

## Putting the “Best” in Best Efforts

Rob Park<sup>†</sup>

Suppose that John, an art dealer, agrees to use his “best efforts” to sell David’s self-portrait. John, finding that his time is better spent promoting the work of competing artists, sells David’s painting for ten dollars to a minor art dealer who does not plan to showcase the painting. Outraged, David sues for breach of contract on the grounds that John did not use his best efforts to find a suitable buyer. David contends that John should have been more aggressive in looking for buyers.

How should a lawyer advise David or John about this case? Intuitively, it seems clear that John did not use his “best efforts” to sell the painting. Not only did John fail to work particularly hard, but he expended his efforts to help a competing painter. Yet in many jurisdictions, John does not violate his duty to David in this situation. In some of these jurisdictions, the best efforts provision does not oblige John to do *anything* to sell the painting.

Today, the law of best efforts obligations is deeply unsettled, badly in need of clarity. Although parties routinely include best efforts clauses in contracts, Allan Farnsworth has found that the phrase “best efforts” has no consistent meaning in the law.<sup>1</sup> In the twenty-two years since Farnsworth noted this inconsistency, the law has remained opaque and unstable. Uncertainty in default rules can be especially pernicious in contract law.<sup>2</sup> When contracting parties do not know to whom they are allocating the risk of a particular occurrence, they cannot assign an appropriate price to the performance of the contract. Moreover, when rights are indeterminate, rent-seeking is inevitable.<sup>3</sup>

Because of the uncertainty surrounding the legal effect of best efforts promises, an approach that imposes consistency could add value to many transactions. This Comment suggests imposing an agency ob-

---

<sup>†</sup> B.A. 2001, Grinnell College; J.D. Candidate 2006, The University of Chicago.

<sup>1</sup> See E. Allan Farnsworth, *On Trying to Keep One’s Promises: The Duty of Best Efforts in Contract Law*, 46 U Pitt L Rev 1, 7–13 (1984) (describing several of the approaches that courts have used to define a best efforts duty and noting the inconsistency among them). See also *First National Bank of Lake Park v Gay*, 694 S2d 784, 790 (Fla App 1997) (Farmer concurring) (“Although deceptively simple and ostensibly clear, the usual contractual term, best efforts, has little common meaning among lawyers, if this case is any guide.”).

<sup>2</sup> See, for example, *Siegelman v Cunard White Star Ltd*, 221 F2d 189, 195 (2d Cir 1955) (“A tendency toward certainty in commercial transactions should be encouraged by the courts.”).

<sup>3</sup> See Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan L Rev 577, 591 (1988) (explaining that clear rules “discourage what is called ‘rent-seeking’ behavior”).

ligation governed by fiduciary duties on those who promise to use their best efforts. Beyond the virtue of consistency, this approach conforms to the economic theory of legal default rules.<sup>4</sup>

Part I examines several approaches to the problem of best efforts clauses that courts and commentators have suggested. Part II describes the contexts in which parties use best efforts clauses, and looks at why they choose to structure their contractual relationships in this way. Part III explains the Comment's solution: imposing an agency obligation on those who promise to use their best efforts.

## I. POSSIBLE APPROACHES TO BEST EFFORTS

### A. Judicial Approaches

Courts have taken a wide variety of approaches to defining "best efforts." Indeed, the approaches have ranged from letting the jury decide the meaning of the term<sup>5</sup> to giving no effect at all to the provision.<sup>6</sup> One court has required a duty that is greater than good faith but less than that required of an agent.<sup>7</sup> Each of these approaches imposes uncertainty on contracting parties, fails to deter opportunism, or fails to induce the parties to describe the meaning of "best efforts." Because each approach imposes problems, it is puzzling that parties continue to include best efforts provisions in contracts.

#### 1. Letting the jury decide.

In *First National Bank of Lake Park v Gay*,<sup>8</sup> a Florida appellate court concluded that the best way to resolve the meaning of "best efforts" was to allow a jury to decide the meaning of the term.<sup>9</sup> The court refused to instruct the jury on the meaning of the phrase "best efforts" and left its interpretation to the jury's unbridled discretion.<sup>10</sup> This approach enables judges to avoid the difficult work of resolving the meaning of the vague term "best efforts." At least superficially, interpreting "best efforts" seems like the kind of thing that a jury would

---

<sup>4</sup> See the discussion of this theory in Part III.B.

<sup>5</sup> See *First National Bank of Lake Park v Gay*, 694 S2d 784, 788 (Fla App 1997) (holding that the jury should determine the effect of a best efforts provision in a lease).

<sup>6</sup> See *Kraftco Corp v Kolbus*, 1 Ill App 3d 635, 274 NE2d 153, 156 (1971) (holding that, under Illinois law, a best efforts promise failed to create a contract because of a lack of mutuality of obligation).

<sup>7</sup> See *Bloor v Falstaff Brewing Corp*, 601 F2d 609, 614 (2d Cir 1979) (holding that a best efforts provision required the promisor to work to his own detriment to fulfill the promise).

<sup>8</sup> 694 S2d 784 (Fla App 1997).

<sup>9</sup> *Id.* at 788 ("The definition of 'best efforts' may vary depending on the factual circumstances surrounding the transaction and the intent of the parties entering into the transaction.").

<sup>10</sup> *Id.*

do well. Indeed, who better than twelve ordinary people to interpret the meaning of everyday words like “best efforts”?

Unfortunately, allowing a jury to determine the meaning of a contractual term provides no guidance to contracting parties as to how to structure future transactions. Because jury decisions have no value as precedent, they cannot inform contracting parties of the meaning of a best efforts clause. Thus, if courts refuse to provide instructions, the law cannot provide a clear definition of the scope of a best efforts obligation. Furthermore, different juries might offer different interpretations, providing contracting parties with little guidance as to the likely outcome of litigation involving best efforts provisions.<sup>11</sup> Under this rule, sophisticated parties will assiduously avoid best efforts provisions. No respectable lawyer would leave the meaning of his client’s promise to the whim of a jury. Instead, the cost of this rule will fall on unsophisticated parties who might include a best efforts provision without knowing that protracted and expensive litigation may be necessary to resolve a dispute over whether this duty has been satisfied. Thus, this outcome cannot be what the parties intended; it subjects them to stiff penalties should they fail to specify what “best efforts” means. Letting the jury resolve this question, therefore, while attractive because it enables judges to avoid the problem, provides an unsatisfying resolution to this dilemma.

2. Best efforts as lacking mutuality of obligation and emphasizing the underlying duty of good faith.

Every contract imposes a duty of good faith and fair dealing in its performance and enforcement.<sup>12</sup> This rule is intended to prevent opportunism and enable a party to bargain without being unduly suspicious of his contracting partner. Detecting opportunism, however, can be difficult, so this implied term does not offer complete protection from malfeasance. Nevertheless, some courts suggest that best efforts provisions create no obligation beyond that specified elsewhere in the contract.<sup>13</sup> That is, unless there is mutuality of obligation elsewhere in the agreement, these promises fail to create a legal obligation.<sup>14</sup> Under

---

<sup>11</sup> I assume that trial judges will not overturn jury verdicts, as seems likely if they do not instruct the jury as to the meaning of the term.

<sup>12</sup> See Restatement (Second) of Contracts § 205 (1981).

<sup>13</sup> In Illinois, this is the general rule. See James M. Van Vliet, Jr., “*Best Efforts*” Promises under Illinois Law, 88 Ill Bar J 698, 698–99 (2000) (“A promise to use ‘best efforts,’ without more, is too vague to create a binding contractual obligation.”).

<sup>14</sup> See *Kraftco*, 274 NE2d at 156 (“In this case, there was no obligation upon [the contracting party] other than to use his best efforts. . . . As such, the contract was lacking in mutuality of obligation and was unenforceable.”).

this rule, a best efforts clause has no legal effect. At most, it can remind parties of the underlying requirement of good faith, so long as other provisions of the agreement satisfy the requirement of mutuality of obligation.

When courts refuse to give legal effect to best efforts promises, one cannot help but wonder why parties would include such provisions at all. In general, parties are unlikely to incur the costs of bargaining for a provision that has no legal effect. One possible explanation for the existence of these clauses is that parties may be unaware of the state of the law on this point. In that case, refusing to give effect to these promises thwarts the parties' intentions because it is unlikely that they included the clause without intending to create a binding obligation.<sup>15</sup>

Another explanation is that one party is aware of the rule and is trying to take advantage of the other party's ignorance. In this case, the sophisticated party opportunistically uses his knowledge of the legal impotence of best efforts obligations to defraud a less sophisticated contracting partner. Ironically, this case presents exactly the sort of opportunistic behavior that the duty of good faith is intended to deter. Because courts cannot easily separate opportunism from good faith, however, giving no effect to a bargained-for best efforts promise enables opportunists to take advantage of less sophisticated parties.

One might conclude that treating best efforts promises under the existing doctrine of good faith would, at least, clarify the law. Unfortunately, that conclusion would be wrong; as Steven Burton has noted, the legal standard for good faith performance is notoriously unclear.<sup>16</sup> "[N]either courts nor commentators have articulated an operational standard that distinguishes good faith performance from bad faith performance."<sup>17</sup> This means that, under the good faith standard, the parties face an intolerable level of uncertainty regarding the level of duty that the contract imposes. This standard gives no effect to bargained-for promises to use best efforts, almost certainly thwarting the parties' intentions and opening the door to opportunism.

---

<sup>15</sup> There is an analogy here to the "Rule of Validation" from conflict of laws doctrine. Because parties intend to create obligations with their promises, a court should choose the law that upholds the obligation. See Restatement (Second) of Conflict of Laws § 203 (1971) (noting that, when state usury laws contain only slight variations, "the courts deem it more important to sustain the validity of a contract, and thus to protect the expectations of the parties, than to apply the usury law of any particular state").

<sup>16</sup> Steven Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv L Rev 369, 369 (1980).

<sup>17</sup> *Id.*

### 3. Greater than good faith, but less than a fiduciary duty.

The Second Circuit, applying New York law, offered another interpretation of a best efforts provision in *Bloor v Falstaff Brewing Corp.*<sup>18</sup> In that case, the court imposed a duty that was greater than good faith but less than a fiduciary duty. In the contract, Falstaff agreed to use its best efforts to promote the plaintiff’s beer. When Falstaff promoted its own products at the expense of the plaintiff’s, Bloor sued on the ground that this performance did not meet Falstaff’s duty to use its best efforts.

The court held that Falstaff had violated its best efforts duty, but the opinion provided no workable standard for future cases. Judge Friendly, writing for the court, wrote that the contract did not require Falstaff to bankrupt itself in promoting the plaintiff’s products or even to sell them at a substantial loss.<sup>19</sup> Nevertheless, Falstaff could not “emphasiz[e] profit *über alles* without fair consideration of the effect on Ballantine[’s] volume.”<sup>20</sup> The court found that, in fact, Falstaff “was content to allow [Ballantine’s sales] to plummet so long as that course was best for Falstaff’s overall profit picture.”<sup>21</sup>

Although the court did not mention agency explicitly, this standard is similar to, though less certain than, the one that this Comment suggests.<sup>22</sup> The problem with Judge Friendly’s approach is that it does not outline a clear rule around which parties can bargain. Instead, it offers a vague standard that requires a fact-intensive inquiry in each case. Rather than simply ask whether the defendant violated its duty as an agent to the plaintiff, the court, without clear elaboration, sets the duty as greater than good faith. Thus, even though the *Bloor* standard gives effect to the best efforts promise, it does not give the parties a clear default rule around which they can negotiate. This uncertainty imposes litigation costs on parties who cannot know their rights until a court rules on the issue. Uncertainty remains, even if the court’s inter-

---

<sup>18</sup> 601 F2d 609 (2d Cir 1979) (holding that the defendant’s emphasis on overall profitability resulting in decreased sales of the plaintiff’s beer violated a best efforts distribution agreement).

<sup>19</sup> Id at 613–14 (“Once the peril of insolvency had been averted, the drastic reduction in Ballantine sales . . . required Falstaff at least to explore whether steps not involving substantial losses could have been taken to stop or at least lessen the rate of decline.”).

<sup>20</sup> Id at 614.

<sup>21</sup> Id at 614–15 (describing Falstaff’s conduct by stating that such a showing shifted the burden to Falstaff “to prove there was nothing significant it could have done to promote Ballantine sales that would not have been financially disastrous”).

<sup>22</sup> A case that came to a result similar to that in *Bloor* was *National Data Payment Systems, Inc v Meridian Bank*, 212 F3d 849, 854 (3d Cir 2000) (noting that best efforts provisions impose a “high standard” on promisors).

pretation does approximate what the parties would have intended at the time of contracting.<sup>23</sup>

## B. Commentators' Approaches to Best Efforts

Several commentators have addressed the problem of interpreting best efforts clauses. While many have merely noted the inconsistency in this area of the law,<sup>24</sup> others have suggested novel solutions to this problem. Though this commentary offers valuable approaches to the law of best efforts, it does not provide a workable standard that satisfies the reasonable expectations of parties and provides a clear rule around which parties can negotiate and structure future transactions.

### 1. Diligence insurance.

One approach has been to apply a standard of diligence insurance to best efforts provisions.<sup>25</sup> This means that the promisor need only maximize his own profits under the contract. For example, parties to distribution agreements often use best efforts provisions.<sup>26</sup> If the distributor were subject to a diligence insurance standard, he would only need to maximize his own profit from sales of the promisee's goods. So long as the distributor does not violate the duty of good faith and fair dealing that all contracts contain, he can do whatever he likes without violating his duty of best efforts. Thus, this argument follows the "good faith" approach<sup>27</sup> in suggesting that a promise to use one's best efforts has no legal effect.

This approach rejects the "well-defined" standard of an agency relationship governed by fiduciary duties as too exacting on the pro-

---

<sup>23</sup> Victor Goldberg argues that the *Bloor* court's approach does not comport with what the parties would have wanted at the time of contracting. Victor P. Goldberg, *In Search of Best Efforts: Reinterpreting Bloor v. Falstaff*, 44 SLU L J 1465, 1475-76 (2000). After a thorough review of the record in *Bloor*, Goldberg concludes that the parties intended the provision to underline the duty of good faith. Id at 1479-80 ("The more likely function [of the best efforts clause] was to police diversion."). That is, they intended for Falstaff to be free to maximize its own profits from the contract. Id at 1478 ("The parties want an arrangement which maximizes the value to the buyer *ex ante*.").

<sup>24</sup> See generally J.C. Bruno, "Best Efforts" Defined, 71 Mich Bar J 74 (1992) (describing the various tests that courts have used to define the term best efforts).

<sup>25</sup> See generally, for example, Lawrence S. Long, Note, *Best Efforts as Diligence Insurance: In Defense of "Profit Uber Alles"*, 86 Colum L Rev 1728 (1986) (arguing that allowing the promisor to maximize his own profits benefits both parties by minimizing uncertainty).

<sup>26</sup> See, for example, *Bloor*, 601 F2d at 610 (providing an example of a best efforts clause in a contract for beer distribution). See also Richard A. Posner, *Antitrust Law* 206-07 (Chicago 2d ed 2001) (explaining how distributors use "best efforts" clauses).

<sup>27</sup> See *Kraftco*, 274 NE2d at 156 (holding that best efforts clauses do not create binding contractual obligations).

misor,<sup>28</sup> but one is left to wonder whether “diligence insurance” is demanding enough. As mentioned above, the law of good faith and fair dealing is anything but clear. More troublingly, this commentary evades the question of why the parties would include a best efforts provision if they did not intend for it to have any legal effect.

Victor Goldberg takes up this theme in arguing that the parties in *Bloor* intended for that best efforts provision merely to emphasize the duty of good faith.<sup>29</sup> Goldberg maintains that the Second Circuit erred in holding Falstaff to a higher standard. In treating the contract as a distribution agreement, the court missed the fundamental point of the transaction: “The essential feature of the contract is that Ballantine was exiting the beer business and was making a one-shot sale of some of its assets to Falstaff.”<sup>30</sup> Rather than ask whether Falstaff had lived up to its duty of best efforts, the court should have merely inquired whether Falstaff acted opportunistically in violation of the duty of good faith and fair dealing.<sup>31</sup> Goldberg asserts that the case’s facts make clear that Falstaff did not act opportunistically.

Why, then, did the parties include this provision? Noting that the agreement included the term “best efforts” seven times, Goldberg contends that the parties did not attach any single meaning to these words.<sup>32</sup> Because this clause was mere boilerplate that was not intended to create a substantive obligation, the court should not give it any legal effect. Goldberg’s argument does not, however, address the root of the problem in *Bloor*: the parties’ frequent—and possibly haphazard—use of the phrase “best efforts” in their contract. The diligence insurance proposal does nothing to prevent parties from using these words haphazardly.<sup>33</sup> If best efforts clauses create an agency relationship governed by fiduciary duties, parties will be deterred from haphazardly using this phrase. Equally important, this approach gives effect to bargained-for best efforts promises.

Moreover, it is not clear that the parties in *Bloor* did not intend to create some kind of legal obligation with the disputed best efforts

---

<sup>28</sup> Long, Note, 86 Colum L Rev at 1732 (cited in note 25) (suggesting that a fiduciary duty would not have allowed Falstaff to distribute brands other than Ballantine).

<sup>29</sup> Goldberg, 44 SLU L J at 1466 (cited in note 23) (suggesting that the contract was not a distribution agreement after all).

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id at 1471 (arguing that “[t]he casual usage of the phrase in these varied contexts does suggest a certain lack of care about its content”).

<sup>33</sup> By contrast, the theory of penalty defaults *would* prevent parties from using words haphazardly. See Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87, 97 (1989) (arguing that default rules that penalize haphazard use of phrases like “best efforts” maximize welfare by inducing parties to specify the terms of a contract with particularity).

clause. The contract required Falstaff to pay a royalty of fifty cents per barrel of Ballantine beer sold.<sup>34</sup> Another provision required Falstaff to use “its best efforts to promote and maintain a high volume of sales under the Proprietary Rights.”<sup>35</sup> The text of this provision seems to require more than mere good faith in trying to maintain a high volume of sales. By including the provision in the contract, the parties show either that they intend for it to have meaning or that they are not exercising sufficient care in preparing the contract. Refusing to give this provision legal effect introduces uncertainty in the law because, assuming that mutuality exists elsewhere, courts must ascertain whether the promisor has breached its duty of good faith, a notoriously slippery concept. Finally, the diligence insurance approach may lead to opportunism in the use of best efforts provisions when only one party knows that the bargained-for clause has no legal meaning.

## 2. Joint maximization.

Other commentators have suggested that a better approach to best efforts provisions is to interpret the clause in a way that maximizes the joint welfare of the parties to the agreement.<sup>36</sup> It is easy to suggest that courts should maximize the parties’ joint wealth; after all, this would maximize the social value of the contract. Determining how parties can maximize this value, however, is rarely within a court’s capabilities. And forcing courts to provide valuable default terms shifts the cost of contracting to taxpayers, even though the parties are better positioned to specify value-maximizing terms. For these reasons, the joint maximization approach is merely a starting point; it does not demonstrate how courts can add value to disputed contractual provisions.

Assuming that courts actually could maximize joint welfare, it may not be desirable to saddle them with this responsibility. The theory of penalty defaults suggests that courts should not bail parties out when they fail to specify the terms of their agreement.<sup>37</sup> Doing so will induce parties to invest fewer resources into drafting agreements be-

---

<sup>34</sup> Goldberg, 44 SLU L J at 1470 (cited in note 23) (citing the contract requiring Falstaff to pay “a sum in cash computed at the rate of \$.50 per barrel for each barrel of 31 U.S. gallons sold by the Buyer during the preceding calendar month”).

<sup>35</sup> *Id.* at 1471 (citing the contract).

<sup>36</sup> See Charles J. Goetz and Robert E. Scott, *Principles of Relational Contracts*, 67 Va L Rev 1089, 1114–17 (1981) (arguing that a definition of best efforts clauses that requires “joint maximization” or “optimal output” is “the single most plausible interpretation of the underlying economic motivation involved”).

<sup>37</sup> See Ayres and Gertner, 99 Yale L J at 97 (cited in note 33) (“Penalty defaults, by definition, give at least one party to the contract an incentive to contract around the default. From an efficiency perspective, penalty default rules can be justified as a way to encourage the production of information.”).



cause they know that if the matter is litigated, a court will reach a solution that maximizes the value of the transaction. A rule that succeeded in providing parties with the perfect default term in all circumstances would have prohibitive enforcement costs. Because courts' default terms would be better than the parties' negotiated terms, litigation would become part of the bargaining process. This approach also would shift the burden of creating value-enhancing transactions to taxpayers who ultimately would have to shoulder much of the cost of litigation. Thus, even if courts could easily implement the joint maximization policy, allowing them to do so would not resolve the problem of interpreting best efforts clauses.

Maximizing the value of contractual provisions is not within the institutional capacity of courts. If maximizing joint welfare were as simple as Charles Goetz and Robert Scott suggest, the parties would have done so with specific provisions in their initial agreement.<sup>38</sup> And even if they failed to do so at that stage, they could do so in settlement talks on the eve of trial. Thus, the joint maximization rule merely states the obvious: because the social gain from contracting is at its highest when the parties' joint welfare is maximized, contracts should maximize parties' joint welfare. Of course they should; the trick is providing a legal framework that enables parties to craft socially desirable bargains. If finding the terms that would do so were easy, we can be sure that the parties would have discovered them on their own without resorting to litigation. Each party's incentive is to maximize the joint gain from contracting—by definition, that is when the social gain from contracting is greatest. After finding terms that maximize joint welfare, the parties can negotiate over how to distribute the gains from contracting. Trusting judges to do this—after the parties have failed—is naïve.

Asserting that courts should maximize the joint wealth of parties to a contract is a starting point, not an end. When a mutually beneficial solution is obvious, of course a court should not impose great hardship upon one of the parties. But courts must look beyond the case at hand and provide standards for parties to use in future negotiations. Under the approach that Goetz and Scott suggest, the contract itself is unnecessary. The court can rewrite the bargain in a manner that it believes maximizes the joint wealth of the parties. Courts do not want to create a cause of action for any party to a contract who believes that performance of the agreement as written did not maximize

---

<sup>38</sup> See generally R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960) (showing that when transaction costs are low parties will achieve value-maximizing outcomes through bargaining).

the parties' joint welfare. Allowing such an action would produce needless (and endless) litigation. Furthermore, this approach does not provide a clear rule around which parties can bargain. In fact, the probable outcome of such a rule would be studious avoidance of best efforts clauses, at least by parties aware of the rule.<sup>39</sup>

Each of the solutions discussed above has major problems. If courts follow the *Bloor* approach or merely let the jury decide what "best efforts" means, the problem is uncertainty for contracting parties. For "diligence insurance" and "good faith," the rule does not give effect to a bargained-for promise. Finally, the joint maximization rule gives judges a role for which they are ill-suited: maximizing the return from a contractual relationship. Because none of these approaches deals with best efforts provisions effectively, another solution is necessary.

This Comment suggests that the best way to resolve these disputes and provide certainty for contracting parties is to attach an agency obligation to best efforts clauses. By importing the law of agency into this setting, courts can achieve the clarity that contracting parties crave from default rules. Furthermore, courts can achieve this outcome without imposing huge costs on contracting parties. Indeed, in many cases, this rule will track the parties' intentions.

## II. HOW AND WHY PARTIES USE BEST EFFORTS CLAUSES

### A. In General

The foregoing analysis shows that, under current law, best efforts clauses present a danger to contracting parties. Under the "good faith" approach, these provisions are not given effect and, thus, can add value to contracts only by emphasizing the duty of good faith and fair dealing. Conversely, the standards of *Bloor* (imposing a duty greater than good faith, but less than a fiduciary duty) and *Gay* (letting the jury decide) leave parties with great uncertainty regarding the meaning of these provisions. Under these circumstances, why do parties include these provisions in contracts?

The simplest explanation for the enduring use of best efforts provisions is that unsophisticated parties are ignorant of the law of best efforts. To the untrained eye, a best efforts provision is a simple way to require the promisor to work as hard as possible on the promisee's behalf. By hypothesis, an unsophisticated party would be unaware of the precise legal import of the phrase. Thus, parties might include the

---

<sup>39</sup> An outcome that may not be entirely bad. This approach might force parties to explain exactly what they mean by best efforts.

agreement because the language expresses a desire to require the promisor to work especially hard on the promisee's behalf.

Another possible explanation for the use of best efforts provisions is that one party knows the rule while the other does not. In that case, the knowledgeable party could use this knowledge opportunistically to the other party's detriment. In states that follow the diligence insurance approach, which requires only that the promisor maximize his own profits, the law imposes an obligation that is the opposite of the plain meaning of the contract's text. Because of the disconnect between the contract's language and the legal obligation that it creates, this rule could expose contracting parties to opportunism.

Though it seems unlikely that parties would use best efforts provisions as mere diligence insurance, it is possible that, on occasion, both parties agree to this clause in order to underscore the already existing duty of good faith. Of course, an easier way to underscore this duty would be to include a provision explaining that the parties recognize the duty of good faith and fair dealing and agree to abide by it. Because rational parties would not include provisions that have no legal effect, the proportion of best efforts clauses that are intended to have no effect is probably low.

Finally, it is possible (but unlikely) that parties intend to leave an open term that a judge or jury can resolve equitably if litigation is necessary. In this case, the parties would prefer a rule like those in *Bloor* or *Gay* to this Comment's proposed approach, which would attach an agency obligation to best efforts promises. If courts adopted this proposed approach, parties who found the costs of contracting greater than the value of certainty would be deprived of a value-adding clause. Because contractual defaults tend to be bright-line rules, creating an indeterminate obligation would become difficult. Perhaps the best response to this concern is that these people should use arbitration to resolve their disputes. Rather than shift the costs of litigating their disputes to taxpayers via the courts, they should internalize these costs by paying for arbitration.

Typically, contracting parties crave certainty, because legal certainty allows them to attach an appropriate value to the contract. This Comment's approach brings clarity to this area of the law, but at a cost. Contracting parties who genuinely prefer a vague standard that a Solomonic judge or jury can implement will be deprived of public subsidy for a potentially valuable clause. Agreements intended to emphasize the contractual duty of good faith and fair dealing will need to be drafted carefully if they are to avoid creating an agency relationship.

## B. Some Common Contexts

Contracting parties use best efforts provisions in a wide variety of commercial settings. Because best efforts clauses come up most frequently in certain types of agreements, this discussion will pay particular attention to how parties use best efforts provisions in these settings. Before one decides whether this Comment offers a valid approach, one must understand how it will work in these contexts. Best efforts provisions are most common in distribution agreements and leases,<sup>40</sup> but can be found in management contracts as well. In each case, the purpose of the provision is to solve a problem of unequal information, precisely the problem that agency and fiduciary duties solve.

Distribution agreements often contain provisions that require the distributor to use its best efforts to sell as much of the manufacturer's product as possible.<sup>41</sup> These agreements "require[] the distributor to promote the manufacturer's product vigorously."<sup>42</sup> In this context, it is tempting to conclude that best efforts provisions should be interpreted according to the prevailing custom of the beverage industry (or distribution in general). The Uniform Commercial Code (UCC) requires courts to consider "usage of trade" when interpreting contracts for the sale of goods.<sup>43</sup> Given the frequency with which parties include best efforts provisions in distribution agreements, one would expect for most participants in this business to have a good idea of what they mean by "best efforts." Unfortunately, usage of trade is neither as uniform nor as clear as the UCC assumes.<sup>44</sup> Even within an industry, merchants rarely agree about the meaning of terms commonly found in contracts.<sup>45</sup> Thus, reading best efforts clauses as imposing a fiduciary duty could force manufacturers and distributors to explain what they mean by "best efforts," if not an agency relationship.

---

<sup>40</sup> See Goetz and Scott, 67 Va L Rev at 1111 & n 43 (cited in note 36) (listing other common examples of best efforts agreements, including employment agreements, corporate contracts, joint ventures and partnerships, insurance agreements, publishing contracts, and trusts).

<sup>41</sup> See Posner, *Antitrust Law* at 206 (cited in note 26). See also *FTC v Coca-Cola Co*, 641 F Supp 1128, 1133 (D DC 1986) ("In return for these perpetual franchises, bottlers are obliged to use their best efforts to promote the company's product line, and are typically barred from dealing in same-flavored products of other concentrate companies."), vacd and remd, 829 F2d 191 (DC Cir 1987).

<sup>42</sup> Posner, *Antitrust Law* at 206 (cited in note 26).

<sup>43</sup> See UCC § 1-201(3) (ALI 2005) ("'Agreement', as distinguished from 'contract', means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing or usage of trade.").

<sup>44</sup> See Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U Chi L Rev 710, 715-16 (1999) (arguing that usages of trade are so poorly understood within an industry that the concept is not useful in interpreting contracts).

<sup>45</sup> *Id.* at 722-23, 725-27 (finding this to be the case in both the hay industry and the grain and feed industry).

Patent licensing agreements often contain best efforts clauses. A licensee will agree to use his best efforts to “further the manufacture and sale of the articles covered by the patents.”<sup>46</sup> Similarly, parties include best efforts provisions in entertainment licensing agreements where the licensee agrees to exploit the licensor’s intellectual property.<sup>47</sup> In essence, these agreements are distribution agreements for intellectual property, so the analysis of best efforts clauses in distribution agreements fits this context as well.

Parties to a lease of real property occasionally include best efforts provisions in their leases.<sup>48</sup> For example, the tenants might agree to use their best efforts to open a commercial establishment by a specified date, or a landlord might agree to use his best efforts to complete construction by a certain date.<sup>49</sup> One commentator suggests that landlords and tenants are unaware of the legal meaning of these clauses when they enter into these agreements.<sup>50</sup> Given the uncertain state of the law regarding these provisions, landlords and tenants subject themselves to a substantial risk of opportunism and litigation when they include a best efforts provision in a lease.

Finally, parties occasionally include best efforts clauses in contracts to register securities.<sup>51</sup> In these cases, the promisor agrees to use his best efforts to register the securities with the SEC by preparing and filing a registration statement. Although the parties could phrase this duty in a variety of different ways, it is clear that they intend to create a binding obligation to perform the formalities required to register securities. Here, it seems likely that parties intend to create an agency

---

<sup>46</sup> Patents, 69 Corpus Juris Secundum § 355 at 460 (West 2001) (describing best efforts agreements in the context of patents).

<sup>47</sup> See Daniel J. Coplan, *When Is “Best Efforts” Really “Best Efforts”: An Analysis of the Obligation to Exploit in Entertainment Licensing Agreements and an Overview of How the Term “Best Efforts” Has Been Construed in Litigation*, 31 Sw U L Rev 725, 725 (2002).

<sup>48</sup> See, for example, *Gay*, 694 S2d at 786 (finding that the parties to a lease agreed to use their best efforts to induce a current tenant to terminate his lease early). See also Morton P. Fisher, Jr., *Use of “Best Efforts” Clauses in Leases—An Emerging Test*, in *Commercial Real Estate Leasing* 593, 595, 598 (ALI-ABA 1989) (noting that best efforts clauses in lease agreements may also include obligations to secure rezoning, arrange utilities, or grant clear title). In return for these perpetual franchises, bottlers are obliged to use their best efforts to promote the company’s product line, and are typically barred from dealing in same-flavored products of other concentrate companies.

<sup>49</sup> Fisher, *Use of “Best Efforts” Clauses in Leases* at 595 (cited in note 48) (describing common uses of best efforts provisions in leases).

<sup>50</sup> *Id.* (“Often in such circumstances the landlord or tenant, as the case may be, is not fully cognizant of the substantial burden that results from a ‘best efforts’ obligation.”).

<sup>51</sup> See *United Telecom, Inc v American Television and Communications Corp.*, 536 F2d 1310, 1316–18 (10th Cir 1976) (finding that an expert’s opinion about the meaning of best efforts was irrelevant because the expert’s opinion was no different from the common understanding of those words).

relationship, which requires the promisor to follow the promisee's instruction. Even if they do not intend to create an agency relationship, though, parties involved in a registration of securities are almost certainly sophisticated enough to bargain around a default rule.

The common thread linking each of these situations is a problem of unequal information. Because the promisee cannot monitor the promisor's performance, he must rely on the law to create the proper incentives for the promisor. Likewise, fiduciary duties exist so that parties can deal with these problems of unequal information.<sup>52</sup> For that reason, imposing a fiduciary obligation on all best efforts promises fits well in these contexts. I return to this point in Part III.C after discussing the theory behind the Comment's solution.

### III. FIDUCIARY DUTIES AND THE COMMENT'S SOLUTION

This Part lays out the law of fiduciary duties and explains the logic behind the Comment's approach. First, this Part gives a general description of the law of agency with a focus on fiduciary obligations outside of the corporate context. Second, it delineates the economic justification for applying fiduciary duties to best efforts promises. In particular, it discusses the economic theory behind choosing default terms and why default rules matter. More important, this Part explains why the economic theory of default rules justifies imposing an agency relationship here. Third, it applies this approach in some common contexts, and finally it sketches several objections to this approach and rebuts them.

#### A. Agency and Fiduciary Duties

Fiduciary duties exist so that parties can deal with problems stemming from "unequal costs of information."<sup>53</sup> Thus, a principal hires an agent to deal on his behalf "with others having superior information."<sup>54</sup> A businessman trusts his lawyer to negotiate on his behalf. Without knowledge of legal rules, the businessman relies on his lawyer's fidelity to this fiduciary tie because monitoring the lawyer's performance is costly for someone ignorant of legal rules. Because the law of agency protects the principal from an unfaithful agent, the prin-

---

<sup>52</sup> See Richard A. Posner, *Economic Analysis of Law* § 4.7 at 114 (Aspen 6th ed 2003) ("The fiduciary principle is the law's answer to the problem of unequal costs of information."). See also Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 Yale L J 277, 301 (1998) (explaining that "fiduciary relationships are perceived to implicate special problems of asymmetric information" and that "fiduciaries tend to occupy an informationally privileged position").

<sup>53</sup> Posner, *Economic Analysis of Law* § 4.7 at 114 (cited in note 52).

<sup>54</sup> *Id.*

cial need not lose sleep over the potential of the agent using the contract to enrich himself. For people in this position, an agency relationship governed by fiduciary duties can be an especially valuable contractual tool. In the absence of such duties, it would be difficult for the promisee to appraise the promisor’s performance.

Courts and commentators have found it difficult to define fiduciary duties with precision.<sup>55</sup> Nevertheless, “[t]he clear implication . . . is that an agent is under duty to act solely and entirely for the benefit of his principal in every matter connected with his agency.”<sup>56</sup> The essence of agency is that the agent owes integrity and fidelity to the promisee. That is, he must conduct all affairs of this relationship in an honest manner, eschewing profits gained at his principal’s expense.

#### 1. Duties of care and obedience.

The duty of care requires that the promisor make reasonable decisions on behalf of the promisee.<sup>57</sup> If the principal chooses to challenge a decision or action, the burden is on him to show that the agent has violated this duty.<sup>58</sup> The law requires the agent to exercise the degree of skill that is common to those engaged in similar businesses or pursuits,<sup>59</sup> and to exercise any special skills.<sup>60</sup> What constitutes reasonable care depends on the case’s particular circumstances, in particular the character and subject matter of the agency.<sup>61</sup> For example, if John agrees to act as David’s agent in the sale of a painting, then courts would resolve any dispute by looking to the standard of care that is typical of art dealers who act as painters’ agents.

In addition to the duty to exercise reasonable care, an agent is subject to a duty of obedience; that is, he must obey the person to whom he owes agency.<sup>62</sup> When given clear instructions, an agent must

<sup>55</sup> See William A. Gregory, *The Law of Agency and Partnership* § 67 at 140 (West 3d ed 2001).

<sup>56</sup> *Id.*, citing Restatement (Second) of Agency § 387 (1958) (describing the obligations that a fiduciary duty entails).

<sup>57</sup> See *Carrier v McLlarky*, 141 NH 738, 693 A2d 76, 78 (1997) (“Agents have a duty to conduct the affairs of the principal with a certain level of diligence, skill, and competence.”).

<sup>58</sup> See Restatement (Second) of Agency § 379, comment b (stating that for tort and contract claims against an agent, the principal bears the burdens of proving both the agent’s negligence and any resulting damages).

<sup>59</sup> See *id.*

<sup>60</sup> See *F.W. Myers & Co v Hunter Farms*, 319 NW2d 186, 188 (Iowa 1982) (“[A] paid agent is subject to a duty to the principal . . . to exercise any special skill that he has.”).

<sup>61</sup> See *Preston v Prather*, 137 US 604, 608–09 (1891) (“[T]he omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived.”).

<sup>62</sup> See *Central Alaska Broadcasting, Inc v Bracale*, 637 P2d 711, 712–13 (Alaska 1981), quoting Restatement (Second) of Agency § 385 (“[A]n agent is subject to a duty to obey all

follow them.<sup>63</sup> On the other hand, when there is no problem of unequal information (that is, the principal believes that he knows what to do), there is no need to protect the agent's independence and the agent must obey the principal.

Although the obligation imposed by the duty of care may seem trivial, it makes some sense to have a relatively low standard. First, the agent is subject to a duty of obedience, which means that he must obey the principal's instructions. Rather than sue his agent, the promisee should merely provide clear instructions. The necessity of obeying orders tempers the low procedural standard required under the duty of care. Second, courts do not have the competence necessary to make substantive business decisions; it is better to leave these decisions to the parties to an agreement.<sup>64</sup>

## 2. Duty of loyalty.

Though the duty of care is not particularly exacting, the duty of loyalty requires that the fiduciary act exclusively in his principal's interest in all aspects of his agency. When accused of violating this duty, courts require that the agent exonerate himself. In a famous passage, then-Judge Cardozo described the duty of loyalty as follows:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.<sup>65</sup>

Thus, the duty of loyalty requires a high degree of fidelity to the principal's interests on the part of an agent.

Although the agent must satisfy a higher standard of conduct than mere good faith, the standard is not so high as to be burdensome. The primary goal of fiduciary duties is to enable people to hire agents to deal on their behalf without incurring the potentially massive costs

---

reasonable directions in regard to the manner of the performing a service that he has contracted to perform.").

<sup>63</sup> See Gregory, *The Law of Agency and Partnership* § 69 at 144 (cited in note 55).

<sup>64</sup> See *AC Acquisitions Corp v Anderson, Clayton & Co*, 519 A2d 103, 111 (Del Ch 1986) (noting the "limited institutional competence of courts to assess business decisions").

<sup>65</sup> *Meinhard v Salmon*, 249 NY 458, 164 NE 545, 546 (1928) (finding that a real estate developer violated his fiduciary duties by contracting with another developer without telling his partner in a joint venture).



of monitoring the agents’ performance.<sup>66</sup> Applying this duty to the common circumstances in which parties enter into best efforts contracts, one finds that the agency standard matches the reasonable expectations of the parties while providing a clear rule around which parties can negotiate. By combining the duties of care, loyalty, and obedience, fiduciary duties resolve the problems of unequal information that cause parties to bargain for best efforts provisions.

#### B. Sophisticated Parties, Unsophisticated Parties, and the Economic Theory of Default Rules

Because this Comment seeks to provide a default interpretation for best efforts provisions, an analysis of the economic theory of default rules is necessary. The theoretical justification for attaching an agency obligation to this promise varies depending on the level of sophistication of the parties to the contract. For contracts between two sophisticated parties, an ideal default term induces parties to reveal information about themselves. When both parties are unsophisticated, the default term should conform to the meaning of the contract’s “plain language.” In a contract between a sophisticated and an unsophisticated party, default rules should recognize this inequality and prevent opportunism.

##### 1. Choosing a default rule and why it matters.

When crafting a default rule, there are several methods that courts and legislatures can adopt. The traditional economic approach has been to create a default rule that followed what the parties would have wanted had they specified the term.<sup>67</sup> Another idea is to adopt a countermajoritarian default rule that induces the parties to reveal information in negotiating around the undesirable default term.<sup>68</sup> Finally, Cass Sunstein and Richard Thaler have argued that courts and poli-

---

<sup>66</sup> See Posner, *Economic Analysis of Law* at 114 (cited in note 52) (“[The fiduciary principle] allows you to hire someone with superior information to deal on your behalf with others having superior information. By imposing a duty of utmost good faith rather than the standard contractual duty of ordinary good faith, it minimizes the costs of self-protection to the fiduciary’s principal.”).

<sup>67</sup> See Frank H. Easterbrook and Daniel R. Fischel, *The Corporate Contract*, 89 Colum L Rev 1416, 1433 (1989) (“The gap-filling rule will call on courts to duplicate the terms the parties would have selected, in their joint interest, if they had contracted explicitly.”).

<sup>68</sup> See Ayres and Gertner, 99 Yale L J at 95 (cited at note 33) (“[W]e suggest that efficiency-minded courts and legislatures may want to intentionally increase . . . transaction costs to discourage parties from contracting around certain defaults.”).

cymakers should allow “libertarian paternalism” to guide their choices in crafting default rules.<sup>69</sup>

The traditional “would have wanted” approach emphasized that a desirable default rule minimized transaction costs.<sup>70</sup> By adopting the term that the parties would have negotiated, the law prevents needless duplication of identical provisions. The parties to the agreement need not waste resources by repeatedly negotiating the same terms. When that term is the default, parties only need to incur transaction costs if their needs are abnormal. Because most people will not need to incur these transaction costs, a desirable default term minimizes the aggregate drag of transaction costs. Thus, the traditional approach is one that tries to minimize overall transaction costs and does not trouble itself with behavioral limitations or inducing parties to reveal valuable information.

The theory of penalty defaults suggests that legislatures and courts, when picking default terms, should consider the costs of contracting around (and those of failing to contract around) default rules.<sup>71</sup> Penalty defaults, by giving the parties an incentive to contract around the undesirable default rule, induce contractual specificity.<sup>72</sup> “From an efficiency perspective, penalty default rules can be justified as a way to encourage the production of information.”<sup>73</sup> Ayres and Gertner offer the famous case of *Hadley v Baxendale*<sup>74</sup> as an example of penalty defaults in action. Though the court’s ruling may not have been consistent with what most fully informed parties would have wanted, it nonetheless acts efficiently by inducing parties to reveal information about possible consequential damages.<sup>75</sup>

---

<sup>69</sup> See Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U Chi L Rev 1159, 1162 (2003) (“[W]e argue for self-conscious efforts, by private and public institutions, to steer people’s choices in directions that will improve the choosers’ own welfare.”).

<sup>70</sup> See Easterbrook and Fischel, 89 Colum L Rev at 1433 (cited in note 67) (arguing that the prescription of a default term “makes sense, however, only when . . . it is the term that the parties would have selected with full information and costless contracting”).

<sup>71</sup> See Ayres and Gertner, 99 Yale L J at 94 (cited in note 33) (“[E]fficiency-minded lawmakers should sometimes choose penalty defaults that induce knowledgeable parties to reveal information by contracting around the default penalty.”).

<sup>72</sup> See *id.* at 97 (“Because the [penalty] default potentially penalizes both parties, it encourages both of them to include a [specified] term.”).

<sup>73</sup> *Id.*

<sup>74</sup> 156 Eng Rep 145 (Ex 1854) (establishing a penalty default rule that damages for a breach of contract are limited to an amount both parties would have reasonably contemplated at the time they made the contract, unless otherwise specified).

<sup>75</sup> See Ayres and Gertner, 99 Yale L J at 103–04 (cited in note 33) (“*Hadley* is inconsistent with a full-information, ‘what the parties would have wanted’ standard. Instead, *Hadley* penalizes high-damage [parties] for withholding information that would allow [other parties] to take efficient precautions.”).

A new theory of default rules, called “libertarian paternalism,” suggests that courts and policymakers should consider behavioral limitations when crafting default rules and, thus, choose rules that favor unsophisticated parties who, all too often, are unaware of their rights.<sup>76</sup> Behavioral limitations on human cognition often mean that default rules will be sticky; that is, parties will fail to bargain around an undesirable default rule. Thus, courts should be mindful of this likelihood when crafting default rules by not deviating far from the bargain that parties would choose if they were aware of all of their cognitive limitations.

The controversy surrounding default rules is of purely academic interest if the default rule does not affect contractual outcomes. The Coase Theorem suggests that default rules are not important because, in a world of low transaction costs, parties will always bargain for efficient contract terms.<sup>77</sup> Even so, behavioral economists have found that contractual default rules can be “sticky” because people show an “endowment effect.”<sup>78</sup> Because people are usually willing to pay less for an entitlement than they are willing to accept to sell it, bargaining around injunctions or default rules is less likely than traditional microeconomic theory suggests. Because of this behavioral foible, default rules do affect transactional outcomes and can add value to transactions if they are crafted effectively.

Perhaps unfortunately, our world has yet to achieve a state of Coasean nirvana.<sup>79</sup> Because of transaction costs and behavioral foibles, the initial assignment of rights affects contractual outcomes. For example, default rules exert a major influence on employee 401(k) retirement plan decisions.<sup>80</sup> Switching the default contribution can have

---

<sup>76</sup> See Sunstein and Thaler, 70 U Chi L Rev at 1159 (cited in note 69) (arguing that public policy can correct for the fact that “in some cases individuals make inferior decisions in terms of their own welfare—decisions that they would change if they had complete information, unlimited cognitive abilities, and no lack of self-control”).

<sup>77</sup> Coase, 3 J L & Econ at 15 (cited at note 38) (“[I]f such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.”).

<sup>78</sup> See Cass R. Sunstein, *Switching the Default Rule*, 77 NYU L Rev 106, 112–15 (2002) (explaining that in various contexts, including employment situations, “those who initially receive a legal right value it more than they would if the initial allocation had given the right to someone else”). See also Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, in Cass R. Sunstein, ed., *Behavioral Law and Economics* 211, 211 (Cambridge 2000) (reviewing various experiments to show “[t]he assumption that entitlements do not affect value contrasts sharply with empirical observations of significantly higher selling than buying prices”).

<sup>79</sup> See Kahneman, Knetsch, and Thaler, *Experimental Tests* at 211 (cited in note 78) (explaining how human irrationality prevents us from achieving an efficient assignment of rights).

<sup>80</sup> See Brigitte C. Madrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q J Econ 1149, 1149–50 (2001) (showing that changing a

profound effects on how employees allocate their retirement money. Thus, the default rule can determine contractual outcomes; courts and legislatures should craft default rules with this knowledge in mind.

2. Sophisticated parties—a fiduciary requirement acts as a penalty default.

For sophisticated parties, treating a best efforts promise as requiring a fiduciary duty imposes a penalty default on contracting parties. Because most sophisticated parties engaging in distribution agreements (for example) may not intend to create an agency relationship, this default term encourages them to specify the actual terms of the agreement.

A skeptic of this approach might argue that, in the distribution business, all parties know exactly what best efforts provisions require. In that case, forcing the parties to renegotiate agreements would impose transaction costs with no gain, either to transacting parties or the legal system. There are two responses to this objection. First, if everyone knows exactly what a best efforts promise requires, specifying these requirements in a more complete agreement should be relatively costless. That is, the transaction costs that the rule imposes on sophisticated parties are trivial. Given the gains that this rule confers on unsophisticated parties,<sup>81</sup> these costs still may be worth incurring. Second, the skeptic's faith in the market for distribution may be misplaced. When asked, parties rarely give uniform answers as to the meaning of "usages of trade."<sup>82</sup> Though imposing a penalty default on these distributors may impose transaction costs in the short run, the long-run effect of the rule will be to cut litigation costs by forcing parties to specify the terms of their agreements with greater clarity. Moreover, in this case, the costs of resolving disputes as to the meaning of "best efforts" fall on the parties to the agreement, rather than beleaguered taxpayers.

In the case of contracts between sophisticated parties, who are more aware of their legal obligations than naïve parties, the suggested rule acts as a penalty default. If the meaning of best efforts provisions is clear, then the transaction costs of specifying this meaning with precision should be low. On the other hand, if the meaning of these provisions is unclear, the suggested rule induces parties to specify the terms of the agreement and internalize the costs of doing so. In one case, the

---

401(k) program from an opt-in program to a default-enrollment program dramatically increased employee participation).

<sup>81</sup> See Part III.B.3.

<sup>82</sup> See Bernstein, 66 U Chi L Rev at 715 (cited in note 44) ("These findings . . . suggest that 'usages of trade' and 'commercial standards,' as those terms are used by the [UCC], may not consistently exist, even in relatively close-knit merchant communities.").

result is a tolerable cost of matching the expectations of unsophisticated parties; in the other, the result is favorable compared to the other approaches.

3. Unsophisticated parties—a fiduciary duty closely approximates the plain meaning of “best efforts.”

By hypothesis, unsophisticated parties are unaware of legal default rules and, therefore, presumably intend for a contract to be interpreted according to the plain meaning of its language. Because these parties are not informed of the content or meaning of default rules, a forward-looking (or transactional) approach to crafting default rules does not apply to them. A default term does not influence how unsophisticated parties choose to structure transactions, so a term that matches their expectations provides the most practical and just way to resolve disputes. This approach minimizes litigation costs and enforces contracts in the manner that parties expect.

An agency obligation closely tracks the reasonable person’s understanding of “best efforts” and, thus, approximates what unsophisticated parties typically want these provisions to mean. In conversation, if someone told you that he would use his “best efforts” to find you a job, you would expect him to work very hard on your behalf. After all, the word “best” indicates a superlative effort, unsurpassed by anything else that he can do. Though agency does not require the promisor to work unceasingly, it does require him to act with the “utmost good faith” and refrain from enriching himself at the promisee’s expense.<sup>83</sup>

By attaching fiduciary duties to all best efforts promises, the law tracks the expectations of unsophisticated parties. Though the greatest gains from this approach may come from inducing sophisticated parties to elaborate on the meaning of a best efforts promise, this gain does not come at the expense of unsophisticated parties. Instead, these parties see gains because the law actually follows the intended meaning of the promise. In many jurisdictions, the law contradicts the plain meaning of the contractual term. Where the contract requires “best efforts,” some courts strike down the contract for lack of mutuality of obligation because the promisee need not do anything to fulfill his obligation.<sup>84</sup> Thus, one who promises to use his best efforts need not expend any effort at all.

---

<sup>83</sup> 3 Am Jur 2d Agency § 205 (2002) (“The agent or employee is bound to exercise the utmost good faith, loyalty, and honesty toward the principal or employer.”).

<sup>84</sup> See Part I.A.2.

4. A contract between one sophisticated and one unsophisticated party—eliminating opportunism.

Perhaps most important, imposing a fiduciary duty in these circumstances eliminates any threat of opportunism. Under the diligence insurance approach, a best efforts promise imposes no obligation beyond the duty of good faith and fair dealing and fails for a lack of mutuality if there is no consideration beyond the promise to use best efforts.<sup>85</sup> Because unsophisticated parties would not know that this obligation was meaningless, they are vulnerable to opportunistic behavior. By imposing a fiduciary duty on the promisor, sophisticated parties cannot prey on the naïve.

While fiduciary duties do not act as a penalty default in this context, they do provide the certainty that contracting parties usually crave. The Comment's approach provides such certainty without adopting a rule that will disadvantage unsophisticated parties. Because this solution tracks the plain meaning of the words "best efforts," it does a better job of enforcing provisions that legally naïve contracting parties negotiate. Therefore, by providing certainty to sophisticated parties and tracking the intentions of the naïve, the Comment provides the best solution to the problem of best efforts provisions.

C. Applying this Approach in Common Contexts

Part II.B explained that best efforts clauses are often used in distribution agreements and leases of real property. Understanding the practical effect of the Comment's approach requires an inquiry into how it would work in these contexts. In these distribution contracts, fiduciary duties may approximate the likely intention of the parties in using a best efforts clause. In *FTC v Coca-Cola Co.*,<sup>86</sup> the court noted that best efforts clauses in distribution agreements typically required that the distributor not distribute competing products.<sup>87</sup> This obligation is akin to the requirement that a fiduciary not engage in self-dealing without disclosing such dealing and proving the fundamental fairness of the transaction. Thus, a fiduciary duty better approximates the intentions of the parties than diligence insurance. Furthermore, it provides a clearer rule than does the approach taken in *Bloor*.

Moving on to the context of leases of real property, imagine a tenant signing a lease that provides that the landlord will use his best efforts to maintain clean common areas. The tenant believes that this

---

<sup>85</sup> See Part I.B.1.

<sup>86</sup> 641 F Supp 1128 (D DC 1986), vacd and remd, 829 F2d 191 (DC Cir 1987).

<sup>87</sup> Id at 1134.

lease will require the landlord to work to the best of his capacity to achieve cleanliness. Interpreting best efforts as creating a fiduciary duty would enable the parties to price the lease appropriately and prevent opportunism. Fisher suggests that, in the past, courts have sought to preserve their flexibility in interpreting these provisions in order to use them as a “tool of equity.”<sup>88</sup> Today, we recognize that this approach merely creates contractual uncertainty and deters potentially valuable contracts. Requiring the landlord to act as his tenant’s fiduciary will deter the haphazard use of best efforts provisions. Moreover, this duty will match the tenant’s reasonable expectation of the term’s meaning.

In *Olympia Hotels Corp v Johnson Wax Development Corp*,<sup>89</sup> the court considered an agreement to use best efforts to manage a hotel owned by the promisee.<sup>90</sup> The court held that so long as the promisor treated the promisee no worse than it treated other, uncomplaining recipients of its “best efforts,” it did not violate the provision.<sup>91</sup> An agreement to manage a business on behalf of a promisee is a classic candidate for a fiduciary duty. Presumably, because the promisee has chosen not to manage the business itself, there is a problem of unequal information. Furthermore, the risk of self-dealing in managing the business is tremendous. Thus, corporate directors and managers are required to abide by fiduciary duties in running the corporation. The risk of self-dealing is such that they must act under a duty of loyalty. The same reasoning applies when one party promises to use its best efforts to manage the other’s business.

#### D. Possible Objections to This Approach

Though the agency approach appears to be the best available, it is not without problems. Perhaps most troubling is the vague nature of the agency relationship. Because courts apply the law of fiduciary duties in such varied contexts, it is not particularly clear. But the essence of an agency relationship is clear: a fiduciary must act in the interest of his principal even at some cost to himself. Moreover, a principal is far less susceptible to opportunism than a typical promisee because the standard governing the relationship is higher than ordinary good faith.

---

<sup>88</sup> Fisher, *Use of “Best Efforts” Clauses in Leases* at 595 (cited in note 48) (“Courts have traditionally expressed a desire to preserve the flexibility, of the concept of best efforts, based upon the rationale that by preserving its flexibility the concept of best efforts can be applied in a myriad of situations as a tool of equity.”).

<sup>89</sup> 908 F2d 1363 (7th Cir 1990) (holding that a best efforts clause required the promisor to use efforts similar to those expended in the fulfillment of other, unquestioned contracts).

<sup>90</sup> *Id* at 1372–73.

<sup>91</sup> *Id* at 1373 (concluding that “best efforts” cannot be defined through parole evidence, but instead through a comparison to “the efforts the promisor has employed in those parallel contracts where the adequacy of his efforts have not been questioned”).

Even though fiduciary duties are not completely clear, courts cannot manipulate them as easily as the notoriously dicey concept of “good faith and fair dealing.” Because the level of obligation imposed by a best efforts promise is so unclear, this Comment’s approach brings greater certainty to contracting parties. After all, the alternatives are to allow a jury to decide the meaning of the term or not to enforce the term at all. Thus, the Comment’s approach provides parties with a much better conception of the duties imposed by a best efforts provision.

The skeptical reader might wonder why, if parties want a fiduciary duty, they do not say so explicitly in the initial contract, rather than use vague words like “best efforts.” For sophisticated parties, doing so would be simple. But in that case, the justification for changing the meaning of the term is to induce parties to clarify the meaning of the obligation. Because unsophisticated parties may be unaware that fiduciary duties exist, much less how to invoke them, the goal of a default term is not to influence future transactions. In this case, fiduciary duties resolve a concrete legal dispute. Because the law of agency is the closest that the law comes to matching the plain meaning of “best efforts,” it provides the most practical way to resolve a dispute as to the meaning of this term. That said, this objection approaches the problem from a purely transactional perspective. Once there is a dispute as to the meaning of “best efforts,” resolving it requires interpretation of the term. Fiduciary duties provide a relatively clear rule, rather than leaving the dispute’s resolution to the unguided discretion of a jury.

Because the duty of care is an easily satisfied procedural standard, one might object that its requirement is insufficient to conform to an unsophisticated party’s interpretation of “best efforts.” Why would such parties not intend a higher standard of care? Indeed, to an unsophisticated contracting party, “best efforts” implies a superlative effort, one not captured by the meager requirements of the duty of care. This objection raises a problem of institutional capacity for courts. In a typical case, it is unlikely that a judge would be able to make a better business decision than the parties to the contract. Moreover, because the promisor is subject to the duty of obedience, revisiting his substantive decisions is unnecessary. If the promisee does not like his agent’s decision, he can simply tell him to make another decision. This context is unlike a corporate board, in which a director cannot easily follow the instructions of many, widely dispersed shareholders. In a typical best efforts contract, it is practical and simple for a promisee to express displeasure with the promisor’s effort or decisions. Because he would be subject to an agency obligation, the promisor must obey any instructions.

The problems of unequal information that fiduciary duties are intended to solve have several dimensions, only one of which is captured



in the duty of loyalty's ban on conflicts of interest. Indeed, clients hire attorneys for their substantive advice and hard work to achieve a desired result, not simply to keep them from engaging in conflicts of interest. Because the law considers the duty of care sufficient to compel lawyers to do high-quality work, one suspects that this standard will suffice in the context of best efforts promises. Thus, the duty of care, in tandem with the duty of obedience, almost certainly is sufficient to compel satisfactory performance of best efforts contracts. Demanding a higher standard of care from these promisors than is required of lawyers is unnecessary.

A final argument against the Comment's approach could be that it increases transaction costs on parties who must contract around this rule. Although these parties cannot use best efforts clauses in the manner that they would have liked, the default rule forces them to specify the terms of the agreement with greater precision. This requirement could lead parties to draft value-enhancing agreements, despite the increased transaction costs. Because a clear agreement is less likely to be litigated, the added transaction costs that this approach imposes on parties are not entirely lost. Nevertheless, there almost certainly is some loss; otherwise, the parties would have specified the terms more clearly in the first place.

Although these objections have merit, they do not invalidate the case for creating a fiduciary relationship when parties include a best efforts clause in a contract. Most contracting parties intend something like a fiduciary relationship when they draft a best efforts contract. What's more, even if the parties do not intend a fiduciary relationship, this rule enables them to contract around a clear default rule, instead of an easily manipulated standard or, worse, a penalty rule of which they are unaware. Therefore, when parties include a best efforts provision in a contract, that clause should create an agency relationship between the parties.

#### CONCLUSION

Today, the law of best efforts is a hopeless muddle. Indeed, it is surprising that best efforts provisions find their way into contracts at all. Courts can clarify this situation by imposing a fiduciary duty on parties who agree to use their best efforts. This rule conforms to the reasonable expectations of the parties and thus will not bring hardship upon unknowledgeable parties. By achieving the twin goals of certainty (for sophisticated parties) and conformity to parties' expectations (for the unsophisticated), this approach provides the best way to resolve a dispute involving a “best efforts” clause.