



Chris Griswold, P.C.

## News From the Firm

February 2018

### Message From Chris....

The commercial business world is driven by certain, basic, legal terminology that appears in many contracts (by whatever name called). Understanding some of these better helps everyone. At the top of the list of commonly used terms (which are very worth discussing) are the usual qualifiers that condition the quality of effort that a party must employ in order to meet its contractual obligations. Good stuff. See more below (and don't forget to click on my Facebook or YouTube links below to also see my short video on this material).

### Understanding Legal Terminology As Regarding Obligations

#### **Question #1: What does “good faith efforts” mean?**

**Answer:** We've seen this term used in contracts. It means that, however the context reads within the contract, the *subject party must actually employ some sort of effort*. For example, if a purchase-sale contract reads “...the Buyer must employ “**good faith efforts**” to ensure that no confidential information obtained from Seller or Seller's agents, contractors, employees or representatives during the Due Diligence Period is disclosed to any third party(ies) without the written consent of Seller...,” it means that the Buyer must somehow prove it somehow actually attempted to keep certain information (which later leaked out to a third party) from leaking out to such third party – *through the actual use of some sort of effort*. For instance, Buyer, in advance of such leak, sent out emails or texts to its own agents, contractors, representatives and employees to keep such information secret from (and undisclosed to) third parties. That way, later on, when the leak occurs, the Buyer can point towards the emails or texts it previously sent out as proof that it *actually, in good faith*, made some sort of effort to prevent the leak that later occurred. This is the lowest standard folks, and not very hard to satisfy. [Note: this contract is for a major, multi-million dollar transaction folks.]

#### **Question #2: What does “reasonable efforts” mean?**

**Answer:** Insert the phrase “**reasonable efforts**” into the foregoing fact pattern. It means that the Buyer *does something more lofty to prevent the leak*. For example, Buyer sent out certified letters to its own agents, contractors, employees and representatives, and, in addition to that, Buyer held a one day required orientation at its headquarters whereby all of Buyer's agents, contractors, employees and representatives attended a non-disclosure orientation/seminar to receive instruction on how to best prevent leaks of such confidential information during the then, forthcoming due diligence period. This is a higher standard folks, and harder to meet. Why? *It expects a subject party to do what another “reasonable person” would do to prevent the leak....* So, even more must be done to meet this higher standard than simply a *good faith effort*.

**Question #3: What does “best efforts” mean?**

**Answer:** With “best efforts” inserted into the fact pattern, you’re basically holding the Buyer to the highest standard imaginable; so much so that, if a leak later occurs, it’s basically Buyer’s fault, period. *How so?* This highest standard basically means that, *unless it somehow becomes impossible to prevent the leak, then any leak that later occurs is the fault of Buyer.* The only way to prove the “*impossibility of preventing the leak*” is to show that someone died behind the wheel of a car before they had a chance to communicate well, or, a flood or natural disaster occurred which prevented Buyer from preventing the disclosure which happened after the office floated away and the sensitive papers were later found upon the banks of a river by the children of the Seller’s competitor (which is a Force Majeure exception, if such exception is drafted into the contract itself). *So, be careful of someone putting a “best efforts” obligation upon you.*

**Question #4: What do you need to remember about using these various terms?**

**Answer:** You need to remember which party you are, what the obligation is at hand, and how much control you actually have in getting something done or preventing something from happening. *Don’t bite off (or accept the obligation to bite off) more than you can chew.*

What My Clients Are Saying

“Chris Griswold is a good business attorney whom I’ve used often and much through the years, for both my business and personal needs, and whom I’d gladly refer to anyone. He’s creative, prompt, eager to help and very competent. He’s good at what he does, he has fun doing it, and it shows up in his work through his good problem solving skills. Chris is great.”  
*Edward F. Wells / President, Wells Nelson & Associates / Oklahoma City, Oklahoma*

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