

# BEST EFFORTS?: DIFFERING JUDICIAL INTERPRETATIONS OF A FAMILIAR TERM

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## INTRODUCTION

For certain contractual obligations, parties may agree to use specific levels of effort when satisfying their responsibilities. Clauses such as “best efforts” clauses describe these levels of effort and can apply to a variety of obligations in an equal variety of transactions. Although these clauses are common, agreements rarely delineate the exact parameters of performance that will satisfy the requirement. As a result, when litigation arises from an alleged breach of an efforts clause, the task of defining and interpreting the term falls to the court.

The judicial landscape is littered with conflicting interpretations of efforts clauses. Some courts apply tough, exacting standards when analyzing a bound party’s performance,<sup>1</sup> while other courts hold that efforts clauses in general are too vague to be enforced.<sup>2</sup> This lack of uniformity creates difficulty when determining what a best efforts clause requires from the promising party, especially if the agreement applies to actions that occur throughout different jurisdictions.<sup>3</sup> A universal approach to the interpretation of best efforts is necessary, and it is the purpose of this Note to suggest which standard courts should apply.<sup>4</sup>

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1. See, e.g., *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 267 (S.D.N.Y. 1978), *aff’d*, 601 F.2d 609 (2d Cir. 1979) (stating that best efforts obligates a party to make a good faith effort to the extent of its total capabilities).

2. See, e.g., *Kraftco Corp. v. Kolbus*, 274 N.E.2d 153 (Ill. App. Ct. 1971).

3. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1119 (1981) (“A search for the meaning of a best efforts obligation in terms of traditional legal doctrine is not very illuminating.”).

4. Analyzing different iterations of efforts clauses (“diligent efforts,” “commercially reasonable efforts,” “best efforts,” etc.) offers little guidance when determining whether a party used its best efforts. Some courts hold that different clauses require different levels of performance, yet others hold that all efforts clauses obligate parties to the same level of action. Compare *NCNB Nat’l Bank of N.C. v. Bridgewater Steam Power Co.*, 740 F. Supp. 1140 (W.D.N.C. 1990) (using a strictly subjective approach

This Note first analyzes implicit contractual elements and their relevance to a best efforts interpretation. Following is a description of the numerous best efforts standards. After a comparative analysis, this Note ultimately concludes that when determining whether a party has met its best efforts obligation, courts should apply an exacting standard with both subjective and objective elements.

## I. CONTRACTUAL ELEMENTS

### A. *The Implicit Duty of Good Faith and Fair Dealing*

Under general contract law, courts are routinely called upon to supplement agreements with implied terms and obligations.<sup>5</sup> Implicit terms can relate to the duty of best efforts,<sup>6</sup> agreement termination, impracticability or frustration, and the conditioning of one party's duties on the performance of another.<sup>7</sup> One such term is the duty of good faith and fair dealing.<sup>8</sup> Relevant to this Note's discussion, some courts interpret best efforts clauses to demand nothing more than what is required by this implied duty of good faith.<sup>9</sup>

The duty of good faith is almost universally implied in contractual agreements.<sup>10</sup> The Restatement recognizes that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."<sup>11</sup> It follows that if a contract does not contain explicit performance requirements, the implied duty of good faith will govern the performance of the

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to best efforts clause), *with* LeMond Cycling, Inc. v. PTI Holding, Inc., No. Civ. 03-5441, 2005 WL 102969 (D. Minn. Jan. 14, 2005) (applying subjective and objective elements when analyzing a "commercially reasonable efforts" clause), and PAUL S. BIRD, PRACTISING LAW INSTITUTE, PRIVATE EQUITY M&A: CURRENT TOPICS 50 (2002), available at 1339 PLI/Corp 11 (Westlaw) ("[W]e are not aware of any case that interprets 'commercially reasonable efforts,' or even 'reasonable best efforts' as distinct, less stringent standards than 'best efforts.'").

5. 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.16 (2d ed. 2001).

6. The seminal case for the implied duty of best efforts is *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917), where the court read a best efforts obligation into an exclusive-rights contract. For discussion regarding the *implicit* duty of best efforts, which this Note does not discuss, see 15 SAMUEL J. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 48:3 (4th ed. 1990); 2 JOSEPH M. PERILLO & HELEN H. BENDER, CORBIN ON CONTRACTS § 5.27 (rev. ed. 1995); FARNSWORTH, *supra* note 5, § 7.17. Also note that for exclusive agreements governed by the Uniform Commercial Code, the seller is under an implied obligation to use best efforts to supply the goods, and the buyer must in turn use best efforts to promote their sale. U.C.C. § 2-306 (2003).

7. FARNSWORTH, *supra* note 5, § 7.17.

8. *Id.* For a list of cases that illustrate this proposition, see 17A AM. JUR. 2D *Contracts* § 370 n.1 (2005).

9. See *infra* Part II.D.

10. 17A AM. JUR. 2D *Contracts* § 370 (2005) ("Generally, there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.").

11. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

parties. In these instances, if a party fails to use good faith efforts towards its obligations, the court may find a breach of the contract.<sup>12</sup>

What the duty of good faith requires depends on the circumstances of the agreement,<sup>13</sup> and the general duty of good faith can be articulated in different ways.<sup>14</sup> According to the Restatement, “Good faith performance . . . emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”<sup>15</sup> Under this definition, actions that “violate community standards of decency, fairness or reasonableness” fall outside of the meaning of good faith.<sup>16</sup> More specifically, “Subterfuge and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified . . . and fair dealing may require more than honesty.”<sup>17</sup> In essence, the duty of good faith concerns notions of honesty and fair play,<sup>18</sup> and absent a specific provision outlining a party’s performance, these notions of fairness will determine whether a party has satisfied its contractual duties.

### ***B. Best Efforts and Good Faith***

If a contract contains a specific provision governing a party’s performance, such as a best efforts clause, courts must determine how this clause interacts with the implied duty of good faith. Unlike the duty of good faith, the duty to use best efforts is only implied in limited circumstances.<sup>19</sup> Therefore, best efforts obligations are likely to apply only when specifically contained within a

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12. FARNSWORTH, *supra* note 5, § 7.17(b) (“One party’s acting in bad faith may amount to such a breach as will not only subject that party to an action for damages but will excuse the other party’s remaining duties of performance.”) (footnote call numbers omitted).

13. *See id.* § 7.17; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (“The phrase ‘good faith’ is used in a variety of contexts, and its meaning varies somewhat with the context.”).

14. *See* FARNSWORTH, *supra* note 5, § 7.17(b). Farnsworth identifies two ways of defining the boundaries of good faith. *Id.* One method defines *bad* faith, and the other defines good faith based on the expectations of the parties. *Id.* Compare Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201 (1968) (“[‘Good faith’] is a phrase without general meaning . . . of its own and serves to exclude a wide range of heterogeneous forms of bad faith.”), with Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980) (“Good faith performance . . . occurs when a party’s discretion is exercised for any purpose within the reasonable contemplation of the parties . . .”).

15. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

16. *Id.*

17. *Id.* § 205 cmt. d.

18. E. Allan Farnsworth, *On Trying to Keep One’s Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 8 (1984) (“Good faith is a standard that has honesty and fairness at its core.”).

19. An implied duty of best efforts will normally arise only in exclusive licensing deals. *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, 726 (2002).

contract. Because the duty of good faith—and not best efforts—is the minimum performance standard implicit in all contracts, it logically follows that a contract containing an explicit best efforts clause requires additional performance beyond good faith.<sup>20</sup> Put another way, the best efforts standard should be more “onerous”<sup>21</sup> and “exacting”<sup>22</sup> than the standard of good faith.

When interpreting a best efforts clause, most courts hold that a promisor is obligated to use efforts beyond those required by the implied duty of good faith.<sup>23</sup> However, a minority of courts use “good faith” and “best efforts” interchangeably and hold that a party that meets its duty of good faith has sufficiently met its best efforts commitment.<sup>24</sup> By equating best efforts and good faith, the authority of the best efforts clause is removed entirely, and the agreement is interpreted as if the best efforts language was not in the contract at all. The practical impact of this minority interpretation is that the implied duty of good faith, and not the bargained-for best efforts clause, will govern the contested party’s performance, which likely goes against the reasonable expectations of the parties.

### *C. Best Efforts and the Contextual Analysis*

Although courts apply different standards to determine whether a party has met its best efforts obligation, one general notion applies: when the contract does not expressly contain a definition of best efforts, courts will look to the circumstances of the agreement to determine the meaning of the clause.<sup>25</sup> Therefore, no matter what standard a court uses to determine whether a party’s actions are sufficient in light of a best efforts promise, that determination cannot be made without an examination of the facts surrounding the agreement.<sup>26</sup>

The impact of the contextual approach to best efforts clauses is that the analysis of a bound party’s performance will center on the abilities and expectations of the particular parties to the contract. Focusing on the specific facts surrounding a contract reflects the logic that a best efforts clause can require different levels of performance depending on the party bound by it. A small,

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20. See, e.g., *Grossman v. Lowell*, 703 F. Supp. 282, 284 (S.D.N.Y. 1989) (holding that a best efforts clause required an additional obligation beyond the implicit duty of good faith).

21. FARNSWORTH, *supra* note 5, § 7.17.

22. *Id.* § 7.17(c).

23. See *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Pub. Co.*, 306 N.Y.S.2d 599, 600 (N.Y. App. Div. 1969), *aff’d*, 281 N.E.2d 142, 142 (N.Y. 1972).

24. See *Grant v. Bd. of Educ.*, 668 N.E.2d 1188, 1197 (Ill. App. Ct. 1996); *W. Geophysical Co. of Am., Inc. v. Bolt Assocs., Inc.*, 584 F.2d 1164, 1171 (2d Cir. 1978); *Triple-A Baseball Club Assoc. v. Ne. Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987).

25. See *Perma Research & Dev. Co. v. Singer Co.*, 308 F. Supp. 743, 748 (S.D.N.Y. 1970) (“‘Best efforts’ . . . is a term which necessarily takes its meaning from the circumstances.”); Victor P. Goldberg, *Great Contracts Cases: In Search of Best Efforts: Reinterpreting Bloor v. Falstaff*, 44 ST. LOUIS U. L.J. 1465, 1465 (2000) (noting that best efforts can only be defined contextually).

26. See *Triple-A*, 832 F.2d at 225 (explaining that best efforts “cannot be defined in terms of a fixed formula . . . [but] varies with the facts and the field of law involved”).

regional brewer, for example, may satisfy its best efforts obligations with a level of performance that would not sufficiently establish the best efforts of a national brewer such as Anheuser-Busch.<sup>27</sup>

In addition to its practical implications, the contextual analysis has procedural implications as well. Because the meaning of best efforts must be gleaned from the circumstances, a question of fact will often exist as to whether a party has used its best efforts.<sup>28</sup> It follows that if the breach of a best efforts clause results in litigation, the case will likely survive the summary judgment phase, because the meaning of the best efforts clause must be determined by the finder of fact.

## II. INTERPRETATIONS OF BEST EFFORTS

### A. The Exacting Bloor Standard

*Bloor v. Falstaff Brewing Corp.*<sup>29</sup> established a frequently cited standard for analyzing best efforts clauses.<sup>30</sup> The plaintiff, James Bloor, was the trustee of P. Ballantine & Sons (“Ballantine”),<sup>31</sup> a regional brewery that produced beer and ale for sale in the Northeastern market.<sup>32</sup> The defendant, Falstaff Brewing Corporation (“Falstaff”), the nation’s fifth largest brewer at the time of trial,<sup>33</sup> acquired Ballantine’s assets in March 1972, including the rights to Ballantine’s brewing labels.<sup>34</sup>

In the agreement to acquire Ballantine, Falstaff contracted to “use its best efforts to promote and maintain a high volume of sales” of the Ballantine brands.<sup>35</sup> After a severe decline in the sale of Ballantine products, Ballantine’s trustee sued

27. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 267 (S.D.N.Y. 1978), *aff’d*, 601 F.2d 609 (2d Cir. 1979).

28. *See* *Mor-Cor Packaging Prods., Inc. v. Innovative Packaging Corp.*, 328 F.3d 331, 335–36 (7th Cir. 2003); *First Union Nat’l Bank v. Steele Software Sys. Corp.*, 838 A.2d 404, 428 (Md. Ct. Spec. App. 2003) (“[A]lthough contract interpretation is generally a question of law, a factual determination may be required as to what is deemed to be ‘best efforts.’”); *USAirways Group, Inc. v. British Airways PLC*, 989 F. Supp. 482, 491 (S.D.N.Y. 1997) (“[T]o the extent that the term ‘best efforts’ . . . is ambiguous, and criteria by which to measure the parties’ ‘best efforts’ are lacking, the extrinsic circumstances concerning the parties’ understanding of that term may be considered by the finder of fact.”).

29. 454 F. Supp. 2d 258.

30. One commentator refers to *Bloor* as a “casebook favorite.” Goldberg, *supra* note 25, at 1465.

31. *Bloor*, 454 F. Supp. at 260. In 1969, Investors Funding Corporation purchased Ballantine. *Id.* at 263.

32. *Id.* In the early 1970s, New York, New Jersey, Connecticut, and Pennsylvania accounted for about half of the sales of Ballantine products. *Id.*

33. *Id.* at 264. Falstaff’s inability to grab a “substantial foothold” in the Northeast market motivated the acquisition. *Id.*

34. *Id.*

35. *Id.* at 260. Farnsworth has explained that the parties in a best efforts obligation “come into sharpest conflict when . . . it is in the interest of the promisor to maximize net profit while it is in the interest of the promisee to maximize gross receipts.” Farnsworth, *supra* note 18, at 10. Such was the case in *Bloor*.

Falstaff for the alleged breach of the best efforts clause.<sup>36</sup> The factual issue for the court<sup>37</sup> was whether Falstaff's merchandising efforts were sufficient in light of their obligation to use best efforts.<sup>38</sup>

Falstaff argued that a subjective standard should apply when determining the meaning of a best efforts clause, and accordingly, Falstaff's poor financial condition should be taken into consideration when analyzing its efforts to sell and promote Ballantine products.<sup>39</sup> The trustee argued for an objective approach, which would analyze Falstaff's actions from the standard of the "average, prudent comparable" brewer.<sup>40</sup>

The trial court interpreted the best efforts clause to obligate Falstaff to promote Ballantine products in "good faith and to the extent of its own total capabilities."<sup>41</sup> The court defined "capability" to include not only the subjective financial ability of the bound party, but also objective factors such as "the marketing expertise and experience attributable to the 'average, prudent, comparable' brewer."<sup>42</sup> The best efforts clause did not, however, require Falstaff to promote Ballantine products to the same degree that a much larger brewer might have done.<sup>43</sup> Rather, the clause obligated Falstaff to promote and sell to the "extent of its own total capabilities," so Falstaff's own abilities and opportunities were central to the court's analysis.<sup>44</sup>

Analyzing the promotion and sales of Ballantine products to determine whether Falstaff put forth sufficient effort, the trial court held that Falstaff failed to meet its obligation to use best efforts.<sup>45</sup> A number of Falstaff's business decisions led to the court's conclusion. These included the closing of four of six retail distribution centers which accounted for a "significant percentage"<sup>46</sup> of Ballantine sales, a decision that had "disastrous" results according to a Falstaff vice president;<sup>47</sup> the selection of certain distributors for Ballantine products when there was "strong concern about their ability to cover the [distribution] area";<sup>48</sup> the inequitable treatment of Ballantine products in relation to Falstaff products, such as the extensive advertising of Falstaff (but not Ballantine) products in Texas and

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36. *Bloor*, 454 F. Supp at 265. Ballantine also claimed breach of contract on two additional theories of recovery. *Id.*

37. The trial was held before the court without a jury. *Id.* at 260.

38. *Id.* at 266.

39. *Id.* Falstaff contended that it promoted the Ballantine products to the full extent of its limited financial abilities. *Id.*

40. *Id.* (quoting *Arnold Prods., Inc. v. Favorite Films Corp.*, 176 F. Supp. 862, 866 (S.D.N.Y. 1959)).

41. *Id.* at 267.

42. *Id.* The "average, prudent, comparable" brewer standard was the objective test argued for by the trustee. *Id.*

43. *Id.*

44. *Id.* This included Falstaff's financial abilities. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 268.

Missouri;<sup>49</sup> and the sale of Falstaff, a premium beer, for extensive periods of time for a lower price than Ballantine, a cheaper, non-premium beer.<sup>50</sup>

Falstaff's reduction of expenses also contributed to the breach of contract.<sup>51</sup> In 1975, Falstaff closed its advertising department, and enacted severe personnel cutbacks in its distribution, sales, marketing, advertising, and warehousing departments.<sup>52</sup> Cutbacks had the effect of virtually eliminating all promotion and advertising for Ballantine Beer, and experts for both Falstaff and Ballantine testified that "personal contact, merchandising and advertising were essential to the marketing of any beer."<sup>53</sup> Falstaff's decision to make personnel cuts was based on its reduced financial strength in 1975, when because of serious cash-flow problems, Falstaff could not meet its pressing debts.<sup>54</sup> The court, however, found that while Falstaff may have had financial troubles in 1975, the company still had "considerable borrowing capacity."<sup>55</sup> In addition, Falstaff's "financial picture was much improved" in 1976 and 1977.<sup>56</sup> As such, the severe cutbacks in advertising personnel may have only been *temporarily* justified in late 1975, but these cuts were not justified in light of Falstaff's financial condition in 1976 and 1977.<sup>57</sup>

Falstaff defended its personnel cutbacks and marketing strategy by arguing that the policies after 1975 affected Ballantine and Falstaff sales equally.<sup>58</sup> The court rejected this argument on two separate grounds. First, the court held that the policies did not affect both brands of beer equally.<sup>59</sup> Second, the court stated that even if the policies did affect both brands equally, Falstaff's contractual obligations to promote and sell Ballantine beer created a greater obligation to Ballantine's product than to its own.<sup>60</sup> In essence, the court held that Falstaff, accountable only to its shareholders, could treat its own product however it wanted, even going so far as to discontinue its sales.<sup>61</sup> By contrast, the contractual obligations to use best efforts in the sale and promotion of Ballantine products

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49. *Id.* at 271.

50. *Id.*

51. *Id.* at 270.

52. *Id.*

53. *Id.*

54. *Id.* at 264. In March of 1975, Falstaff could not meet its payroll, nor pay off other immediate debts. *Id.* To meet these requirements, Paul Kalmanovitz forwarded upwards of \$10 million to Falstaff so that its debts could be paid. *Id.* In return, Mr. Kalmanovitz received 35% of Falstaff's preferred shares. *Id.* In addition, Falstaff named Mr. Kalmanovitz Chairman of the Board, giving him control over the Board of Directors. *Id.* Falstaff's shareholders approved this agreement on April 28, 1975. *Id.*

55. *Id.* at 267.

56. *Id.* The appellate court later recognized that the trial court may have "unduly minimized" Falstaff's impending insolvency issues. *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 n.8 (2d Cir. 1979).

57. *Bloor*, 454 F. Supp. at 270.

58. *Id.*

59. *Id.*

60. *Id.* at 270-71.

61. *Id.* at 270.

created a markedly different relationship between Falstaff and Ballantine's products and required a greater effort to promote and sell.<sup>62</sup>

In addition, even if Falstaff's financial condition was dire—which the court held it was not—performance of a contract cannot be excused “where the difficulty of performance arises from financial difficulty or economic hardship.”<sup>63</sup> Furthermore, the court quoted with approval the New York Court of Appeals: “[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, *even to the extent of insolvency or bankruptcy*, performance of a contract is not excused.”<sup>64</sup> Thus, the trial court would likely not excuse a party from its obligations even in the case of bankruptcy. The court therefore found Falstaff in breach of its requirement to use its best efforts to promote and sell Ballantine products.<sup>65</sup>

The Second Circuit Court of Appeals upheld the finding that Falstaff breached its contractual obligation to Ballantine.<sup>66</sup> Although the court recognized that Falstaff had a “right to give reasonable consideration to its own interests” when making business decisions,<sup>67</sup> the best efforts clause obligated Falstaff to treat the Ballantine brand better than its own.<sup>68</sup> Although Falstaff's decision to maximize profits in spite of serious losses in volume to the Falstaff brand of beer would have been permissible,<sup>69</sup> the best efforts clause meant that Falstaff could not take this profit-centered approach with the Ballantine brands if a severe decrease in those sales would result.<sup>70</sup> Since the decision to go forward with the profit-driven approach occasioned the severe decrease in Ballantine product sales, Falstaff breached its best efforts covenant.<sup>71</sup>

Regarding Falstaff's dire financial condition, the Court of Appeals did not construe the trial court's holding to *require* a purchaser to “spend itself into bankruptcy to promote the sales of [the acquired company's] products.”<sup>72</sup> The appellate court, however, did place the burden on the purchaser to show that “there was nothing significant it could have done to promote [the acquired company's] sales that would not have been financially disastrous.”<sup>73</sup> Thus, when a party contracts to use best efforts to promote a company's product and a lawsuit arises

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62. *Id.*

63. *Id.* at 267 n.7.

64. *Id.* (quoting 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 41 (N.Y. 1968)) (emphasis added).

65. *Id.* at 270.

66. Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 614 (2d Cir. 1979).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* According to the appellate court, the trial court made a permissible inference that Falstaff simply did not care about Ballantine's sales volume and was content to let that volume plummet if it meant higher profits for Falstaff. *Id.*

71. *Id.* at 614–15.

72. *Id.* at 614.

73. *Id.* at 614–15.



over an alleged breach of that obligation, *Bloor* requires a high standard of performance, even if the bound party is in financial turmoil.<sup>74</sup>

**Analysis: *Bloor*'s Impact on the Interpretation of Best Efforts**

Some commentators suggest that *Bloor* failed to advance the interpretation of best efforts clauses because Falstaff's performance was such a blatant breach of its obligation to promote and sell Ballantine products.<sup>75</sup> However, an analysis of the circumstances of the agreement is necessary when pinpointing the meaning of a best efforts clause.<sup>76</sup> By outlining the framework for analysis, *Bloor* contributed to the interpretation of best efforts clauses by providing a clear standard which calls for evaluating subjective (total capabilities of the promising party and circumstances surrounding the agreement in question) and objective (average, prudent, comparable party) factors.

**B. Cases Following the *Bloor* Standard**

Some courts follow *Bloor* and apply exacting standards containing both objective and subjective elements.<sup>77</sup> Such was the case in *Carlson Distributing Co. v. Salt Lake Brewing Co.*,<sup>78</sup> a dispute with facts similar to those in *Bloor*. In 1994, Salt Lake Brewing Co. ("SLB") contracted with Carlson Distribution Co. ("Carlson") to distribute SLB's "Squatters" brand of beer.<sup>79</sup> A clause in the distribution agreement obligated Carlson to use its best efforts in the sale, marketing, and distribution of Squatters.<sup>80</sup> In 2000, SLB notified Carlson that it had terminated the distribution agreement, and Carlson sued for breach of

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74. See Morton P. Fisher, Jr., *Use of "Best Efforts" Clauses in Leases—An Emerging Test*, in ALI-ABA COURSE OF STUDY: COMMERCIAL LEASING 345 (1990), available at C494 ALI-ABA 341, 345 (Westlaw). According to Fisher:

The *Bloor* decision imposes a heavy burden on the best efforts promisor in two significant respects. First, such a promisor must be willing to sustain losses of an unknown, yet certainly substantial, quantity in satisfaction of its best efforts obligation. Moreover, in a court proceeding, the best efforts promisor will have the burden of proving that there was nothing that could be done to attain the objective of the contract that would not have been financially disastrous.

*Id.*

75. See Farnsworth, *supra* note 18, at 11 (stating that *Bloor* "did relatively little to add precision to the meaning of 'best efforts,' since [Falstaff] fell so far short of the mark"); Goldberg, *supra* note 25, at 1465 ("[S]ome commentators have found Falstaff's breach so egregious as to provide not much of a test of the boundaries of 'best efforts.'").

76. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 267 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979).

77. One court has determined that although the *Bloor* standard incorporated the objective element of an "average, prudent, comparable" entity, "the tone of [the *Bloor* court's] opinion indicates that [the] careful analysis of what constitutes best efforts essentially focused on the particular defendant's conduct." *Oleg Cassini v. Jovan, Inc.*, No. 84 Civ. 2117, 1987 WL 7733, at \*1 (S.D.N.Y. Mar. 3, 1987).

78. 95 P.3d 1171 (Utah Ct. App. 2004).

79. *Id.* at 1174.

80. *Id.* at 1175.

contract.<sup>81</sup> In response, SLB filed a counterclaim alleging that Carlson had breached its obligation to use best efforts in the distribution of Squatters beer.<sup>82</sup>

Before trial, Carlson moved to admit evidence that showed the sale of Squatters beer had decreased dramatically after M & M Distributing Co. (“M & M”) took over distribution duties from Carlson following SLB’s termination of Carlson’s agreement.<sup>83</sup> The trial court, finding this evidence irrelevant to the issue of whether Carlson met its contractual obligation, excluded the evidence.<sup>84</sup> Carlson appealed to contest, *inter alia*, the exclusion of this evidence.<sup>85</sup>

Both SLB and Carlson cited *Bloor* when suggesting which standard the court should apply to Carlson’s performance.<sup>86</sup> Carlson argued that best efforts “implicated the objective standard of the ‘average, prudent, [and] comparable’ distributor.”<sup>87</sup> Under this standard, the performance of M & M would be relevant since comparing M & M and Carlson’s distribution of Squatters would help to evaluate Carlson’s performance objectively in light of its duty to use best efforts.<sup>88</sup> By contrast, SLB argued that the *Bloor* standard was fully subjective,<sup>89</sup> so the performance of M & M was irrelevant to the determination of whether Carlson used its best efforts to sell and promote Squatters.<sup>90</sup> These differing interpretations of the *Bloor* standard (one supporting a wholly objective approach and the other supporting a wholly subjective approach) highlight the ambiguity not only of the *Bloor* decision, but also of this entire area of contract law.

The *Carlson* court held that a party bound by a best efforts clause “agrees to do the best that it can regardless of the capabilities of others.”<sup>91</sup> At first glance, this test appears to be purely subjective, but the court recognized that the performance of other parties may still be relevant.<sup>92</sup> Under *Carlson*, in order to compare the actions of outside parties when analyzing performance under a best efforts obligation, the two parties must be “comparable.”<sup>93</sup> The “performance of the one [party] must also be evidence of the capabilities of the other [party].”<sup>94</sup>

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81. *Id.* at 1174–75.

82. *Id.* at 1175.

83. *Id.* at 1175, 1178.

84. *Id.* at 1175.

85. *Id.* at 1176.

86. *Id.* at 1178–79.

87. *Id.* at 1178.

88. *Id.*

89. *Id.* at 1178–79. SLB supported the fully subjective interpretation by citing the *Bloor* court’s observation that the best efforts obligation did not require Falstaff to promote Ballantine beer to the same degree that a larger brewer might have, but it did require Falstaff to promote Ballantine beer to the extent of its own capabilities. *Id.* (citing *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 267 (S.D.N.Y. 1978), *aff’d*, 601 F.2d 609 (2d Cir. 1979)).

90. *Carlson*, 95 P.3d at 1178–79.

91. *Id.* at 1179.

92. *Id.*

93. *Id.*

94. *Id.* This objective element is similar to the “average, prudent, comparable” entity element used in *Bloor*, 454 F. Supp. at 267.

More specifically, the efforts of another party “would have to take place under similar circumstances where evidence of [another party’s] efforts would bear in some meaningful way on [the obligated party’s] capabilities to perform similarly.”<sup>95</sup>

The trial court held that M & M distributed Squatters under different conditions and circumstances than did Carlson, and therefore, evidence of M & M’s distribution was excluded.<sup>96</sup> Upon review, the Court of Appeals held that the trial court did not abuse its discretion in making the determination to exclude the evidence.<sup>97</sup> Because “M & M’s actual performance did not accurately reflect upon whether Carlson employed its own best efforts,”<sup>98</sup> evidence of M & M’s performance was not relevant in the analysis of Carlson’s distribution of Squatters under its best efforts obligation.<sup>99</sup> Therefore, only “the capabilities and circumstances of Carlson alone” should be analyzed when determining whether Carlson met its best efforts obligation.<sup>100</sup>

Both *Carlson* and *Bloor* conducted a primarily subjective analysis when examining a party’s performance under a best efforts obligation to sell and promote another party’s product.<sup>101</sup> Yet, both courts also allowed objective evidence to factor into the analysis.<sup>102</sup> Neither the *Bloor* nor *Carlson* standard can accurately be described as wholly objective or wholly subjective.<sup>103</sup>

Examining another breach of a best efforts clause, the court in *First Union National Bank v. Steele Software Systems Corp.*<sup>104</sup> also applied a standard that included both subjective and objective elements. The agreement at issue obligated First Union National Bank (“First Union”) to use its best efforts to direct title search and appraisal work for First Union home equity loans to Steele Software Systems Corp. (“Steele”).<sup>105</sup> Specifically, the service agreement stated: “For all of the Services and Reports, as required by First Union for Residential

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95. *Carlson*, 95 P.3d at 1179.

96. *Id.* The record reflected that “M & M was taking on Squatters as a new line, and one that was in direct competition with other brands that were already established in the M & M distribution scheme.” *Id.* These circumstances meant that M & M’s performance was irrelevant to the determination of whether Carlson employed best efforts. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 267 (S.D.N.Y. 1978), *aff’d*, 601 F.2d 609 (2d Cir. 1979) (holding that the best efforts obligation contracted Falstaff to sell and promote Ballantine’s products “in good faith and to the extent of its own total capabilities”); *Carlson*, 95 P.3d at 1179 (finding that “the ‘best efforts’ standard is primarily a subjective one”).

102. *See Bloor*, 454 F. Supp. at 272 (“[Falstaff] neglected to act in the manner required of the *average, prudent, comparable* brewer in marketing [Ballantine’s] product.”) (emphasis added); *Carlson*, 95 P.3d at 1179 (“[E]vidence of the actions or capabilities of others may still be relevant.”).

103. *Carlson* turned on wholly subjective factors, but only because evidence of a comparable distributor was not present. *See supra* note 96 and accompanying text.

104. 838 A.2d 404 (Md. Ct. Spec. App. 2003).

105. *Id.* at 417.

Real Estate secured loans, First Union will use its best efforts to direct these transactions to Steele.”<sup>106</sup> The agreement was made on a non-exclusive basis, and expired on May 1, 2000.<sup>107</sup>

In April 1999, First Union informed Steele that it had already satisfied its minimum volume requirements under the agreement and that First Union would not be providing Steele with the opportunity to perform further services, nor would First Union be renewing the contract when it expired in May 2000.<sup>108</sup> Steele filed suit claiming, *inter alia*, breach of contract.<sup>109</sup> The jury found that First Union had breached its contract and awarded damages to Steele in the amount of \$37,476,342.<sup>110</sup> First Union appealed the verdict.<sup>111</sup>

The appellate court first held that the best efforts clause was not too vague to be enforced.<sup>112</sup> Then, in determining how to analyze the best efforts clause, the appellate court cited Professor Farnsworth’s analysis that the best efforts standard has diligence at its core.<sup>113</sup> More specifically, the court stated that a best efforts clause does not *necessarily* bind a party to give all of its efforts to promoting the promisee’s product,<sup>114</sup> meaning that a party can fulfill its best efforts obligation while still promoting its own competing products.<sup>115</sup> As in *Bloor*,<sup>116</sup> the court in *First Union* held that the meaning of the best efforts clause must be taken from the subjective circumstances.<sup>117</sup>

The court outlined the subjective and objective factors that the jury could have reasonably relied upon to determine whether First Union used its best efforts.<sup>118</sup> The subjective factors included First Union’s transaction volume, Steele’s capabilities and speed of service, and the risks to which First Union would be exposed by sending a majority of its transactions to one vendor.<sup>119</sup> The court also recognized objective factors such as the *reasonable* business needs of a large regional bank to place its business with more than one vendor, the *ordinary*

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106. *Id.*

107. *Id.* at 417–18.

108. *Id.* at 419.

109. *Id.* at 409.

110. *Id.* at 425. The jury awarded Steele \$39,476,342 in compensatory damages for breach of contract and the same amount for fraudulent inducement, as well as \$200,000,000 in punitive damages. *Id.* The trial court held that the damages for breach of contract duplicated those for fraudulent inducement and entered judgment for \$39,476,342 in compensatory damages and \$200,000,000 in punitive damages. *Id.*

111. *Id.*

112. *Id.* at 452.

113. *Id.* at 429; *see also* Farnsworth, *supra* note 18, at 8 (“Best efforts is a standard that has diligence as its essence . . .”).

114. *First Union*, 838 A.2d at 429.

115. *Id.* (citing *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979)); *see also* FARNSWORTH, *supra* note 5, § 7.17(c) (stating that courts agree “that a duty of best efforts does not of itself impose a duty of exclusive dealing”).

116. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 267 (S.D.N.Y. 1978), *aff’d*, 601 F.2d 609 (2d Cir. 1979).

117. *First Union*, 838 A.2d at 448.

118. *Id.*

119. *Id.*

business meaning of a promise to use best efforts, and the *industry standard* for similar contracts between banks and service vendors.<sup>120</sup> These objective factors, which include references to the relative size of First Union as well as the industry standard for the contract at issue, are similar to the “average, prudent, comparable” party factor from *Bloor*.<sup>121</sup>

The court ultimately found sufficient evidence to support the jury’s determination that First Union had breached its obligation to use best efforts.<sup>122</sup> The evidence included the amount of business Steele received before the agreement, a provision in the contract suggesting that Steele’s business would continue to increase, Steele’s prompt and high quality work, the volume of First Union’s business, and the bank’s need to spread risk and maintain other business contacts. The court upheld the jury’s damages award for breach of contract based on the level of business that would have been generated from reasonably diligent efforts.<sup>123</sup>

### C. The Purely Subjective Approach to Analyzing Performance

The standards in *Bloor*, *Carlson* and *First Union*, although primarily subjective, allow the fact finder to take objective elements—such as the performance of comparable outside parties—into consideration when determining whether a best efforts obligation has been satisfied.<sup>124</sup> Some courts have removed the objective analysis and employ a purely subjective approach, including the court in *NCNB National Bank of North Carolina v. Bridgewater Steam Power Co.*<sup>125</sup> Bridgewater Steam Power Co. (“Bridgewater”) contracted with NCNB Bank of North Carolina (“NCNB”) for the performance of financial services.<sup>126</sup> The agreement contained an obligation for NCNB to use best efforts to arrange for the financing of a wood-fired electric generating facility for Bridgewater in New Hampshire.<sup>127</sup> When Bridgewater refused to pay NCNB in return for services rendered, NCNB sued to recover the unpaid fees.<sup>128</sup>

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120. *Id.*

121. *Bloor*, 454 F. Supp. at 267.

122. *First Union*, 838 A.2d at 452. The trial court held that the best efforts clause required First Union to provide Steele with more than 50% of the services for its loans. *Id.* at 427. Steele argued that the best efforts clause was a promise from First Union to give Steele 75–85% of the bank’s title and appraisal work. *Id.* The appellate court explicitly rejected the notion that the best efforts clause required First Union to supply Steele with a specific percentage of business. *Id.* at 448.

123. *Id.* at 450, 452.

124. *Bloor*, 454 F. Supp. at 267 (allowing comparison of the bound party to the “average, prudent, comparable” party); *Carlson*, 95 P.3d at 1179 (stating that comparison between the bound party and another party is allowed when “evidence of [another party’s] efforts would bear in some meaningful way on [the obligated party’s] capabilities to perform similarly”); *First Union*, 838 A.2d at 448 (holding that the jury was properly allowed to consider objective factors such as industry standards and comparable parties when analyzing the bound party’s performance).

125. 740 F. Supp. 1140 (W.D.N.C. 1990).

126. *Id.* at 1151.

127. *Id.* In addition to the financing provision, the agreement also required NCNB “(1) to engage in a financial and factual analysis of the Facility, (2) to develop proforma

In its defense, Bridgewater asserted that NCNB was not entitled to fees because it failed to use best efforts to arrange financing for the proposed facility.<sup>129</sup> To support this defense, Bridgewater “argued that NCNB did not act promptly, failed to identify and solicit all investors who might have been interested in financing the facility, failed diligently to pursue lenders contacted, and failed to market the facility as aggressively as it could have.”<sup>130</sup>

Since a definition of best efforts was not set forth in the agreement, the court determined the meaning of the clause from the circumstances.<sup>131</sup> Chiefly, the court emphasized that NCNB’s ability to secure financing was directly related to the specifics of the project.<sup>132</sup> Regarding NCNB’s specific level of performance, the court emphasized NCNB’s previous transactional experience when analyzing its decisions, including the choice to delay the securing of financing.<sup>133</sup> In addition, the court considered NCNB’s “expertise, financial status, opportunities, and other abilities” in determining whether it used its best efforts.<sup>134</sup>

The court found that the facts clearly established that NCNB never relented in its performance—despite encountering numerous difficulties—and its efforts to obtain financing satisfied the best efforts obligation.<sup>135</sup> Because the ability to secure financing was directly related to the specifics of the project, the fact that Bridgewater was disappointed with NCNB’s performance was insufficient

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financial statements and cash flow projections, (3) to determine an appropriate legal and financial structure for the project, [and] (4) to form a business and financial plan for presentation to potential financing sources.” *Id.* The parties did not dispute these provisions of the agreement. *Id.*

128. *Id.* at 1141. The trial was held before the court without a jury. *Id.*

129. *Id.* at 1151.

130. *Id.*

131. *Id.* at 1152. The court stated that “because Bridgewater Steam’s goal in engaging NCNB, and NCNB’s goal in accepting Bridgewater Steam as a client, was to obtain financing for the construction and development of the Facility, the meaning of the term ‘best efforts’ can be determined from the circumstances.” *Id.*

132. *Id.* The court stated that the “ability to obtain financing directly related to the anticipated success of the project, the specific project’s assets, and the existing contracts for the construction of the project and for the sale of the specific project’s output.” *Id.*

133. *Id.* NCNB decided to delay financing on a number of occasions based on its belief that Bridgewater would have a greater ability to secure funds after the resolution of a number of problems. *Id.* The problems included “the existence of a zoning dispute and related litigation, the end of the 1985 calendar year, a dispute between the partners which eventually resulted in litigation among them, and the failure of Bridgewater Steam to select definitively its major suppliers.” *Id.* The determination that delaying would increase the ability to secure financing for the facility was based on NCNB’s experience in financial transactions. *Id.* The court found that these decisions to delay were “rational and plausible.” *Id.*

134. *Id.*

135. *Id.* at 1153. The court listed a number of steps that NCNB took in securing financing, including distributing the Placement Memorandum to financing sources, soliciting financing from sources that NCNB knew to be active in the project financing market, being available to NCNB to assist with negotiations, and reviewing and analyzing financing proposals. *Id.* at 1152.

to establish breach.<sup>136</sup> The court made no reference to any objective third party, and the focus of the court's analysis remained squarely on the details and circumstances of the project and the parties involved.<sup>137</sup>

The court in *Olympia Hotels Corp. v. Johnson Wax Development Corp.* took a different approach to the wholly subjective analysis of best efforts clauses.<sup>138</sup> Defendant Racine hired Olympia Hotels Corp. ("Olympia") as a hotel management firm to establish a first-class hotel.<sup>139</sup> The agreement contained a provision whereby Olympia promised to use its best efforts to make the hotel a success.<sup>140</sup> Several years after the hotel was built, the hotel was floundering, and Racine gave Olympia a written notice of default.<sup>141</sup> Soon after, Olympia sued, and Racine counter-claimed for breach of contract.<sup>142</sup>

To determine whether Olympia had used its best efforts, the Seventh Circuit, in an opinion written by Judge Posner, utilized a subjective analysis that focused on Olympia's prior, similar activities.<sup>143</sup> The court rejected the notion, which the *Bloor* court had supported, that a promisor bound to use best efforts must treat the promisee's affairs *better than its own*.<sup>144</sup> Judge Posner required much less of Olympia, holding that it had not undertaken to treat Racine's affairs even *the same as it treated its own*.<sup>145</sup> Rather, Posner defined best efforts as "the efforts the promisor has employed in those parallel contracts where the adequacy of his efforts have not been questioned."<sup>146</sup> This means that "[i]f Olympia worked as hard for Racine as it did for its other, but noncomplaining, customers, then it was using its best efforts within the meaning of the contract."<sup>147</sup>

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136. *Id.* This suggests that, due to the difficulties surrounding the facility, Bridgewater may have been disappointed regardless of the efforts put forth by NCNB, but mere disappointment is not a sufficient benchmark for determining whether best efforts have been met.

137. *Id.*

138. 908 F.2d 1363, 1373 (7th Cir. 1990).

139. *Id.* at 1366.

140. *Id.*

141. *Id.*

142. *Id.* at 1365.

143. *Id.* at 1373; see James M. Van Vliet, Jr., "Best Efforts" Promises Under Illinois Law, 88 ILL. B.J. 698, 701 n.30 (2000) (explaining that Judge Posner's standard defines best efforts as the "[u]sual effort by [the] promisor").

144. *Olympia*, 908 F.2d at 1373-74.

145. *Id.* Racine argued that Olympia was a fiduciary of Racine, and as such, Olympia contracted to treat Racine's affairs as if they were its own. *Id.* at 1373. Judge Posner held that the best efforts clause did not create a "fiduciary endeavor," and Racine's argument therefore failed. *Id.* at 1374.

146. *Id.* at 1373. Judge Posner stated that meaning of best efforts is most clear when the party bound to this effort has had similar contractual obligations with other parties. *Id.*

147. *Id.* at 1373.

**Analysis: Comparison of Purely Subjective Best Efforts Tests**

Judge Posner's analysis differs from the subjective analysis in *Bridgewater*, which included not only an evaluation of the obligated party's efforts, but also an evaluation of that party's abilities.<sup>148</sup> By contrast, Judge Posner's standard is far less complex in that the court must analyze only previous *efforts* under similar contracts when determining whether a party used its best efforts.<sup>149</sup> The court need not analyze the past, present, or future *abilities* of a bound party, nor must it compare those abilities to the party's performance under the contract.<sup>150</sup>

Simply put, best efforts are established under *Olympia* if the bound party has employed the same level of effort in a parallel contract, and that effort was not questioned by the other party.<sup>151</sup> Therefore, if Party A argues that Party B has breached its best efforts obligation, that claim will only succeed if (1) Party B had previously contracted with another party (Party C) in a similar contractual agreement; (2) Party B's effort in that agreement was parallel to the effort being questioned by Party A; and (3) Party C complained about that effort. So if no previous contractual partner has questioned the adequacy of Party B's similar level of performance in a prior, similar agreement, Party A's breach of contract claim will likely fail.

Judge Posner's definition of best efforts might be effective for contracts between recurring business partners, but it is wholly ineffective as a globally applicable rule. Even for those cases where the promisor has similar contracts, confusion and inequity may still result.<sup>152</sup> Judge Posner's standard is only applicable if the "promisor has similar contracts with other promisees."<sup>153</sup> If the party accused of breaching a best efforts clause has never previously executed a similar contract (perhaps because the contract at issue is the first of its type into which that the party has entered), then *Olympia* offers no guidance as to the meaning of a best efforts clause. For these reasons, Judge Posner's test is ineffectual in many cases that may arise.

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148. NCNB Nat'l Bank of N.C. v. Bridgewater Steam Power Co., 740 F. Supp. 1140, 1152 (W.D.N.C. 1990). There the court considered NCNB's "experience, expertise, financial status, opportunities, and other abilities" in determining whether the best efforts clause had been met. *Id.*

149. *Olympia*, 908 F.2d at 1373.

150. *Id.* Further, because the contract at issue contained an integration clause, Judge Posner upheld the District Court's decision forbidding Racine to present evidence of the precontractual discussions or agreements concerning the meaning of the best efforts clause based on the parol evidence rule. *Id.* If the contract were the product of fraud, then an inquiry into discussions that took place prior to the signing of the contract would be permissible. *Id.*

151. *Id.*

152. See MARK S. HOLMES, PRACTICING LAW INSTITUTE, PATENT LICENSING: STRATEGY, NEGOTIATIONS, FORMS, § 1:3.2 n.5 (2001) (citing *Olympia* as an example of a court applying a definition of best efforts that had unexpected and possibly unpleasant results).

153. *Olympia*, 908 F.2d at 1373.



Even in cases where the bound party has previously performed under a similar contract, courts will still encounter difficulty applying Judge Posner's best efforts definition. *Olympia* defines best efforts as those previous efforts where the adequacy of the performance was not questioned.<sup>154</sup> However, the opinion offers no insight as to the court's intended definition of the word "questioned." Subsequent courts will therefore have to decide what level of *complaining* from a prior party is sufficient to establish a "questioned" effort, be it an informal letter or an official lawsuit. The vagueness and unpredictability of the opinion increases the likelihood that inequity will result.

In addition, *Olympia* does not require that the questioning be reasonable. It merely requires that the adequacy of the bound party's effort be questioned. Therefore, wholly frivolous lawsuits that question a party's performance can disqualify those efforts from being used as evidence of a best efforts. This is true even if the previous performance in the questioned contract was so exhaustive that no greater effort could have been reasonably—or even unreasonably—expended.

Comparative evidence of similar previous performance is relevant for other best efforts standards, but only under *Olympia* is it *required*.<sup>155</sup> Accordingly, standards that do not require this comparison can effectively analyze a best efforts clause even without evidence of similar previous efforts and thus should be favored over the limited *Olympia* standard.

#### **D. Good Faith**

Some courts maintain that best efforts clauses obligate parties to nothing more than the duty of good faith implicit in every contract. An Illinois court took this position when analyzing the Chicago Board of Education's best efforts obligation to obtain a provision in a collective bargaining agreement.<sup>156</sup> The plaintiff, Erskine Grant, a tenured teacher who had been wrongfully discharged and subsequently reinstated, reached a settlement agreement with the Board allowing him to retire early.<sup>157</sup> A clause in the deal required the Board to use its best efforts to enter into an agreement with the Chicago Teacher's Union whereby the Board would pay all the teachers who participated in the early retirement program for their accumulated-but-unused sick days.<sup>158</sup> After the trial court denied payment of Grant's remaining sick days accrued prior to his wrongful termination,

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154. *Id.* The court describes these unquestioned efforts as those performed for "noncomplaining" customers. *Id.*

155. *See* Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258, 267 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979) (explaining that failure to provide evidence of an "average, prudent, comparable" party does not render the test ineffectual); Carlson Distrib. Co. v. Salt Lake Brewing Co., 95 P.3d 1171, 1179 (Utah Ct. App. 2004) (explaining that subjective analysis considers the abilities of the bound party regardless of whether there is evidence of a comparable party that may assist in determining whether best efforts were achieved); First Union Nat'l Bank v. Steele Software Sys. Corp., 838 A.2d 404, 448 (Md. Ct. Spec. App. 2003) (noting that a variety of factors are considered beyond industry standards or behavior of comparable parties).

156. Grant v. Bd. of Educ., 668 N.E.2d 1188, 1197 (Ill. App. Ct. 1996).

157. *Id.* at 1191.

158. *Id.*

Grant appealed.<sup>159</sup> One of the bases for his recovery was that the Board breached its best efforts clause to obtain the provision requiring the repayment of unused sick days.<sup>160</sup>

Analyzing the breach claim, the court recognized that “[a] best efforts undertaking has been likened to the exercise of good faith implied in all contracts.”<sup>161</sup> In fact, the court used the terms “best efforts” and “good faith” interchangeably throughout the opinion.<sup>162</sup> For example, the court stated that “[t]he question of whether a party has satisfied its ‘best efforts’ or good faith obligations is a factual one.”<sup>163</sup> By equating these two terms, *Grant* establishes that a best efforts clause can be satisfied by any performance that comports with good faith.<sup>164</sup> The court remanded for further analysis pursuant to this best efforts standard.<sup>165</sup>

Similarly, in *Western Geophysical Co. of America, Inc. v. Bolt Assocs., Inc.*, the Second Circuit Court of Appeals also applied a good faith standard when analyzing a best efforts obligation.<sup>166</sup> At issue was an exclusive licensing agreement between Western Geophysical Company of America (“Western”) and Bolt Associates (“Bolt”).<sup>167</sup> The agreement, which gave Western an exclusive license to use and sublicense an air-gun device,<sup>168</sup> obligated Western to use its best efforts to promote worldwide licensing and use of the device.<sup>169</sup> Ultimately, Bolt terminated the agreement based primarily on the contention that Western failed to

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159. *Id.* at 1190. The trial court initially held that Grant had been wrongfully discharged and ordered his reinstatement with back pay and restoration of all benefits. *Id.* Subsequently, Grant and the Board agreed that after his reinstatement, Grant would be allowed to retire. *Id.* The Board, however, refused to pay Grant’s 260.5 accrued and unused sick days. *Id.* After Grant filed a motion to enforce judgment, the trial court ordered the Board to pay the sixty-two unused sick days Grant accrued during his wrongful discharge, but denied payment of the 198.5 sick days that accrued before his discharge. *Id.* at 1191–92. Grant appealed. *Id.* at 1192.

160. *Id.*

161. *Id.* at 1197 (citing *United States v. Bd. of Educ.*, 799 F.2d 281, 292 (7th Cir. 1986); *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1978); *W. Geographical Co. v. Bolt Assocs., Inc.*, 584 F.2d 1164, 1171 (2d Cir. 1978)).

162. *Id.*

163. *Id.* (emphasis added).

164. *Id.* (citing *United States v. Bd. of Educ.*, 799 F.2d at 292 (“[A]ny best efforts clause . . . can be satisfied by any of a wide range of possible levels and types of performance that comport with the exercise of ‘good faith’ by the obligor.”)).

165. *Id.* at 1198. The court found that there were two potential interpretations of the best efforts clause, one that required payment for Grant’s unused sick days, and one that did not. *Id.* The court instructed the trial court that it could consider any parol evidence offered by the parties to help determine what the Board had actually obligated itself to do. *Id.*

166. 584 F.2d 1164, 1170–71 (2d Cir. 1978).

167. *Id.* at 1167.

168. *Id.* The device was to be used for underwater seismic exploration. *Id.* at 1166.

169. *Id.* at 1167.

satisfy its best efforts obligation.<sup>170</sup> Western subsequently brought suit against Bolt claiming breach of contract.<sup>171</sup>

The Court of Appeals upheld the District Court's determination that Western had in fact met its best efforts obligation.<sup>172</sup> The District Court construed the term "best efforts" to require an "active exploitation in good faith," and the Second Circuit found this definition proper.<sup>173</sup> Under this standard, the Second Circuit found substantial evidence to support the District Court's determination that Western satisfied the performance benchmark.<sup>174</sup> The evidence, including Western's good faith business judgment as to the best way to promote sublicensing and its attempts to improve the device and develop peripheral equipment, established that Western did not merely "sit on its hands" during the contractual period.<sup>175</sup> Further, Bolt failed to complain to Western about any alleged non-compliance with the contract during its term.<sup>176</sup> Finally, while Western *could* have sublicensed the device, the court upheld the trial court's determination that Western was not *required* to do so.<sup>177</sup> As such, Western satisfied its best efforts obligation through its "active exploitation in good faith."<sup>178</sup>

Because Western so clearly expended sufficient effort towards fulfilling its agreement, the case may not add anything to the understanding of best efforts. Recall that *Bloor* suffers similar criticism because the defendant fell so far short.<sup>179</sup> Nonetheless, *Western's* definition of best efforts does provide a clear standard that can be applied to cases dealing with a variety of contracts.

*Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.* also equated good faith and best efforts.<sup>180</sup> Jordan Kobritz, the majority owner of a Triple-A baseball franchise in Maine, contracted to buy a Double-A franchise from Northeastern Baseball Inc. ("NBI").<sup>181</sup> One element of the contract obligated both parties "to use their best efforts to obtain Eastern League approval" for the sale.<sup>182</sup>

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170. *Id.*

171. *Id.*

172. *Id.* at 1171.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See supra* note 75 and accompanying text.

180. 832 F.2d 214, 225 (1st Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

181. *Id.* at 217. At the time of trial, American professional baseball was divided into the Major Leagues (consisting of twenty-six teams divided into the American and National leagues) and the Minor Leagues. *Id.* at 216. The Minor Leagues were divided into four different classifications: Triple-A, Double-A, Single-A, and Rookie Leagues. *Id.* One of the Double-A leagues was the Eastern League. *Id.* In addition to NBI's sale of its Double-A franchise, NBI also contracted to purchase a Triple-A franchise from Kobritz. *Id.* at 217. Essentially, NBI and Kobritz agreed to swap baseball franchises. *Id.*

182. *Id.*

After the Eastern League refused to approve the sale,<sup>183</sup> Kobritz sued NBI claiming breach of the best efforts clause.<sup>184</sup>

In its analysis of NBI's best efforts, the court noted that "the 'best efforts' standard has been held to be equivalent to that of good faith."<sup>185</sup> The court explained: "The good faith obligation under an exclusive dealing contract is for the seller to use best efforts to supply the goods and the buyer to use best efforts to promote the sale."<sup>186</sup> The court made the sweeping claim that "[w]e have been unable to find any case in which a court found . . . that a party acted in good faith but did not use its best efforts."<sup>187</sup>

In fact, other cases stand in direct conflict to the contention that good faith equals best efforts. One such case involved a suit between the copyright owner of a series of books on basic electricity ("Van Valkenburgh") and the publisher of that series ("Hayden").<sup>188</sup> Van Valkenburgh's electrical books were Hayden's best selling publications, and accounted for a "substantial part of its income."<sup>189</sup> Between 1962 and 1963, the parties attempted to negotiate an agreement to publish a new edition to the series, but the copyright owner refused to reduce Hayden's royalties.<sup>190</sup> Unable to reach a deal, the publisher hired different authors to prepare a new group of electronic books that followed a similar organization and presentation style as the Van Valkenburgh series.<sup>191</sup> Van Valkenburgh sued Hayden for breach of contract.<sup>192</sup>

In analyzing whether Hayden failed to provide its best efforts in promoting Van Valkenburgh's books, the court recognized that a publisher has a "general right to act on its own interests" even if this action may lessen a certain author's royalties.<sup>193</sup> In other words, publishers are not restricted from publishing books that compete with one another.<sup>194</sup> However, the court recognized that "there

183. *Id.* at 218.

184. *Id.* at 217. Kobritz sought damages against NBI for alleged repudiation of contract, NBI's alleged conversion of the Kobritz's Triple-A franchise, and NBI's alleged breach of a side agreement that contained the best efforts clause. *Id.* at 218-19.

185. *Id.* at 225.

186. *Id.* (quoting *Gestetner Corp. v. Case Equip. Co.*, 815 F.2d 806, 811 (1st Cir. 1987) (construing ME. REV. STAT. ANN. tit. 11, § 2-306 (1964))).

187. *Id.* The court held NBI used its best efforts to obtain approval of the sale. *Id.* at 227. Furthermore, the court rejected as clearly erroneous the lower court's "speculation as to what other steps McGee should have taken." *Id.* at 227-28. The court "found no cases . . . holding that 'best efforts' means every conceivable effort." *Id.* at 228. The court also found that although Kobritz made little effort in obtaining Eastern League approval, this was insufficient to establish breach. *Id.*

188. *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Pub. Co.*, 281 N.E.2d 142, 143 (N.Y. 1972). Hayden published a five volume series on Basic Electricity and a six volume series on Basic Electronics between 1954 and 1959. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* In addition, the new books were marketed by Hayden to the customers that had previously placed large orders for the Van Valkenburgh books. *Id.*

192. *Id.* at 144.

193. *Id.* at 145.

194. *Id.*

may be a point where that activity is so manifestly harmful to the author, and must have been seen by the publisher . . . to be harmful, as to justify the court saying there was a breach of the covenant to promote the author's work."<sup>195</sup> The court affirmed the lower court's finding that Hayden breached its best efforts obligation based on Hayden's actions in publishing and promoting blatantly competing publications.<sup>196</sup>

However, the court also upheld the lower court's determination that Hayden *did not* breach its implicit covenant of good faith and fair dealing.<sup>197</sup> Therefore, under *Van Valkenburgh*, a party can act in good faith yet fail to meet its best efforts obligations. This, of course, is the very result that the *Triple-A* court claimed it could not find.<sup>198</sup>

#### Analysis: The Good Faith Approach Sterilizes Best Efforts Clauses

The duty of good faith is implicit in virtually every agreement.<sup>199</sup> Contracting parties are bound by this good faith duty even if expected levels of performance are not specifically addressed in contract itself. This means that the implied duty of good faith and fair dealing provides a baseline for evaluating contractual performance. Since the starting point of a party's performance is good faith, common sense suggests that by explicitly including a best efforts clause, the parties intended to obligate the promisor to a level of performance beyond that of mere good faith. Holding otherwise sterilizes best efforts clauses leaving them without independent meaning.

In his comparison of good faith and best efforts, Farnsworth states:

Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed on those contracting parties that have undertaken such performance. The two standards are distinct and that of best efforts is the more exacting . . . .<sup>200</sup>

Applying this analysis, even if courts cannot agree on how to define best efforts, the clause requires, at a minimum, performance beyond that of mere good faith. By equating good faith and best efforts, courts remove all meaning from the best efforts provision. This stands in stark contrast to the canon that "every word, phrase or term of a contract must be given effect" whenever possible.<sup>201</sup> In order to give effect to the bargained-for best efforts clause, courts should obligate the promisor to perform beyond the good faith efforts inherent in every contract.

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Triple-A Baseball Club Assoc. v. Ne. Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987).

199. *See supra* note 10.

200. FARNSWORTH, *supra* note 5, § 7.17(c).

201. 11 WILLISTON, *supra* note 6, § 32:5.

### *E. Best Efforts is Too Vague to be Enforced*

A minority of courts, including a line of cases in Illinois, avoid defining best efforts altogether and hold that these clauses are unenforceable.<sup>202</sup> Under this approach, a best efforts standard, absent a specific definition, is too indefinite and vague to be enforced.<sup>203</sup> One justification for this rule is that it avoids creating a confusing and inconsistent landscape of case-by-case definitions.<sup>204</sup> In addition, the rule encourages parties to specifically define performance parameters within their contracts.<sup>205</sup> Finally, invalidating these clauses ensures that courts cannot read a definition of best efforts into a contract that runs contrary to the intentions of the parties.<sup>206</sup>

The rule in Illinois is not that best efforts clauses are *per se* illusory. Rather, they are unenforceable when the agreement lacks specific performance parameters.<sup>207</sup> In order for a best efforts clause to survive the vagueness test, contracting parties must provide specific criteria—such as time durations and sales quotas—that will be used to measure the promisor's effort.<sup>208</sup> Additionally, a best efforts clause *may* be valid under Illinois law if the definition of best efforts can be inferred from the circumstances surrounding an agreement where parties agree to work towards a *specific goal*.<sup>209</sup>

### **Analysis: The Intentions of the Parties Are Not Served by Non-enforcement**

Although one of the justifications for invalidating best efforts clauses is to protect the intentions of the parties,<sup>210</sup> the Illinois rule encourages the opposite result. By taking the time and effort to bargain for a best efforts obligation, the parties likely intended to give teeth to the clause rather than merely clutter the

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202. See, e.g., *Kraftco Corp. v. Kolbus*, 274 N.E.2d 153, 156 (Ill. App. Ct. 1971); see also *Pinnacle Books, Inc. v. Harlequin Enters. Ltd.*, 519 F. Supp. 118, 122 (S.D.N.Y. 1981) (holding that a best efforts clause regarding future negotiation was unenforceable). The *Pinnacle* court distinguished its case from the long line of New York cases enforcing best efforts clauses, including *Bloor* and its progeny. *Id.* at 121–22. The *Pinnacle* court reasoned that the meaning of the particular best efforts clause at issue could not be implied from the circumstances because the parties had not agreed to work towards a specific goal, but rather agreed only to try to reach a future agreement. *Id.* Most jurisdictions disagree with this approach. See, e.g., *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 838 A.2d 404, 449 (Md. Ct. Spec. App. 2003) (“[B]est efforts clauses generally have been held enforceable because the parties intend to be bound, and there is an articulated standard.”).

203. *Kraftco*, 274 N.E.2d at 156.

204. Van Vliet, *supra* note 143, at 701–02.

205. *Id.*

206. *Id.*

207. *Kraftco*, 274 N.E.2d at 155–56.

208. *Heritage Remediation/Eng'g, Inc. v. Wendnagel*, No. 89 C 413, 1989 WL 153373 at \*5 (N.D. Ill. Nov. 9, 1989).

209. *Id.* at \*6 (distinguishing a valid best efforts clause from the one rejected in *Pinnacle Books, Inc. v. Harlequin Enterprises, Ltd.*, 519 F. Supp. 118 (S.D.N.Y. 1981)). For a discussion of *Pinnacle*, see *supra* note 202.

210. See Van Vliet, *supra* note 143, at 701–02.

agreement with superfluous language.<sup>211</sup> Since the parties made the effort to include the clause within the contract, courts should make the effort to interpret the intended meaning of the provision.<sup>212</sup> The intentions of the parties are better served by defining best efforts by the circumstances of the agreement rather than simply refusing to enforce the clause altogether.

### III. COURTS SHOULD ADOPT THE *BLOOR* STANDARD

This Note discusses the standards used by courts when determining whether a party satisfied its best efforts obligation. These standards include: (1) a primarily subjective, exacting analysis that allows the trier to consider objective criteria;<sup>213</sup> (2) a purely subjective approach;<sup>214</sup> (3) Judge Posner's *Olympia* standard defining best efforts based on the promisor's prior similar contracts;<sup>215</sup> (4) a good faith standard;<sup>216</sup> (5) and a line of cases which hold that best efforts clauses are too vague to be enforced.<sup>217</sup> This variety of approaches underscores the lack of judicial uniformity in analyzing best efforts clauses. When determining which method is most appropriate, one must remember that the court's primary function when interpreting contracts is to bring about the intentions of the parties.<sup>218</sup> With this goal in mind, courts should apply the standard that best achieves those intentions.

Courts that follow *Bloor* apply the most exacting standard when determining whether a best efforts clause has been satisfied. A party, having agreed to do "the best that it can,"<sup>219</sup> must perform to the "extent of its own total capabilities"<sup>220</sup> to meet its obligation. When making this determination, the trier considers the subjective circumstances of the agreement, including the financial condition of the parties, as well as the objective actions of an "average, prudent comparable" party.<sup>221</sup> Although the bound party need not spend itself into bankruptcy in order to fulfill its obligation,<sup>222</sup> nor disregard all competing interests or products,<sup>223</sup> the performance burden is high.<sup>224</sup>

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211. See 11 WILLISTON, *supra* note 6, § 32:5 ("An interpretation which gives effect to all provisions of the contract is preferred to one which renders a portion of the writing superfluous, useless or inexplicable.").

212. *Id.* (stating that "[t]o the extent possible . . . every word, phrase or term of a contract must be given effect").

213. See *supra* Parts II.A–B.

214. See *supra* Part II.C.

215. *Id.*

216. See *supra* Part II.D.

217. See *supra* Part II.E.

218. See 11 WILLISTON, *supra* note 6, § 32:2.

219. Carlson Distrib. Co. v. Salt Lake Brewing Co., 95 P.3d 1171, 1179 (Utah Ct. App. 2004).

220. *Id.* (quoting *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 267 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979)).

221. See *Bloor*, 454 F. Supp. at 266–67.

222. *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979).

223. First Union Nat'l Bank v. Steele Software Sys. Corp., 838 A.2d 404, 429 (Md. Ct. Spec. App. 2003).

224. See *supra* note 74.

Because the *Bloor* standard is primarily subjective, it serves the intentions of the parties by focusing the analysis on the specifics and circumstances of the agreement. Unlike the purely subjective analysis in *NCNB*, however, *Bloor* eases the task of the trier by allowing a comparison between the promisor's performance and the performance of comparable parties in similar transactions. This objective comparison contextualizes the analysis for the trier of fact, and makes *Bloor* superior to the purely subjective analysis.

Further, *Bloor* is vastly superior to the good faith and non-enforcement approaches. When a contract contains a bargained-for best efforts clause, the parties likely intended not only that the clause be enforced, but also that the promisor be bound to a level of performance beyond that which is implied in nearly every contract (good faith). By removing the impact of the best efforts clause, both the good faith and non-enforcement approaches stand in direct conflict with the notion that every word in a contract must be given effect.<sup>225</sup> Since these standards fail to achieve the intentions of the parties, *Bloor*'s primarily subjective analysis is preferred.

#### IV. RECOMMENDATION TO CONTRACTING PARTIES

For the foreseeable future, courts will continue to supply varied definitions to best efforts clauses. Considering these various judicial definitions, the only way a party can ensure that a specific definition of best efforts will be applied is to include the definition within the agreement itself. This guarantees that the true intentions of the parties will be served, and it will necessarily avoid the situation where a court applies an inequitable and unpredictable definition to best efforts, or refuses to apply the clause at all.

However, if parties are reluctant to commit to specific sets of performance criteria, a clear understanding of what jurisdictions govern the contract is critical because of the divergent approaches courts take when defining best efforts clauses. If need be, parties should include choice of law provisions to avoid certain undesired interpretations of best efforts. Failure to take such precautions may lead to unpredictable and un contemplated results.

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225. See 11 WILLISTON, *supra* note 6, § 32:5.