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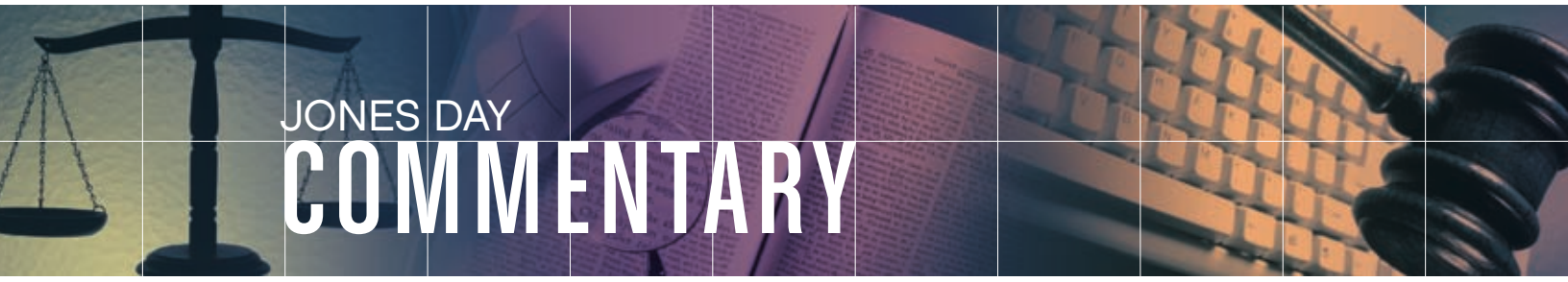

BEST EFFORTS AND ENDEAVOURS–CASE ANALYSIS AND PRACTICAL GUIDANCE UNDER U.S. AND U.K. LAW

Contract lawyers around the world spend hours negotiating seemingly slight changes in contract language. Often these slight changes have significant legal consequences. For example, most lawyers representing a promisor will fight hard to remove a best-efforts standard from a contract in favor of the more palatable reasonable-efforts standard.[1] The conventional wisdom among contract lawyers is that the best-efforts standard is the most onerous of the efforts standards.[2] Some believe that a simple best-efforts clause requires a promisor to do everything in its power to accomplish the obligation, including spending unlimited amounts of money, time, and effort, all to the promisor's detriment. Under United States and United Kingdom case law, this overly burdensome view of the best-efforts standard is unjustified.

Comparing "best" versus "reasonable" seems like a straightforward linguistic analysis. "Reasonable efforts" is a lower standard than "best efforts." In everyday language, "reasonable" does not mean "best." Under contract law, all language should be meaningful, and these standards appear unique. However, this simple understanding seems to break down upon an analysis of U.S. case law and commentaries on the subject of best versus reasonable efforts under U.S. law.[3] In fact, many U.S. courts have found no meaningful distinction between the various efforts standards, unless the parties specify otherwise or both standards are used in the same contract.[4] Similarly, in a recent U.K. decision interpreting various endeavours standards,[5] the High Court stated that "an obligation to use *all* reasonable endeavours equates with using best endeavours."[6] However, that same court confirmed that there is a distinction between best endeavours and reasonable endeavours under U.K. law, although it is unclear what efforts will be required under each of the standards if the parties do not specifically set these out in the contract.

Due to the substantial doubt surrounding whether, and how, courts may attach different consequences to the use of different formulations of obligations to

use efforts or endeavours, the draftsman should proceed with caution in this area. A minority of courts at least purport to recognize distinctions based upon the particular language employed, and contract parties may well behave differently under differently articulated standards, regardless of how such standards might be construed by a court. In any event, the specific terminology should be selected carefully and used consistently (except where a distinction is in fact intended), and consideration should be given to defining with specificity or illustrating through examples the scope and nature of the efforts required.

U.S. CASE LAW

Every obligation in a contract has a judicially implied covenant of good faith and fair dealing. Treatises draw a distinction between best efforts and this implied covenant of good faith. The standard of good faith, according to *Farnsworth on Contracts*, "is a standard that has honesty and fairness at its core and that is imposed on every party to a contract," while the best-efforts standard "has diligence as its essence and is more exacting than the usual contractual duty of good faith."[7] *Corbin on Contracts* describes the best-efforts standard as "a more rigorous standard than good faith."[8]

So what is the obligation imposed by the phrase "best efforts"? The leading U.S. case interpreting the obligation is *Bloor v. Falstaff Brewing Corp.*[9] In this case, Falstaff had purchased Ballantine Ale from Bloor and had agreed to pay Bloor a percentage of the profits from sales of Ballantine Ale. Falstaff agreed to use its best efforts to maintain a high sales volume and maximize the payout to Bloor, but when sales slipped, Falstaff did little to stop the slide. Bloor sued and won in both the district court and on appeal in the Second Circuit, but it is the court's wrangling with the term "best efforts" that provides one of the case's more interesting points of law. The Second Circuit, upon examining the term "best efforts" in the contract, declared, "The requirement that a party use its best efforts necessarily does not prevent the party from giving reasonable consideration to its own interests."[10] However, the court did impose an obligation on Falstaff to act "in good faith and to the extent of its own total capabilities" or at least perform "as well as the average prudent" comparable performer.[11]

The question of whether a party used its best efforts is a subjective factual issue, and courts will consider a party's experience, expertise, financial status, and other abilities when determining whether that party exercised its best efforts in a dispute.[12] However, as discussed later, the parties may (and should) define in the contract what their expectations are for "best efforts" or include a benchmark against which a party's performance should be measured.[13]

For years U.S. courts have used the phrases "reasonable efforts" and "best efforts" interchangeably within and between opinions. Where only one of the terms is used, the best-efforts obligation frequently appears indistinguishable from a reasonable-efforts obligation. Some recent cases have gone so far as to equate best efforts and reasonable efforts. The Federal District Court for the Western District of Wisconsin said, "The duty to use best efforts requires [a party] to use reasonable efforts and due diligence."[14] The Federal District Court of Kansas examined a recent contract that called for best efforts and said, "Best efforts does not mean perfection and expectations are only justifiable if they are reasonable."[15] The Federal District Court for the Southern District of New York has gone a step further, declaring, "New York courts use the term 'reasonable efforts' interchangeably with 'best efforts.' "[16] The Federal District Court for the District of New Jersey may have summed up the nondistinction best. In a 1997 case, the defendant wanted the court to apply a best-efforts standard to a breach-of-contract counterclaim, while the plaintiffs sought a reasonable-efforts standard. The court imposed "an implied duty to act in good faith and with due diligence" but tellingly added, "The Court, however, views this [debate between best and reasonable efforts] as merely an issue of semantics and notes that its decision would not differ if it adopted the best efforts terminology."[17]

Even the drafters of the Uniform Commercial Code saw no distinction between best and reasonable efforts (or were careless with the language in Article 2). In Section 2-306(2), the UCC states:

> A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use *best efforts* to supply the goods and by the buyer to use *best efforts* to promote their sale.[18]

Official Comment 5, which elaborates on Section 2-306(2), describes this provision as requiring parties to "use a *reasonable effort* and due diligence."[19] This language led an Ohio court to say, "The test for best efforts is one of reasonableness."[20]

It should be noted that at least two courts have latched on to the linguistic distinction between "best" and "reasonable" and have stated that there *is* a distinction between the two standards.[21] However, both cases, *In re Chateaugay* and *Krinsky*, provide questionable guidance on the issue, because neither holding rests on the distinction and neither case cites valid authority for this proposition.

In *LTV Aerospace and Defense Co. v. Thomson (In re Chateaugay)*, Thomson and LTV entered into an asset purchase agreement under which Thomson was to purchase the assets of LTV's Missile Division. After failing to achieve regulatory approval, Thomson announced that it regarded the agreement as terminated. LTV filed a claim against Thomson seeking a $20 million reverse breakup fee, claiming that Thomson breached its obligation under this agreement to close the transaction. In relevant part, Section 7.01 of the agreement stated that each party agreed to use "all reasonable efforts to take . . . all actions . . . necessary or desirable . . . to consummate the transactions contemplated by this Agreement." In at least two places in the agreement, the parties used the term "best efforts" instead of the "all reasonable efforts" formulation used in Section 7.01.[22] While those sections were not in dispute, the court stated, "The standard imposed by a 'reasonable efforts' clause such as that contained in section 7.01 of the Agreement is indisputably less stringent than that imposed by the 'best efforts' clauses contained elsewhere in the Agreement."[23] The court went on to say that

> even in the face of a best efforts clause, however, a party is entitled to give "reasonable consideration to its own interests" in determining an appropriate course of action to reach the desired result. A party may thus exercise discretion, within its good faith business judgment, in devising a strategy for achieving its ultimate goal.[24]

Therefore, while the court stated that the reasonable-efforts standard is less stringent than the best-efforts standard, the court used a best-efforts formulation (citing *Bloor*[25] and *Triple-A Baseball Club Assoc.*[26]) to analyze whether or not Thomson met its reasonable-efforts obligation. The court gave no indication whether, or how, Thomson's obligation would differ if "best efforts" would have been used in Section 7.01. Furthermore, the best-efforts versus reasonable-efforts distinction was not relevant to the holding. *In re Chateaugay* nonetheless demonstrates that if both reasonable-efforts and best-efforts standards are used in the same document, a court may attempt to bring meaning to the different formulations. In this case, the court purported to recognize a difference but ultimately applied a best-efforts standard to the "all reasonable efforts" language.

The other case that draws a distinction between best efforts and reasonable-efforts formulations is *Krinsky v. Long Beach Wings*.[27] In this unpublished opinion, the California Court of Appeal (Second District) held that the plain meaning of the term "best efforts" "denotes efforts more than usual or even merely reasonable."[28] In doing so, however, the court cites *National Data Payment Systems v. Meridian Bank*[29] and treatises by Farnsworth and Corbin, all of which distinguish best efforts from good faith, *not* best efforts from reasonable efforts. It seems that the *Krinsky* court was not focused on distinguishing best from reasonable efforts but was simply restating the settled law that an efforts standard, such as best efforts, mandates a higher level of diligence than a simple contract obligation glossed with the implied covenant of good faith.

U.K. CASE LAW

As in the U.S., a duty to exercise reasonable or best endeavours (the U.K. formulation of "efforts") has long been a disputed area of the law in the U.K. The use of these expressions has often left doubt as to what the relevant party may have to do in order to fulfill its obligation. The meaning of the term "best endeavours" has been modified significantly over the years. Originally, an onerous test was established that to satisfy a best-endeavours obligation, "the [obliged party] must, broadly speaking, leave no stone unturned . . . ."[30] Subsequent cases have modified this approach, and best-endeavours clauses are now judged by standards of reasonableness. In addition, even though courts have historically held that the obligated party may be expected to act to its own detriment

under the best-endeavours standard, more recent cases, such as *Terrell v. Mabie Todd & Co. Ltd.*[31] and *Pips (Leisure Productions) Ltd. v. Walton*,[32] state that the obligated party will not have to act against its own commercial interests.

It has been commonly assumed by U.K. contract draftsmen that the best-endeavours standard is a far more stringent obligation than reasonable endeavours, as the reasonable-endeavours obligation has been widely viewed to oblige the relevant party to make only minimal efforts to fulfill the obligation, with commercial considerations being taken into account when deciding what action must be taken.[33] However, in analyzing U.K. case law, as in the U.S., this assumption is broken down, and although there is a distinction between these terms, it is now accepted that under both terms, the relevant party is not required to go beyond that which is reasonable. Therefore, best endeavours should not be regarded as "the next best thing to an absolute obligation."[34]

Although the term "all reasonable endeavours" was widely thought to be a middle position somewhere between best endeavours and reasonable endeavours,[35] the recent decision of *Rhodia International Holdings Ltd. and Rhodia UK Ltd. v. Huntsman International LLC*[36] indicates that, despite best endeavours being a stronger obligation than reasonable endeavours, "*all* reasonable endeavours" equates to "best endeavours." Although the *Rhodia* decision turned solely on the meaning of "reasonable endeavours," the judge considered how reasonable endeavours differed from best endeavours. The *Rhodia* court ruled that:

> An obligation to use reasonable 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. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours.

Two important conclusions can be drawn from this statement by the *Rhodia* court. First, there is no difference between an obligation to use "all reasonable endeavours" and an obligation to use "best endeavours." Second, while there is a difference between reasonable and best endeavours, they are both underpinned by the test of reasonableness; the only difference between the standards is the number of reasonable efforts a party is obliged to take. As a result, it has been suggested by some commentators in the U.K. that any difference is too circular to be of use.

Although the *Rhodia* court concluded that there is a difference between reasonable and best endeavours, it can be inferred from the court's consideration of what "reasonable endeavours" entails that a minor distinction, at best, exists between the two standards. While the judge in *Rhodia* accepted that a reasonable-endeavours obligation would not usually require a party to sacrifice its own commercial interests, the position would be different when a party agreed to take certain steps (as in the *Rhodia* case, where the contract contained a direct covenant/guarantee) as part of the exercise of reasonable endeavours. In those circumstances, a party could not argue that its commercial interest was prejudiced by a certain action, as such party has specifically accepted an obligation to take that action. Thus, in the absence of a specific course of action agreed by the parties, neither the reasonable-endeavours standard (according to the *Rhodia* case) nor the best-endeavours standard (according to the *Terrell* and *Pips* cases) is likely to require a party to sacrifice its own commercial interests. Therefore, contrary to the decision in the *Rhodia* case, there seems to be very little to distinguish between the best- and reasonable-endeavours standards in the U.K., and U.K. draftsmen should be as specific as possible in setting the level of obligation required to fulfill the relevant-endeavours standard.

PRACTICAL GUIDANCE AND DRAFTING CONSIDERATIONS

What options exist for a contract drafter who wants to distinguish best efforts from reasonable efforts or wants to clearly define or distinguish the best-efforts standard? Sometimes contract drafters try to address the lack of clarity by using terms like "reasonable best efforts." In the U.S., "reasonable best efforts," like "best efforts," has no special legal meaning.[37] Likewise, terms like "commercially reasonable efforts" or any of the other "efforts" standards may do nothing to solve the problem. In fact, drafters sometimes make matters worse by using terms like "good-faith best efforts," tying together the related but distinct issues of best efforts and a duty to act in good faith.

In a recent New York case, the court examined the best-efforts standard at length. The court stated, "It is still unclear when and how an express 'best efforts' provision is to be enforced in the absence of articulated objective criteria in the agreement, and, particularly, the relationship between 'best efforts' and 'good faith,' 'fair dealing,' and 'reasonable care.' "[38] This lack of clarity requires contract drafters to take steps to ensure that the intention of the parties is expressed in the four corners of the contract. The courts will look first to the contract, scouring the language for direction on how to measure the parties' conduct.[39]

Therefore, the answer to the problem may be for contract drafters to spell out exactly the level of effort the parties expect by setting forth the specific activities and providing examples. By explaining exactly what the parties mean by their use of a particular efforts clause, drafters begin to remove the uncertainty and vagueness that surround the various efforts clauses, and the question of whether particular actions are contrary to a party's commercial interests will not arise.

In the U.K., this can be illustrated by two recent cases. In *Phillips Petroleum*,[40] an obligation to use reasonable endeavours to agree failed for uncertainty, since no criteria were provided in the contract as to what would be reasonable to do to meet the obligation. However, in *RAE Lambert*,[41] the Court of Appeal held that where the contract was clear in stating what the parties must do to meet a reasonable-endeavours obligation, the clause would be enforceable.

Many times, efforts clauses are included precisely because expected performance may be difficult or impossible to define at the time of the contract's creation. However, even if individual activities cannot be specified, it is possible to define the term "best efforts" in a way that is flexible, yet quantifiable; for example, a contract may provide that the obligation to use best efforts is satisfied if the effort is comparable to efforts made in earlier dealings or in accordance with industry standards. Such a definition at least provides the court some guidance in the event of a dispute. While the definition is still flexible, the court will find it easier to rule on a defined standard than a naked best-efforts clause.

One problem that frequently plagues contracts, like the one in *In re Chateaugay*, is that the drafter has been inconsistent with the efforts standards without defining the differences. Careful attention must be paid to include the standard that is desired, and if more than one standard is called for, the differences between the two should be defined. As with any efforts standard, the terms should be defined as completely as possible. The more leeway a court is given to define the meaning behind a contract's language, the more likely it is that the drafter's intentions will be lost.

Finally, given the near universal view (among both lawyers and businesspeople) that the best-efforts standard is an extraordinarily high obligation, one should carefully consider its usage. If a contract contains a best-efforts clause, the party receiving the benefit of the obligation may have substantial leverage over the promisor because everyone assumes that the best-efforts standard is an obligation approaching guaranteed performance. Because contract disputes are rarely litigated, it may be practically irrelevant that a best-efforts obligor is not legally bound to act in a manner that ignores reasonable consideration for its own interests. For this reason alone, and regardless of the actual legal interpretation, one should avoid using an undefined best-efforts standard when representing a promisor.

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NOTES

1 Professors Robert E. Scott and George G. Triantis noted in their recent Yale Law Journal article, "Not only are explicit 'best efforts' obligations common, they are also the subject of extended negotiations, including negotiation over seemingly minor linguistic variations. Indeed, many contracts reflect a highly nuanced approach to the specification of vague clauses." Robert E. Scott & George G. Triantis, "Anticipating Litigation in Contract Design," 115 YALE L.J. 814, 835–36 (2006).

2 There are numerous efforts or endeavours standards, including "best efforts," "reasonable efforts," "commercially reasonable efforts," "commercial best efforts," "all reasonable efforts," and "all efforts," to name a few.

3 For an extended discussion and comparison of the various efforts standards, see Kenneth A. Adams, "Understanding 'Best Efforts' and Its Variants (Including Drafting Recommendations)," 50 PRAC. LAW. 11 (2004). *See* E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 7.17, at 314, § 7.17b, at 335–36 (1990) (putting best efforts on par with reasonable efforts, stating that "another term that courts often supply is one imposing a duty of 'best' or 'reasonable' efforts [which] requires a party to make such efforts as are reasonable in the light of that party's ability and the means at its disposal and of the other party's justifiable expectations").

4 "The 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." Kenneth A. Adams, "Understanding 'Best Efforts' and Its Variants (Including Drafting Recommendations)," 50 PRAC. LAW. 11, 14 (2004). *See also* Kenneth A. Adams, "Contract Drafting: Debunking Urban Legends," NEW YORK LAW JOURNAL, Dec. 2, 2005.

5 The U.K. usage of various "endeavours" standards seems to mirror the U.S. usage of the various "efforts" standards. For purposes of this *Commentary*, we have made no distinction and have found no evidence that the U.S. or U.K. law would be different based on the use of the word "endeavours" versus "efforts." Kenneth A. Adams, "English Case on 'Best Endeavours' and 'Reasonable Endeavours,' " ADAMSDRAFTING, Mar. 21, 2007, http://adamsdrafting.com/system/2007/03/21/english-case-best-reasonable-endeavours/.

6 *Rhodia Int'l Holdings Ltd. & Rhodia UK Ltd. v. Huntsman Int'l LLC* (2007) EWHC 292 (Comm).

7 E. Allan Farnsworth, 2 FARNSWORTH ON CONTRACTS 383–84 (2d ed. 1998).

8 Arthur L. Corbin, CORBIN ON CONTRACTS § 6.5, at 246 (rev. ed. 1993).

9 *Bloor v. Falstaff Brewing Corp*., 601 F.2d 609 (2d Cir. 1979).

10 *Id.* at 614.

11 *Id.* at 613.

12 *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 655 F. Supp. 513, 540 (D. Me. 1987); *Carlson Brewing Co. v. Salt Lake Brewing Co.*, 95 P.3d 1171, 1179 (Utah Ct. App. 2004).

13 *Pinnacle Books, Inc. v. Harlequin Enters., Ltd.*, 519 F. Supp. 118, 121 (S.D.N.Y. 1981); UCC § 2-306(2) (2006).

14 *Gilson v. Rainin Instrument, LLC*, No. 04-C-852-S, 2005 U.S. Dist. LEXIS 16825, at *14 (W.D. Wis. Aug. 9, 2005).

15 *Corporate Lodging Consultants, Inc. v. Bombardier Aero. Corp*., No. 63-1467-WEB, 2005 U.S. Dist. LEXIS 9259, at *13 (D. Kan. May 11, 2005). The district court made this declaration despite recognizing that the "Kansas Supreme Court has stated that best efforts 'create[s] a standard of conduct for [a party's] performance under the Agreement above and beyond the implied obligation of good faith.' " *Id.* In other words, at least in the district court's mind, both best efforts and reasonable efforts required more effort than "good faith."

16 *Scott-Macon Sec., Inc. v. Zoltek Cos*., No. 04-Civ.-2124, 2005 U.S. Dist. LEXIS 9034, at *40 (S.D.N.Y. May 12, 2005).

17 *Trecom Bus. Sys., Inc. v. Prasad*, 980 F. Supp. 770, 774 n.1 (D.N.J. 1997).

18 U.C.C. § 2-306(2) (2006) (emphasis added).

19 *Id.* at § 2-306 cmt. 5 (emphasis added).

20 *Miami Packaging, Inc. v. Processing Sys., Inc.*, 792 F. Supp. 560, 565 (S.D. Ohio 1991).

21 "By using the term 'reasonable efforts' in Section 7.01 of the Asset Purchase Agreement the parties necessarily intended to impose a *lesser obligation* than would have been required had they chosen to use the term 'best efforts' as they did elsewhere in the Agreement." *LTV Aerospace and Defense Co. v. Thomson* (*In re Chateaugay*), 186 B.R. 561, 594 (Bankr. S.D.N.Y. Aug. 23, 1995) (emphasis added); *Krinsky v. Long Beach Wings*, 2002 WL 31124659 (Cal. App. 2d Dist. Sept. 26, 2002) (unpublished opinion) (stating that the plain meaning of the term "best efforts" "denotes efforts more than usual or even merely reasonable").

22 *LTV Aerospace and Defense Co. v. Thomson* (*In re Chateaugay*), 186 B.R. 561, 594 (Bankr. S.D.N.Y. Aug. 23, 1995).

23 *LTV Aerospace and Defense Co. v. Thomson* (*In re Chateaugay*), 198 B.R. 848 (S.D.N.Y. 1996).

24 *Id.* at 854.

25 *Bloor v. Falstaff Brewing Corp*., 601 F.2d 609 (2d Cir. 1979).

26 *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc*., 655 F. Supp. 513 (D. Me. 1987).

27 *Krinsky v. Long Beach Wings*, 2002 WL 31124659 (Cal. App. 2d Dist. Sept. 26, 2002).

28 *Id.* at 8.

29 *Nat'l Data Payment Sys. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000).

30 *Sheffield Dist. Ry. Co. v. Great Cent. Ry. Co.* (1911) 27 TLR 451.

31 *Terrell v. Mabie Todd & Co. Ltd.* (1952) 69 RPC 234.

32 *Pips (Leisure Prods.) Ltd. v. Walton* (1981) EGD 100.

33 *UBH (Mech. Servs.) Ltd. v. Standard Life Assurance Co.* (1986) The Times Law Reports.

34 *Midland Land Reclamation Ltd. v. Warren Energy Ltd.* (1995) ORB No. 254.

35 *UBH (Mech. Servs.) Ltd. v. Standard Life Assurance Co.* (1986) The Times Law Reports.

36 *Rhodia Int'l Holdings Ltd. & Rhodia UK Ltd. v. Huntsman Int'l LLC* (2007) EWHC 292 (Comm).

37 *In re ValueVision Int'l, Inc. Sec. Litig*., 896 F. Supp. 434 (E.D. Pa. 1995) (giving no weight to the fact that the term "reasonable" appeared before "best efforts" and examining the case as though the phrase in the contract was only "best efforts").

38 *Ashokan Water Servs., Inc. v. New Start, LLC*, 807 N.Y.S.2d 550, 555 (N.Y. Civ. Ct. 2006).

39 "The meaning of a 'best efforts' clause is 'properly determined by the court as a question of law from the four corners of the contract.' " *In re Gulf Oil/Cities Serv. Tender Offer Litig*., 725 F. Supp. 712, 730 (S.D.N.Y. 1989).

40 *Phillips Petroleum Co. (UK) Ltd. v. Enron (Europe) Ltd.* (1997) CLC 329.

41 *RAE Lambert v HTV Cymru (Wales) Ltd.* (1998) FSR 874.