

Mergers & Acquisitions Institute

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Texas Twists

An Essential Guide to Key Texas Law M&A Issues

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Agenda

- Best Efforts
- Indemnification
- Sandbagging
- Non-Reliance
- Mitigation
- Consequential Damages
- Liquidated Damages
- Fiduciary Duties

References

- Treatise by Byron F. Egan entitled **EGAN ON ENTITIES: Corporations, Partnerships and Limited Liability Companies in Texas** (May 2016) ("**EGAN ON ENTITIES**"), which is available on Amazon.
 - *Acquisition Structure Decision Tree*, TexasBarCLE & Business Law Section of State Bar of Texas Choice, Governance & Acquisition of Entities Course, San Antonio, May 20, 2016 ("**Acquisition Structure paper**"): <http://www.jw.com/publications/article/2148>
 - *Joint Venture Governance and Business Opportunity Issues*, University of Texas School of Law 11th Annual Mergers and Acquisitions Institute, Dallas, October 15, 2015 ("**Joint Venture paper**"): <http://www.jw.com/publications/article/2093>
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Best Efforts Clauses

Texas

- In Texas, a “best efforts” commitment, without any goal or guideline against which to measure the commitment, is not enforceable.
 - The goal or guideline does not need to be a black-line metric, but some level of guidance must be provided.
 - Best efforts is arguably a higher standard in Texas than reasonable efforts.
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Best Efforts Clauses

New York

- New York cases have held that the terms “reasonable efforts” and “best efforts” are interchangeable.
 - New York decisions are split on whether objective criteria are required for enforceability.
 - NY courts have said that best efforts requires more than a good faith effort.
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Best Efforts Clauses

Delaware

- Surprisingly little case law in Delaware
 - Those cases that have addressed the issue have upheld the enforceability of these provisions
 - Courts have not required objective criteria but rather have looked at the underlying facts of a party’s efforts.
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