The cases gave rise to some interesting commentaries on the doctrine. Lawrence S. Long formulated three possible meanings of the term "best efforts". The most demanding placed on the party undertaking the obligation a "fiduciary duty" requiring him to subordinate his own interest to that of the party to whom he undertook the duty. None of the decisions cited above supports this interpretation. At the other extreme, the interpretation referred to by the author as "diligence insurance" meant that the interests of the party undertaking the obligation was of primary importance; he would bear no risk of liability except where his lack of effort went so far as to prejudice his own interests. This was the Zilg interpretation, where the publisher was not liable where he justified his cessation of efforts by claiming that he had little hope of making a profit. A midway position would require the interests of both of the parties to be taken into account, as in the Falstaff/Ballantine case or that of the religious opera. Long argued in favour of the "diligence insurance" interpretation, which he believed was the most effective in economic matters.

Lawrence S. Long, *op. cit.*, pp. 1728-1740.

Farnsworth showed that the scope of the duty imposed by the words "best efforts" can increase according to different criteria, which he drew from American case law.


One possibility was for the party owing the duty and the party to whom the duty was owed to be considered as one. The question was then of the degree of care that such a person ought reasonably to have exercised in the given situation. This interpretation might in particular be sufficient to determine the level of effort required from an agent.

On the other hand, however, it may not be possible to consider the two parties as one, since the party undertaking the duty has been chosen by virtue of his special abilities, for example a barrister or an architect. In such cases, 'best efforts' are to be interpreted by reference to the reasonable care and level of competence which one would normally expect from a professional in that field.

Various difficulties arise when the two parties have opposing interests. Thus, a publisher who undertakes to use his best efforts to promote a work whose prospects of success are slim, the author being paid by a commission on sales, would fall into this category. If we look to the reasonable behaviour of a professional in a given field, we must accept that a publisher should be able to stop promoting a book, placing his own interests first (this is an example of the Zilg reasoning mentioned above) where the initial promotional activity had failed. Another possibility in this case would be to return to the first interpretation and to consider the parties as one in order to take as the object of the "best efforts" the volume of sales which would maximise the combined profit of the partners.

Referring Principles:

IV.6.5 - Best efforts undertakings