

Leitch and Barger in Texas Bar Journal: Freedom to Contract in Texas is Wide Open but Not Without Limits

November 1, 2024 Chelsea Leitch, Heather Barger

PRACTICES Commercial Contracts, Corporate

Although Texas law allows for the freedom of contract, recent court cases set new boundaries for the doctrine. Haynes Boone attorneys [Chelsea Leitch](#) and [Heather Barger](#) authored an article for the *Texas Bar Journal* explaining the new landscape and expectations for contracts in Texas moving forward.

Read an excerpt below:

Texans enjoy many freedoms—wide open spaces, education at unparalleled public universities, the ability to fry anything at the State Fair of Texas, and—importantly for lawyers—freedom of contract. “Texas law strongly favors parties’ freedom of contract, under which parties may ‘bargain for mutually agreeable terms and allocate risks as they see fit.’” Although Texas courts are widely deferential to the freedom of contract doctrine, that freedom is not without limits. Two recent Texas cases inform new boundaries for the freedom of contract doctrine and provide additional insight into drafting two common provisions with an eye toward enforceability.

EFFORTS CLAUSES

In commercial contracts, covenants and other obligations are often softened by language stating that a party will use some level of effort—such as “best efforts,” “reasonable best efforts,” or “commercially reasonable efforts”—to perform. Instead of stating that a party is simply obligated to fulfill an obligation, the contract language will state that the party will make efforts to fulfill the obligation. A typical efforts clause may read as follows: “Supplier shall use its best efforts to manufacture the quantity of Products specified in each quarterly forecast delivered by Buyer.”

While the Supreme Court of Texas has not explicitly acknowledged the enforceability of efforts clauses in contracts, it has acknowledged that such clauses can be inherently vague and subjective and present “a multitude of thorny issues” regarding interpretation and enforceability. When a covenant is breached, it is almost impossible to make a confident after-the-fact determination as to whether the obligated party has actually exerted the required level of effort to perform, or if greater effort could have been taken. And yet, the Texas courts of appeals widely acknowledge that such clauses can determine the required level of efforts.

[Read the full article in the *Texas Bar Journal*.](#)