmidth A/S*, 313 F. Supp. 3d 447, 473 (S.D.N.Y. 2018), *aff’d*, 769 F. App’x 40 (2d Cir. 2019) (“In light of the scant case law defining the phrase ‘commercially reasonable efforts,’ and particularly because of the nature of the conduct at issue in this case, it also bears considering the plain meaning of the phrase, and in particular of the word ‘efforts.’”); *Balmoral Racing Club, Inc. v. Churchill Downs, Inc.*, 953 F. Supp. 2d 885, 903 (N.D. Ill. 2013) (using plain meaning to define “best efforts”); *Pizza Hut, Inc. v. Lundy Enters., LLC*, No. 3:11-CV-0011-N, 2013 WL 12123949, at *6 (N.D. Tex. June 11, 2013) (using plain meaning in conjunction with a “commercially reasonable efforts” provision); *Wenske v. Blue Bell Creameries, Inc.*, C.A. No. 2017-0699-JRS, 2018 WL 3337531, at *10 (Del. Ch. July 6, 2018) (using plain meaning to define “best efforts”); *Maestro W. Chelsea SPE LLC v. Pradera Realty Inc.*, 954 N.Y.S.2d 819, 825 (Sup. Ct. 2012) (same).

134. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006); see also *Nw. Nat’l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996) (using dictionary to ascertain the ordinary meaning of a word used in a contract); *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343 n.3 (Del. 1983) (using dictionary to ascertain commonly accepted meaning of term used in company bylaw); *Cove on Herring Creek Homeowners’ Ass’n v. Riggs*, No. Civ.A. 02024-S, 2005 WL 1252399, at *1 & n.10 (Del. Ch. May 19, 2005) (using dictionary to ascertain common understanding of term used in a covenant agreement). Non-Delaware courts are in accord. See, e.g., *Middendorf Sports v. Top Rank, Inc.*, 954 F.3d 1142, 1150 (8th Cir. 2020); *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370,

Using these settled linguistic principles, the plain meaning of “best efforts,” “reasonable efforts,” and “commercially reasonable efforts” dictates that these phrases should be interpreted hierarchically. To take the simplest example, “best” does not mean “reasonable” in everyday English. In making this distinction, the word “best” can be defined one of three ways: first, as an adjective—a “superlative of ‘good’” employed in a context such as “the *best* student in the class.”¹³⁵ Second, “as best” can be used as an adverb—a “superlative of ‘well’” in the context of efforts formulations—meaning “as well, skillfully, or accurately as,” and used in the following representative context: “Try to do it *as best* you can.”¹³⁶ Third, “best” can be employed as a noun, defined as “one’s maximum effort” and used in a context such as “do your *best*.”¹³⁷

Compare these definitions with those of the word “reasonable.” *Merriam-Webster* defines “reasonable” as “moderate, fair” and “not extreme or excessive.”¹³⁸ The *Cambridge Dictionary* likewise characterizes “reasonable” as “fair and not too expensive” and “sensible and fair.”¹³⁹ Of course, a word can have one meaning in colloquial English and quite another in the legal world.¹⁴⁰ Yet, *Black’s Law* is also in accord with the notion that “best” creates a higher obligation than “reasonable.”¹⁴¹

Similarly, adding the word “commercially” to “reasonable” represents a meaningful variation from the word “reasonable” alone. It is a settled principle of contractual interpretation that,

[t]o the extent possible, and except to the extent that the parties manifest a contrary intent, . . . every word, phrase or term of a contract must be given effect. An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.¹⁴²

381 (4th Cir. 2017); *Metro Sales, Inc. v. Core Consulting Grp., LLC*, 275 F. Supp. 3d 1023, 1036 (D. Minn. 2017); *Summit Health, Inc. v. APS Healthcare Bethesda, Inc.*, 993 F. Supp. 2d 379, 390 (S.D.N.Y. 2014); *In re Lusk*, 589 B.R. 678, 686 (Bankr. E.D. Cal. 2018).

135. *Best*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/best> [<https://perma.cc/8S8X-3RV4>] (last visited Dec. 19, 2020).

136. *Id.*

137. *Id.* Kenneth Adams argues that any hierarchical system of efforts variants necessitates this definition of “best,” which either forces parties to act unreasonably or is lexically superfluous to the root phrase of “best efforts,” “to do one’s endeavours.” See Adams, *supra* note 2, at 697–98. This argument is problematic, however, because it improperly assumes that the modifier “best” necessitates an unreasonable level of performance. Although any efforts jurisprudence that obligates parties to act unreasonably is inherently undesirable, a hierarchical approach does not actually compel that result. See *infra* Section IV.B.

138. *Reasonable*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/reasonable> [<https://perma.cc/3Z5R-ZX7B>] (last visited Dec. 19, 2020).

139. *Reasonable*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/reasonable> [<https://perma.cc/9VYC-ANJ2>] (last visited Dec. 19, 2020).

140. See Adams, *supra* note 2, at 699.

141. See *supra* notes 38–39 and accompanying text.

142. 11 WILLISTON ON CONTRACTS, *supra* note 132, § 32:5. For myriad cases reflecting this principle, see *id.*; and see also RESTATEMENT (SECOND) OF CONTRACTS § 203 cmt. b (AM. LAW INST.

“Commercially reasonable” has been defined as “corresponding to commonly accepted commercial practices.”¹⁴³ Including “commercially” as a modifier to “reasonable” can therefore be “meant to [indicate] an objective measure of conformity based on trade usage, course of dealing, and course of performance.”¹⁴⁴ In other words, “commercially reasonable efforts” signals that parties are required to put forth “at least those efforts that people experienced in the relevant business would generally regard as sufficient to constitute reasonable efforts in the relevant circumstances.”¹⁴⁵ So, a “commercially reasonable efforts” clause mandates *at least* “reasonable efforts,” and a party’s obligation beyond that is dictated by common commercial practices within the industry in question.¹⁴⁶ Linguistically, then, interpreting efforts clauses hierarchically is a sensible and accurate means of contractual interpretation in accord with common parlance.

B. PRUDENTIAL CONSIDERATIONS

The pure linguistic case for interpreting efforts standards hierarchically is strong, but not necessarily sufficient. As Judge Learned Hand wrote, although “the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing[.] . . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary.”¹⁴⁷ Yet distinguishing between efforts standards is not purely semantic; there are at least five prudential reasons why a hierarchical schema is preferable to the current system.

First, and most fundamentally, under the current system, judges refuse to construe contractual writings in accord with parties’ obvious intent. At its most central level, the goal of contractual interpretation is to accurately delineate the intent of the parties;¹⁴⁸ indeed, statements to that effect are common refrains from

1981 (“Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous.”); 11 WILLISTON ON CONTRACTS, *supra* note 132, § 32:11 (“Interpretations which give a contract meaning are preferred to those which render it meaningless.”).

143. *Commercially Reasonable*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/commercially%20reasonable> [<https://perma.cc/H3JJ-RBNY>] (last visited Dec. 19, 2020).

144. Jeffrey M. Dressler, *Good Faith Rejection of Goods in a Falling Market*, 42 CONN. L. REV. 611, 627 (2009).

145. Toedt III, *supra* note 36, at 339.

146. See *infra* notes 222–23 and accompanying text (illustrating how contract drafters can effectively differentiate “commercially reasonable efforts” from “best efforts” and “reasonable efforts,” but noting that, because “commercially reasonable efforts” is highly industry dependent, it may behoove drafters to include objective benchmarks against which a party’s conduct can be measured).

147. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff’d*, 326 U.S. 404 (1945); see also *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”).

148. See Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J.L. & PUB. POL’Y 13, 17–18 (2020) (“Because contractual obligations are chosen obligations, they depend in large part on the parties’ intent. . . . Because contractual obligations are chosen obligations, their identification requires *interpretation* of parties’ acts of choice.”); E-mail from Gregory Klass, *supra* note 24.

judges.¹⁴⁹ And the mere fact that parties negotiate for different efforts standards illustrates that there is an appetite for varying degrees of obligation. In other words, if businesses only wanted to include “reasonable efforts” in their agreements, they would do so. Moreover, it is common to include multiple efforts variations within the same contract,¹⁵⁰ indicating that parties often intend to bind each other at one level of obligation within one provision and another level within a different provision of the same contract. Of course, some of these variations may result from imprecise drafting by lawyers. However, when they are not the result of drafting errors—and there is reason to believe that commercial contract drafters are relatively sophisticated actors¹⁵¹—courts are actively frustrating parties’ intent by collapsing different levels of intended obligation into a single standard.

Second, smart, experienced practitioners and commentators already maintain a widespread belief that there are meaningful distinctions between efforts variants.¹⁵² That many lawyers misperceive the law is not reason enough to adopt a hierarchical approach. But ratifying a hierarchy of these standards based on

149. *See, e.g.*, *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081, 1087 (2020) (“Maritime contracts must be construed like any other contracts: by their terms and consistent with the intent of the parties.” (citation and internal quotation marks omitted)); *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135 (2d Cir. 1986) (“The cardinal principle for the construction and interpretation of insurance contracts—as with all contracts—is that the intentions of the parties should control.”); *E. Associated Coal Corp. v. Aetna Cas. & Sur. Co.*, 632 F.2d 1068, 1075 (3d Cir. 1980) (stating that, when interpreting a contract, “the court’s duty is to ascertain the intent of the parties as manifested in the language of the agreement”); *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990) (“Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation.” (citing CAL. CIV. CODE § 1636)); *Old Kent Bank v. Sobczak*, 620 N.W.2d 663, 666–67 (Mich. Ct. App. 2000) (“The primary goal in interpreting contracts is to determine and enforce the parties’ intent.”); *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003) (“[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties.”); *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002) (“The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent”); *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975) (“The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles.”); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (AM. LAW INST. 1981) (“Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.”).

150. *See, e.g.*, *Spilman v. Mosby–Yearbook, Inc.*, 115 F. Supp. 2d 148, 152 (D. Mass. 2000) (using both “commercially reasonable efforts” and “best efforts” in different provisions); *In re ASPC Corp.*, 601 B.R. 766, 790 (Bankr. S.D. Ohio 2019) (same); *Williams Cos. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 273 (Del. 2017) (using both “commercially reasonable efforts” and “reasonable best efforts” in different provisions); *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *46 (Del. Ch. Oct. 1, 2018) (same), *aff’d*, 198 A.3d 724 (Del. 2018).

151. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545 (2003) (describing a sophisticated actor as “(1) an entity that is organized in the corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm”). It stands to reason that most commercial contracts are drafted on behalf of parties that fall into one of those three categories. For a helpful discussion of party sophistication and the role it plays in contractual interpretation, see generally Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493 (2010).

152. *See supra* Section I.C.

logical linguistic differences would bring courts in line with the view of many in the legal community. This creates a value add for both lawyers and clients by helping to ensure that lawyers give their clients accurate advice that is consistent with both common perception and everyday English.

Third, and relatedly, because of the asymmetry between transactional lawyers and the courts' current approach, utilizing a single overarching reasonableness standard does not truly lower front-end transaction costs. Proponents of the current system may argue that subsuming all efforts standards under one umbrella should dramatically lessen front-end transaction costs because it incentivizes parties to not waste valuable time negotiating over efforts standards at all.¹⁵³ However, this theory is incorrect because it assumes that there are no significant discrepancies between courts' interpretations and how lawyers negotiate efforts clauses in practice. As detailed above, parties still spend material time haggling over efforts variations during contract negotiations.¹⁵⁴

Fourth, a single reasonableness umbrella increases the likelihood of litigation, reduces the possibility of settlement, and heightens the uncertainty of the litigation's outcome.¹⁵⁵ Think of litigation as akin to gambling: "In litigation, as in gambling, agreement over the outcome leads parties to drop out."¹⁵⁶ In other words, parties are more likely to settle if either the plaintiff or defendant has a strong case, and conversely, more likely to litigate where either side has a distinct possibility of winning.¹⁵⁷ Because courts interpret efforts clauses with great inconsistency under the existing framework, both sides are incentivized to gamble on the prospects of litigation. This outcome variability works in two ways. On one hand, many judges may simply accept *any* effort a party puts forth above the absolute bare minimum as satisfying its efforts obligations under the current system.¹⁵⁸ Efforts clauses are "open terms," or "contractual provisions that expressly grant a party substantial . . . discretion in performance."¹⁵⁹ When confronted with interpreting an open term like "best efforts" under a compressed reasonableness umbrella, courts may be loath to invalidate an agreement when they have little or no benchmark to distinguish between efforts obligations.¹⁶⁰ Thus, judges may be

153. See *supra* notes 26–27 and accompanying text for an explanation of how efforts clauses help lower front-end transaction costs.

154. See *supra* notes 41–43 and accompanying text.

155. See Gergen, *supra* note 22, at 1067 (arguing that the definitional imprecision of "best efforts" clauses "probably increases the range and probability of variance in litigation outcomes, . . . [and] increases the likelihood of litigation").

156. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984).

157. See *id.*

158. See Scott & Triantis, *supra* note 26, at 817 n.6 (citing Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 304 (1992)); see also Gergen, *supra* note 22, at 1067 (noting that high variance in litigation outcomes exacerbates the problem of underperformance).

159. Gergen, *supra* note 22, at 998–99.

160. See Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 300 (1992) ("As to the application of the second

incentivized to accept a party's underperformance as its "best efforts."¹⁶¹ That efforts provision then becomes essentially useless as a guarantor of performance and superfluous to—or subsumed by—the minimal good faith obligation implied in all contracts.¹⁶²

On the other hand, if judges do not simply accept a party's bare minimum effort as satisfying its efforts obligations, a single, vague "reasonableness" umbrella gives courts enormous power to insert their own interpretations as to what the contracting parties intended. Within the existing system, this potential for judicial improvisation is particularly high when courts are divided on the obligations parties actually have to undertake to satisfy their efforts obligations.¹⁶³ By contrast, classifying efforts obligations on a sliding scale better balances lowering front-end transaction costs with delineating sufficiently specific back-end guideposts to make these clauses worthwhile in the first place. In creating greater certainty, a hierarchical system would therefore also increase opportunities for settlement.¹⁶⁴

Last, the current system increases the potential for imprecise, impossible-to-follow jury instructions if litigation culminates in a jury trial. Jury instructions are particularly important in efforts clause litigation because whether an explicit efforts obligation has been fulfilled is usually a question of fact,¹⁶⁵ and questions

prediction—the duty of best efforts under a lease—it just bars the lessee from consuming no lease services at all."); Scott & Triantis, *supra* note 26, at 817 n.6.

161. See *United States v. Bd. of Educ.*, 799 F.2d 281, 292 (7th Cir. 1986) (noting that "courts may often have to be flexible in determining the amount of performance that would constitute best efforts during the period in question"); see also *supra* Section II.A.1 (explaining how some courts have equated best efforts and the obligatory duty of good faith implied in all contracts).

162. See *supra* notes 62–64 and accompanying text. Again, this is enormously problematic because, under the current schema, courts may actively be frustrating parties' intent. See *supra* notes 148–50 and accompanying text.

163. See 2 KLING & NUGENT, *supra* note 50, § 13.06 & n.5 (recognizing the lack of uniformity and identifying cases adopting varying interpretations to "best efforts" clauses).

164. The highly fact-dependent nature of efforts clause litigation means that, even under a hierarchical schema, a judge or jury will still wield wide discretion in determining whether a party has met its particular efforts obligation. See *supra* notes 48–50 and accompanying text (noting the fact-dependent nature of "best efforts" litigation). Placing the parties' expectations in sharper relief by concretizing obligations at different levels of onerousness, however, would hopefully create greater certainty regarding the litigation's outcome and therefore disincentivize litigation. See *supra* notes 156–57 and accompanying text (explaining how uncertainty regarding a litigation's outcome drives litigation itself).

165. See, e.g., *Samica Enters., LLC v. Mail Boxes Etc. USA, Inc.*, 637 F. Supp. 2d 712, 717 (C.D. Cal. 2008) ("Whether a defendant used best efforts under the circumstances is a factual question usually reserved for the jury."); *Allview Acres, Inc. v. Howard Inv. Corp.*, 182 A.2d 793, 796 (Md. 1962) ("What will constitute reasonable efforts under a contract expressly or impliedly calling for them is largely a question of fact in each particular case . . ."); *Kroboth v. Brent*, 625 N.Y.S.2d 748, 750 (App. Div. 1995) ("[W]hether [a best efforts] obligation has been fulfilled will almost invariably, as here, involve a question of fact." (citation omitted)); *Egan v. Guthrie*, 380 S.E.2d 135, 138 (N.C. Ct. App. 1989) ("The degree to which plaintiff exerted best efforts or reasonable efforts . . . is a question of fact to be properly decided by the trier of facts."); *DaimlerChrysler Motors Co. v. Manuel*, 362 S.W.3d 160, 174 (Tex. Ct. App. 2012); ("Whether a contractual best efforts obligation has been met or fulfilled is

of fact are typically the province of juries.¹⁶⁶

Consider *Macksey v. Egan*, where a Massachusetts judge instructed the jury in the following manner:

‘Best efforts’ is what is reasonable in the circumstances. What constitutes best efforts may be determined by the parties’ intentions. Best efforts does not require unreasonable, unwarranted or impractical efforts and expenditures of time and money out of all proportion to economic reality. Best efforts is equal to a good faith effort to meet one’s obligations. The defendants are allowed to give reasonable consideration to their own interest. The defendants were required to do what was contemplated and what was reasonable under all of the circumstances, and to perform their activities with a good faith effort to the extent of their capabilities. . . . In construing the term ‘best efforts,’ you may consider the experience, expertise, financial status and other abilities of [the defendants].¹⁶⁷

Instructions like these contain a potpourri of legally significant words that would baffle a trained attorney, let alone a lay juror. Unfortunately, the lack of clarity employed in *Macksey* is not an aberration.¹⁶⁸ As a consequence—and because the definition of a particular efforts clause (or clauses) may be outcome determinative—the current schema’s inherent uncertainty incentivizes litigators to dispute efforts terminology within jury instruction submissions and heavily slant definitions toward their sides.¹⁶⁹ Yet this gamble can also backfire. For

usually a question of fact because it is heavily dependent upon the particular circumstances of the case.”).

166. See, e.g., Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1132–34 (2003) (detailing constitutional, statutory, and case law support for the proposition that questions of fact have traditionally been assigned to juries). Crucially, although juries decide questions of fact, the judge instructs those jurors on the law, so even in a jury trial, judges play a crucial role in determining how efforts clauses are defined. See Jeffrey M. Pollock, *Jury Instructions Are Critically Important*, FOX ROTHCHILD LLP (June 26, 2017), <https://www.foxrothschild.com/publications/jury-instructions-are-critically-important> [<https://perma.cc/G5GV-ED4Q>] (“[C]ritically, at the end, the court charges the jury with an instruction on the law tailored to the facts at hand.”).

167. 633 N.E.2d 408, 413 n.16 (Mass. App. Ct. 1994) (first alteration in original). Indeed, the trial judge in *Macksey* came to this definition through a composite of relevant cases in which “best efforts” was in dispute. See *id.*; see also 2 JUDICIAL COUNCIL OF CAL., CALIFORNIA FORMS OF JURY INSTRUCTION MB300H.115 (2020) (“The person who is required to use best efforts must use the diligence of a reasonable person in comparable circumstances . . .”).

168. See, e.g., Charge to the Jury at 6–7, *CFS Kempton GMBH v. Hansen*, No. 03-10091-REK, 2006 WL 8458111 (D. Mass. July 20, 2006), 2006 WL 1026178 (employing essentially the same instructions as used in *Macksey*); Jury Instructions Read to the Jury and Sent into the Jury Room at 19, *Allmed Health Sys., Inc., v. Healthtronics, Inc.*, No. VG09-488663, 2011 WL 7062721 (Cal. Super. Ct. Nov. 4, 2011) (“The ‘reasonable best efforts’ standard requires a party to make such efforts as are reasonable in light of that party’s ability and the means at its disposal and of the other party’s justifiable expectations.”).

169. See, e.g., Plaintiffs’ Proposed Special Jury Instructions and Verdict Form at 7, *Eastwood Ins. Servs., Inc. v. Titan Auto Ins. of New Mexico, Inc.*, No. SACV08-00788 CJC (ANx), 2010 WL 2913622 (C.D. Cal. May 17, 2010) (“In considering what the parties intended by the phrase ‘commercially reasonable efforts’, you should understand that courts sometimes consider the phrases ‘reasonable efforts’

example, in *First National Bank of Lake Park v. Gay*, a Florida court memorably denied a submission in which one party tried to define “best efforts” at an extreme level of onerousness, writing: “[T]he way that reads, you would almost think they have to take an UZI submachine gun and go down there and say ‘end this lease.’”¹⁷⁰

Litigators thus face a two-pronged dilemma of uncertainty at the jury instruction phase. First, because of the extreme ambiguity within this area of the law, parties will fight tooth and nail to push judges toward the most advantageous definition possible of the efforts clause (or clauses) at issue. As in *First National Bank*, however, a jurist may scoff at these attempts.¹⁷¹ Second, like in *Macksey*, the instruction that eventually emerges may do little more than confuse the jury.¹⁷² Parties will fight under any system to define efforts terminology in their favor. But within a hierarchical approach, certain efforts variants—“best efforts,” “reasonable efforts,” and “commercially reasonable efforts,” for example—could at least be grounded at discrete levels of onerousness. This will reduce confusion by forcing litigating parties and judges alike to be more understandable and logically coherent in their jury instructions (and instruction submissions) than they are under the current schema.

IV. HOW COURTS CAN INTERPRET EFFORTS CLAUSES ON A SLIDING SCALE

It is not enough to contend that a hierarchy of efforts standards is superior to the status quo without coherently arguing that a hierarchy of efforts standards: (A) is workable in practice and (B) does not force parties to act unreasonably.¹⁷³

A. A HIERARCHICAL APPROACH TO EFFORTS STANDARDS IS WORKABLE

A hierarchy of efforts standards is practicable; British and Canadian jurisprudence provide guidance on this front, and the American legal system is already intimately familiar with interpreting hierarchical, sliding-scale tests.

Commentator Kenneth Adams, argues that “more-than-reasonable efforts standards are unworkable,”¹⁷⁴ writing: “The confusion [created by interpreting clauses hierarchically] is aggravated by the many variants of *efforts* terminology and the suggestion that each variant expresses a different meaning.”¹⁷⁵ This objection, based on perceived uncertainty, raises a legitimate concern. After all, it

and ‘best efforts’ to be interchangeable.”); Joint Amended Proposed Jury Instructions, Net-Present.com, Inc. v. Bolt, Inc., No. BC 345345, 2007 WL 2314041 (Cal. Super. Ct. June 27, 2007) (“Zeocast claims the term ‘commercially reasonable efforts’ means: efforts that are fair, done in good faith, and corresponding to commonly accepted commercial practices. Bolt claims ‘commercially reasonable efforts’ means that a party puts forth generally the same level of effort it has put forth when it has undertaken similar types of tasks for others.”).

170. 694 So. 2d 784, 787 (Fla. Dist. Ct. App. 1997).

171. *See id.*

172. *See supra* note 167–68 and accompanying text.

173. *See Adams, supra* note 2, at 693–96 (objecting to a hierarchical approach on the grounds that it is unworkable in practice and forces parties to act unreasonably).

174. Adams, *supra* note 2, at 695 (multiple capitalizations and italics altered).

175. *Id.* at 696.

can be difficult to fairly and rationally differentiate language that seems indistinguishable.¹⁷⁶

Yet both British and Canadian courts—judicial systems that maintain contractual interpretation jurisprudence similar to our own¹⁷⁷—already make distinctions between different efforts clauses. In England, courts have long accepted a hierarchy of efforts standards. A 1911 decision, *Sheffield District Railway Co. v. Great Central Railway Co.*, established an onerous definition of “best endeavours”:

We think “best endeavours” means what the words say; they do not mean second-best endeavours. . . . 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 [contracting party] must, broadly speaking, leave no stone unturned to [perform as promised].¹⁷⁸

Subsequent British case law has softened the “no stone unturned” language but maintained a hierarchy-of-efforts language. For instance, the court in *Jolley v. Carmel Ltd.*, noted that:

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.¹⁷⁹

Finally, in *Rhodia International Holdings Ltd. v. Huntsman International LLC*, Justice Flaux articulated a seemingly narrow, but significant, distinction between “best endeavours” and “reasonable endeavours”:

[T]here 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

176. See *supra* Section I.B (illustrating the variety of efforts standards imposed by contracting parties).

177. See Adams, *supra* note 2, at 706 (“Most U.S. courts follow the objective theory of contract interpretation, as do English courts and courts in the common-law [sic] jurisdictions of Canada.” (footnotes omitted)).

178. (1911) 27 TLR 451, 452 (Rail. & Canal Com.) (Eng.).

179. [2000] All ER (D) 771 (Ch) (Eng.) (footnotes omitted); see also *CPC Grp. Ltd. v. Qatari Diar Real Estate Inv. Co.*, [2010] EWHC (Ch) 1535 [252]–[253] (Eng.) (stating that an obligation to use “all reasonable but commercially prudent endeavours” is “not equivalent to a ‘best endeavours’ obligation” (parentheticals and present participle drawn from Adams, *supra* note 2, at 689 n.60)); *Hiscox Syndicates Ltd. v. Pinnacle Ltd.*, [2008] EWHC (Ch) 145 [56] (Eng.) (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’” (parentheticals and present participle drawn from Adams, *supra* note 2, at 689 n.60)); Adams, *supra* note 2, at 689 n.60 (describing how one English case “judg[ed] 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” (quoting *Astor Mgmt. AG v. Atalaya Mining plc*, [2017] EWHC (Comm) 425 (Eng.))).

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.¹⁸⁰

Under Mr. Justice Flaux’s reasoning, therefore, “best endeavours” and “all reasonable endeavours” (and potentially, “reasonable best endeavours”) would be equivalent but “best endeavours” and “reasonable endeavours” would not.¹⁸¹ In sum, British courts recognize a hierarchy of efforts standards, the extent of which may vary depending on judicial interpretation.

Canadian jurisprudence also recognizes a hierarchy of efforts terminology. In Canada, the leading case on efforts clause interpretation is *Atmospheric Diving Systems, Inc. v. International Hard Suits, Inc.*, a 1994 decision in which the British Columbia Supreme Court devised a seven-part definition of “best efforts.”¹⁸² The court wrote:

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.
3. “Best efforts” includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
4. The meaning of “best efforts” is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract’s overall purpose as reflected in its language.
5. While “best efforts” of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
6. Evidence of “inevitable failure” is relevant to the issue of causation of damage but not to the issue of liability. The onus to show that failure was inevitable regardless of whether the defendant made “best efforts” rests on the defendant.
7. Evidence that the defendant, had it acted diligently, could have satisfied the “best efforts” test, is relevant evidence that the defendant did not use its best efforts.¹⁸³

Subsequent Canadian decisions have ratified this test.¹⁸⁴ Neither the Canadian nor British system has collapsed, and, indeed, two Canadian commentators note:

180. [2007] EWHC (Comm) 292 [33] (Eng.) (emphasis added).

181. *See id.*

182. (1994), 89 B.C.L.R. 2d 356 (Can. B.C. Sup. Ct.).

183. *Id.* at para. 71.

184. *See, e.g., Diamond Robinson Bldg. Ltd. v. Conn*, [2010] B.C.T.C. Uned. 76, para. 82 (Can. B.C. Sup. Ct.) (“In *Atmospheric Diving . . .* Madam Justice Dorgan concisely summarizes the law on the meaning

[T]his 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.¹⁸⁵

In addition, American courts are already proficient at implementing hierarchical, seemingly vague sliding-scale approaches within other areas of the law. For instance, as Kenneth Adams acknowledges, a hierarchical method has been applied to negligence, with the terms negligent, grossly negligent, reckless, wanton, and willful used to specify varying degrees of negligence.¹⁸⁶ Likewise, *mens rea* requirements compel a fact finder to consider whether a criminal defendant acted with a particular mental state when determining that defendant's guilt—a schema that is “usually organized hierarchically by the offender's state of blameworthiness.”¹⁸⁷ If fact finders can decide whether to strip an individual of freedom by assigning conduct to a particular mental state, then it seems eminently workable that the same fact finder could competently select between interpretations of various efforts clauses.

Adams counters that forcing courts to interpret varying degrees of efforts obligations introduces unnecessary uncertainty into the system, noting that “judgments involving different levels of negligence arrayed along that spectrum are necessarily unpredictable,” so employing the same approach with efforts formulations will be equally, or more, volatile.¹⁸⁸ It is fair to wonder whether recognizing myriad efforts variants could devolve into little more than splitting hairs and attempting to find distinctions where none practically exist. This slippery-slope objection should be acknowledged and is worthy of serious consideration. Yet it is only valid if one considers the concomitant trade-offs of compressing efforts language into one reasonableness-based definition more acceptable: the linguistic incoherence;¹⁸⁹ the disconnect between practitioners and the courts;¹⁹⁰ the

of ‘best efforts’ . . .’); *Leacock v. Whalen, Beliveau & Assocs. Inc.*, [1996] B.C.J. No. 2085, para. 99 (Can. B.C. Sup. Ct.) (“*Atmospheric Diving* . . . usefully summarizes the law on ‘best efforts’ . . .”); see also Adams, *supra* note 2, at 690–91 (stating that *Atmospheric Diving* is the “best-known Canadian case on *best efforts*” and that “Canadian courts have followed [the] decision”).

185. Geoff R. Hall & Lama Sabbagh, *Reasonable Efforts vs. Best Efforts – Why the Fuss?*, MCCARTHY TETRAULT (Aug. 5, 2014) (footnotes omitted), https://www.mccarthy.ca/en/insights/blogs/canadian-ma-perspectives/reasonable-efforts-vs-best-efforts-why-fuss#_edn1 [<https://perma.cc/49DV-DQ87>].

186. See Adams, *supra* note 2, at 695–96 (recognizing but critiquing the predictability of the sliding scale in negligence cases).

187. *Mens Rea*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/mens_rea [<https://perma.cc/F7DV-9AF3>] (last visited Dec. 22, 2020). For example, the Model Penal Code categorizes states of mind into the following: negligently, recklessly, knowingly, or purposely. *Id.*

188. Adams, *supra* note 2, at 696.

189. See *supra* Section III.A.

190. See *supra* Section II.C.

negation or dilution of parties' intent;¹⁹¹ the increase in potential litigation and reduction in the possibility of settlement;¹⁹² and impossible-to-follow jury instructions.¹⁹³ Undoubtedly, implementing any new approach will create some unpredictability, but that uncertainty will be outweighed by the increased linguistic coherence noted in Section III.A and the prudential improvements outlined in Section III.B.

Instead, courts should start from the basic premise that "best efforts," "reasonable efforts," and "commercially reasonable efforts" represent distinct obligations. A judge should then apply a presumption that an efforts formulation that has not yet been evaluated by relevant courts differs from any variants that judge already considers defined—"best efforts," "reasonable efforts," or "commercially reasonable efforts," for example. This approach coheres with two central principles of contractual interpretation: (1) the goal of contractual interpretation is to accurately delineate the intent of the parties,¹⁹⁴ and (2) "[a]n interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable."¹⁹⁵ This latter presumption against superfluous language should be particularly strong when multiple efforts standards are used in the same disputed contract,¹⁹⁶ which coheres with the Second Restatement's rule that "[a] writing is interpreted as a whole."¹⁹⁷

Like any legal presumption, this principle should be subject to rebuttal to avoid absurd results, again using common rules of contractual interpretation to resolve ambiguity.¹⁹⁸ For example, a judge could start with the presumption that a "commercially reasonable best efforts" clause obligates a different standard of performance than a "customary commercially reasonable best efforts" clause in the same agreement. But that presumption can be rebutted if the parties show that this difference was merely the product of imprecise drafting or if it would be absurd not to consider them equivalent. Again, the seemingly miniscule differences between efforts clauses may, in some instances, cause judicial confusion. This should not, however, cause us to throw the baby out with the bathwater.¹⁹⁹

191. See *supra* notes 148–51 and accompanying text.

192. See *supra* notes 155–64 and accompanying text.

193. See *supra* notes 167–70 and accompanying text.

194. See *supra* notes 148–49 and accompanying text.

195. 11 WILLISTON ON CONTRACTS, *supra* note 132, § 32:5; see also *supra* note 142 and accompanying text.

196. As previously noted, it is common for a single contract to include multiple efforts variants. See *supra* note 150 and accompanying text.

197. RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (AM. LAW INST. 1981).

198. See, e.g., 11 WILLISTON ON CONTRACTS, *supra* note 132, § 30:7 ("When a written contract is ambiguous, . . . [t]he jury or other trier of fact, . . . must interpret the contract's terms in light of the apparent purpose of the contract as a whole, the rules of contract construction, and relevant extrinsic evidence of the parties' intent and the meaning of the words that they used." (footnotes omitted)).

199. See *supra* notes 189–93 and accompanying text (arguing that balancing the benefits and harms of a hierarchical system weighs in favor of reforming the current judicial approach).

B. A HIERARCHICAL APPROACH TO EFFORTS STANDARDS IS “REASONABLE”

A “best efforts” provision does not require a party to expend unreasonable efforts, nor should it. Kenneth Adams takes the position that “imposing an obligation to act more than reasonably is unreasonable” because “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.”²⁰⁰ Adams’s worry is that, under a hierarchical approach, parties will be forced to take extreme, “unreasonable” actions to satisfy their “best efforts” obligations.²⁰¹

This argument, however, does not hold weight. As the Second Restatement notes: “[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.”²⁰² And a “best efforts” clause can, and should, be interpreted according to the “all reasonable efforts” standard already imposed by many courts.²⁰³ Judges should then take the next logical step and hold that a “reasonable efforts” clause merely requires a party to undertake one, or some, reasonable steps to effectuate performance. At first blush, incorporating the word “reasonable” within a definition of “best efforts” may appear incompatible with the notion that “best efforts” and “reasonable efforts” should be considered distinct.²⁰⁴ Yet, as previously mentioned, British and Canadian case law already do this.²⁰⁵ Inserting a “best efforts” clause thus can be—and, in other countries, has been—tempered by a reasonableness constraint while still imposing a stronger obligation than “reasonable efforts.”

Courts would also not be tempted to venture beyond the grounds of some reasonableness constraint when interpreting “best efforts” clauses because parties can, if they want, specify levels of obligation that venture beyond reasonableness. For instance, many lease agreements contain a “hell-or-high-water” provision, or “a contractual provision that requires [a party] to absolutely and unconditionally fulfill its obligations under the lease in all events.”²⁰⁶ Judges are already familiar with distinguishing these provisions in comparison to efforts clauses; indeed, parties have litigated cases where both an efforts and hell-or-high-water clause have allegedly been breached within the same contract. For example, in *Akorn, Inc. v. Fresenius Kabi AG*, the Delaware Chancery Court found that a defendant did not breach its “reasonable best efforts” clause but nonmaterially breached a hell-or-

200. Adams, *supra* note 2, at 694–95.

201. *See id.*

202. RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (AM. LAW INST. 1981).

203. *See supra* note 74 and accompanying text.

204. *See supra* Section II.A.4 (noting that a linguistic distinction between “best” and “reasonable” can be confusing when the word “reasonable” helps define “best”).

205. *See supra* notes 177–85.

206. *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 76–77 (Iowa 2011).

high-water provision.²⁰⁷ A “best efforts” obligation therefore does not necessitate an unreasonable level of performance.

Parts III and IV have argued for a radical revision of current efforts clause jurisprudence. Part V, however, will provide practical advice for practitioners to benefit their clients under the current system’s constraints.

V. HOW TO NAVIGATE THE CURRENT SYSTEM AND MODEL CONTRACT LANGUAGE

How should a contract drafter behave under the current regime to take advantage of its inefficiencies, and how can that drafter impose differing levels of efforts obligations within its bounds? First, when appropriate, ensure that your client is aware of the current schema and probe the other side’s understanding of the existing judicial consensus. Because many lawyers incorrectly perceive efforts clauses as operating hierarchically,²⁰⁸ a drafter can take advantage of the other side’s misunderstanding. For example, suppose you are representing Smith, and Jones’s lawyers want to include a “best efforts” clause to ensure that Smith promotes Jones’s Widgets. Jones’s lawyers inaccurately believe “best efforts” means “every conceivable effort” and “reasonable efforts” represents a lesser obligation. You can accede to Jones’s request to include “best efforts” in exchange for a significant concession in another area of the negotiation—price, for instance. Of course, as Smith’s attorney, you should ensure that Smith understands why you are seemingly conceding this point, particularly if she—or her prior representation—has consistently fought to remove “best efforts” language from prior contracts.

Second, if possible, define your terms precisely and in the context of your contract or business relationship. If Smith is promoting Jones’s Widgets under a “best efforts” or “reasonable efforts” clause, set objective benchmarks against which Jones can measure performance. In fact, some courts—particularly those in the Appellate Division of New York’s First and Second Departments—have noted that “a clear set of guidelines against which to measure a party’s best efforts is essential to the enforcement of such a clause.”²⁰⁹ Although, by contrast, other

207. C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *47 (Del. Ch. Oct. 1, 2018), *aff’d*, 198 A.3d 724 (Del. 2018); *see also* All. Data Sys. Corp. v. Blackstone Capital Partners V L.P., 963 A.2d 746, 763 n.60 (Del. Ch. 2009) (describing a hell-or-high-water clause as reflecting “a much stronger and broader commitment” than a “reasonable best efforts” clause); Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 756 (Del. Ch. 2008) (“Unlike the reasonable best efforts Hexion is obligated to make under other covenants in the merger agreement, both parties have characterized this obligation as ‘come hell or high water.’”); *cf.* Vestron, Inc. v. Nat’l Geographic Soc’y, 750 F. Supp. 586, 593 (S.D.N.Y. 1990) (“A best efforts requirement must be reconciled with other clauses in the contract to the extent possible, not used as a basis for negating them.”).

208. *See supra* Sections I.C, II.C.

209. *Mocca Lounge, Inc. v. Misak*, 462 N.Y.S.2d 704, 707 (App. Div. 1983); *accord* *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 516 (S.D.N.Y. 2011); *Pinnacle Books, Inc. v. Harlequin Enters. Ltd.*, 519 F. Supp. 118, 121 (S.D.N.Y. 1981); *Timberline Dev. LLC v. Kronman*, 702 N.Y.S.2d 237, 239 (App. Div. 2000); *Strauss Paper Co. v. RSA Exec. Search, Inc.*, 688 N.Y.S.2d 641, 642 (App. Div. 1999); *Bernstein v. Felske*, 533 N.Y.S.2d 538, 540 (App. Div.

courts have held that a “best efforts” clause may be enforceable absent objective criteria,²¹⁰ it would still behoove drafters to at least include guidelines or benchmarks within their agreements. This will help reduce potential uncertainty and unpredictability if litigation ensues.²¹¹ Kenneth Adams keenly suggests that drafters tether their efforts clauses to the following guidelines, among others: (1) “[p]ast performance”; (2) “[p]romises made during contract negotiations”; (3) “[i]ndustry practice”; (4) “[e]fforts used by the promisor in connection with other contracts imposing an efforts standard”; and (5) “[h]ow the promisor would have acted if the promisor and promisee had been united in the same entity.”²¹²

Third, include a choice of law clause with respect to the meaning of their efforts provisions, effectively incorporating either British or Canadian law.²¹³ If an attorney selects this option, the attorney should draft the choice of law clause carefully to ensure that it only applies to the efforts provision or provisions.

Fourth, include a provision mandating alternative dispute resolution for any potential conflict to guard against instability inherent in efforts clause litigation under the current system.²¹⁴ Indeed, “contemporary arbitration . . . has become the principal modality for resolving disputes in commercial trade,”²¹⁵ and arbitration may be particularly useful in an efforts clause dispute, which is highly context and fact dependent.²¹⁶ Notably, an arbitrator may have relevant subject-matter expertise;²¹⁷ “arbitration may enhance the ability of parties to have their disputes resolved using trade rules”;²¹⁸ and “arbitration may enable the parties to better preserve their relationship.”²¹⁹

1988); *see also* *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 559 (5th Cir. 2002) (noting that, under Texas law, “it must initially be determined whether the best efforts contract set ‘some kind of goal or guideline’—i.e., the objective to be accomplished by a party’s best efforts-against which the party’s best efforts may be measured” (citing *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.*, 809 S.W.2d 577, 581 (Tex. App. 1991))); *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1440 (7th Cir. 1992) (“Illinois courts have not categorically rejected best efforts clauses as vague and unenforceable. They do not show that a court is bound to enforce any statement a party to a contract makes if the statement contains the word ‘best.’”).

210. *See, e.g.*, *Baron Fin. Corp. v. Natanzon*, 509 F. Supp. 2d 501, 515 (D. Md. 2007) (“Although ‘best efforts’ was not expressly defined by the parties, Maryland law supports such a standard. Additionally, the provision was accompanied by an articulated goal, i.e. ‘maximiz[ing] the profitability of ERN.’” (alteration in original) (citation omitted)).

211. *See supra* notes 155–63 and accompanying text (explaining how the current efforts regime can result in back-end unpredictability).

212. Adams, *supra* note 2, at 713–14 (footnotes omitted).

213. E-mail from Gregory Klass, *supra* note 24; *see supra* notes 177–85 and accompanying text (describing how British and Canadian courts interpret efforts clauses).

214. *See supra* notes 155–72 and accompanying text.

215. Richard R.W. Brooks & Sarath Sanga, *Commercial Arbitration Agreements Between Sophisticated Parties: An Empirical View 2* (Feb. 24, 2013) (unpublished paper), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.640.8827&rep=rep1&type=pdf> [<https://perma.cc/T4ZM-D378>]. Parties can also opt for mediation if they believe it better serves their goals.

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

217. *See* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 451 (2010).

218. *Id.* at 452.

219. *Id.*

Last, parties can define their efforts language to ensure a hierarchical interpretation. Below is some model contract language that lawyers may find helpful:²²⁰

- **Reasonable Efforts:** “One or more reasonable actions reasonably calculated to achieve [the] stated objective, *but with no expectation that all possibilities are to be exhausted.*”²²¹ This obligation, though nonexhaustive, is greater than the duty of good faith implied in all contracts, but lesser than a “best efforts” obligation, which requires that a party put forth *all* reasonable efforts to achieve the stated objective.
- **Commercially Reasonable Efforts:** “Those efforts that reasonable business people [within the same industry] would expect to be made, but . . . not necessarily all such efforts.”²²² This obligation is greater than the duty of good faith implied in all contracts, and requires a party to put forth both “reasonable efforts” *and* any obligations beyond “reasonable efforts” that are dictated by the relevant industry. This obligation does “not require the performing [p]arty to expend any funds or assume liabilities other than expenditures and liabilities which are customary” in nature within the same industry.²²³
- **Best Efforts:** *All* reasonable efforts reasonably calculated to achieve the stated objective. This obligation considers “the experience, expertise, financial status and other abilities” of the performing party.²²⁴ Although this obligation does not require the performing party to take any steps that are *unreasonable* under the circumstances, it does obligate the performing party to take *all* reasonable steps within its power. This obligation is therefore distinguishable from a “reasonable efforts” obligation, which only requires a party to take “one or more” reasonable actions to achieve its objective.

These definitions should be particularly valuable when parties wish to use multiple efforts variants within the same contract.²²⁵

220. These definitions are my own, but much of the language was compiled from multiple sources. *See infra* notes 221–24. These definitions, though clearer than leaving the term undefined, still leave enormous ambiguity in terms of what specific actions would satisfy a party’s performance obligations. Depending on the circumstances, it may be preferable to tether one’s performance obligations to more specific criteria. *See supra* note 212 and accompanying text.

221. Toedt III, *supra* note 36.

222. *Id.*

223. Glenn D. West, *Yoda Was Wrong, At Least with Respect to Contracts—“I’ll Give It a Try” Evidences an Affirmative Commitment After All*, WEIL: GLOBAL PRIVATE EQUITY WATCH (Apr. 10, 2017), <https://privateequity.weil.com/uk/yoda-wrong-least-respect-contracts>. Because what is relevant within the particular industry may not be self-evident, it may be particularly important for a party who wishes to use a “commercially reasonable efforts” provision to anchor its commitment to objective guidelines. *See supra* notes 209–12 and accompanying text.

224. Plaintiffs’ Proposed Jury Instructions at 4, *Cotter v. Conroy*, C.A. No. 09-00933A, 2013 WL 7121728 (Mass. Super. Ct. Oct. 15, 2013).

225. *See supra* note 150 and accompanying text (illustrating that many contracts do utilize multiple efforts variants within the same contract).

CONCLUSION

Courts should eschew the approach taken by a majority of the American judiciary, which finds no distinction between efforts standards. Instead, they should follow the lead of British and Canadian jurisprudence in recognizing a limited, practical efforts hierarchy, starting with a recognition that “best efforts” imposes a higher standard of performance than “reasonable efforts.” Recognizing this limited hierarchy would drastically improve linguistic coherence by bringing courts in line with the plain meanings of “best,” “reasonable,” and “commercially” as a modifier to “reasonable.”

Moreover, instituting a limited efforts hierarchy would mirror many practitioners’ perceptions of the law and would more accurately capture parties’ intent. Differentiating between efforts standards would also help decrease litigation, increase settlements, curb the power of judges to insert their own interpretations on the back-end of litigation, and provide judges and juries a greater level of certainty and accuracy in interpreting efforts terminology.

Further, accepting a hierarchical, sliding scale of efforts variations is workable. As noted above, British and Canadian courts have implemented effective hierarchical efforts clause systems, and judges are already familiar with applying spectrum-based tests when interpreting language—for example, construing degrees of negligence and criminal mental states. Likewise, a hierarchical approach does not require parties to act “unreasonably” under a “best efforts” clause. Instead, a “best efforts” formulation can require that a party take “*all* reasonable efforts” as opposed to merely “some” or “any” reasonable efforts under a “reasonable efforts” standard.

In the meantime, parties should specifically define their terms to avoid placing the onus on courts to decipher their agreements under the current regime. As Kenneth Adams notes: “[T]he 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.”²²⁶ In this case, the world—or at least the majority of American courts that have weighed in on this area of the law—*should* change. To better reflect common sense, parties’ intentions, and the interests of contract jurisprudence writ large, efforts standards should be interpreted hierarchically.

226. Adams, *supra* note 2, at 721.