Clients&FriendsMemo

Blurring the Lines: Dolan v. Altice Demonstrates the Potentially Unexpected and Significant Impact that "Boilerplate" Provisions Can Have on Merger Agreement Interpretation

July 16, 2019

In a recent decision arising out of the sale of Cablevision,[1] the Delaware Court of Chancery issued important guidance regarding the interplay between what are commonly regarded as boilerplate merger agreement provisions and "bespoke" provisions that are drafted specifically for the transaction at issue. Here, Vice Chancellor Slights found that extrinsic evidence was necessary to determine whether a provision in the merger agreement (Section 6.4(f)) was still enforceable despite agreement from all parties that: (i) Section 6.4(f) was *not* listed in the agreement's provision listing clauses that survived post-closing and (ii) the Dolan family, the beneficiaries of Section 6.4(f), were not identified as third-party beneficiaries of the merger agreement, nor was Section 6.4(f) carved out of the no-third-party-beneficiaries clause. The decision underscores that contracting parties need to be careful when considering future interpretive minefields not to assume that a boilerplate provision will take second seat to a bespoke provision.

Background

The *Dolan* action arose out of an agreement and plan of merger (the "Merger Agreement" or "Agreement") entered into between Cablevision Systems Corp. ("Cablevision"), one of the largest cable operators in the United States, and Altice N.V. and Neptune Merger Sub Corp. (collectively, "Altice"), which operates cable, fiber, telecommunications, content and media companies in the United States. In September 2015, Cablevision and Altice entered into the Merger Agreement pursuant to which Altice agreed to pay $34.90 per share of Cablevision stock, resulting in a total merger consideration of $17.7 billion.

Plaintiffs are members of the Dolan family, the founders and then-largest stockholders of Cablevision. They sued to obtain specific performance of certain obligations they claimed were owed by Altice under the Merger Agreement and which, according to plaintiffs, Altice agreed to in order to induce the Dolans to sell Cablevision and vote their shares in support of the merger. In particular, the Plaintiffs allege that Cablevision owned a group of regional cable news television

---

[1] *Dolan, et al. v. Altice USA, Inc., et al. and Cablevision Sys. Cop., et al.*, C.A. No. 2018-0651-JRS (Del. Ch. June 27, 2019).

channels, known collectively as News12 Networks LLC ("News12"), which serve approximately three million households in New Jersey, Connecticut and New York, including two boroughs of New York City and most of Long Island. Protecting News12 and its legacy was of such importance to the Dolan family that during the early merger negotiations, the family attempted to carve out News12 from the transaction. After "intense negotiations" with Altice, the Dolans eventually relented and agreed to include the stations in the Merger in exchange for assurances that Altice would continue to operate News12 "in a manner that preserved its employee base, quality reporting and programming." To that end, Altice agreed in Section 6.4(f) that at least through 2020 it would operate News12 "substantially in accordance with" the station's then-existing business plan, which was incorporated into the Merger Agreement. The Merger closed on June 21, 2016. The Dolans were not parties to the Merger Agreement.

In the spring of 2017, Altice took several actions that were contrary to News12's business plan, including terminating approximately 70 employees. After these layoffs, Altice developed a plan to lay off 10% of News12 employees each year. Plaintiffs argued that these terminations would negatively affect News12's ability to maintain its historic levels of quality and news content and were in direct violation of Section 6.4(f).

After plaintiffs commenced the action, the defendants moved to dismiss on two main grounds. *First*, Altice contended that Section 6.4(f) did not survive the consummation of the merger because it was not included in the list of provisions that survived closing as set forth in Section 9.1. *Second*, Altice alleged that the plaintiffs lacked standing to assert claims under the Merger Agreement because they were not parties to the Agreement and Section 9.8 of the Agreement specifically disclaimed any intention to confer rights on third-party beneficiaries (save for inapplicable subjects such as Directors and Officers insurance and the rights of shareholders to receive merger consideration).

The Court denied Altice's motion to dismiss, finding that while "the goal of contract construction in instances like this is to 'harmonize' related contractual provisions," "[t]hat simply cannot be done here by looking only within the four corners of the Merger Agreement," and consequently, "[e]xtrinsic evidence will be needed to determine what Section 6.4(f) was intended to mean and how, if at all, it is to be enforced."

The Relevant Provisions

Section 6.4(f)

(i) Parent will operate News12 Networks LLC ("News12") from and after [June 21, 2016] [(")the Closing[")] substantially in accordance with the existing News12 business plan (the "News12 Business Plan"), a true and complete copy of which is included in Schedule 6.4(f) of the Company Disclosure Letter, as the same may be adjusted as provided in Schedule 6.4(f), through at least the end of plan year 2020 within the current News12 footprint as of the date of this Agreement.

(ii) The Company will operate News12 in accordance with the existing News12 Business Plan through the Closing.

(iii) Either party may make reference to Section 6.4(f) and to Schedule 6.4(f) of the Company Disclosure Letter in connection with securing franchise and other regulatory approvals.

Section 9.1

This Article IX and the agreements of the Company, Parent and Merger Sub contained in Article IV and Sections 6.8 (*Employee Benefits*), 6.9 (*Expenses*) and 6.10 (*Director and Officer Liability*) shall survive the consummation of the Merger and the Transactions. This Article IX and the agreements of the Company, Parent and Merger Sub contained in Section 6.9 (*Expenses*), Section 6.11 (*Financing*), Section 6.12 (*Indemnification Relating to Financing*) and Section 8.5 (*Effect of Termination and Abandonment*) and the Confidentiality Agreement shall survive the termination of this Agreement. **All other representations, warranties, covenants and agreements in this Agreement shall not survive the consummation of the Merger and the Transactions or the termination of this Agreement.**

Section 9.8

Except (i) as provided in Section 6.10 (*Director and Officer Liability*) or Section 9.15 (*Financing Sources*) and (ii) for the right of holders of Shares as of the Effective Time, after the Effective Time, to receive the aggregate consideration payable pursuant to Article IV of this Agreement, which rights set forth in clauses (i) and (ii) of this Section 9.8 are hereby expressly acknowledged and agreed by Parent and Merger Sub, **Parent and the Company hereby agree that their respective representations, warranties and covenants set forth in this Agreement are solely for the benefit of the other party hereto, in accordance with and subject to the terms of this Agreement, and this Agreement is not intended to, and does not, confer upon any Person other than the parties hereto any rights or remedies hereunder**, including the right to rely upon the representations and warranties set forth herein. . . . The representations and warranties in this Agreement are the product of negotiations among the parties hereto and are for the sole benefit of the parties hereto.

Takeaways

- **Contracting parties need to carefully consider relying on boilerplate or "bespoke boilerplate" provisions when those provisions may come into conflict with a bespoke contract provision.** The Court recognized that, "[n]ot surprisingly, as with most contracts, the Merger Agreement features some boilerplate, some bespoke provisions and some bespoke boilerplate. The question presented here is whether the boilerplate and bespoke boilerplate should be construed, as a matter of law, to render a bespoke provision superfluous." In other words, according to the Court, the issue was whether Section 6.4(f) was rendered "superfluous" by standard provisions regarding survival and third-party beneficiaries. For reasons explained below, the Court refused to so find as a matter of law. For that reason, to the extent contracting parties can foresee potential conflict between "bespoke" and "boilerplate" provisions, they should consider expressly agreeing which controls and state that clearly in the agreement.

- **A non-party to a Merger Agreement that disclaims third-party beneficiaries may nonetheless establish that it has standing to enforce provisions of the Merger Agreement.** A threshold issue for the Court was whether the Dolans had standing to enforce Section 6.4(f) despite not being identified as third-party beneficiaries in Section 9.8 of the Merger Agreement. The Court held that to demonstrate standing to enforce the contract as third-party beneficiaries, Plaintiffs must plead facts that allow a reasonable inference that: "(i) the contracting parties [] intended that the third party beneficiary benefit from the contract, (ii) the benefit [was] intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party [was] a material part of the parties' purpose in entering into the contract." Vice-Chancellor Slights found that the Dolans satisfied these criteria by alleging that (i) they would not have agreed to include News12 in the transaction if Altice had not promised to operate the stations in accordance with the News12 business plan, (ii) the inclusion of section 6.4(f) was in exchange for the Dolan's agreement to vote their Class B shares in favor of adoption of the Merger Agreement and (iii) Section 6.4(f) was included in the Merger Agreement to "induce the Dolan family to sell their Cablevision stock, merge Cablevision and News12 into Altice and sign the Written Consent in favor of the Merger Agreement."
- **Seemingly boilerplate provisions, such as provisions that disclaim third-party beneficiaries, can be interpreted as having the force of more specific provisions.** The Court's inquiry also focused on the interpretation of Section 9.8 of the Merger Agreement, which provided that "the "representations, warranties and covenants" set forth in the Merger Agreement only run to and bind the parties to the Agreement. Recognizing that Section 9.8 did not identify the Dolans as parties under the Agreement or carve out Section 6.4(f), Plaintiffs invoked "the canon that a specific provision of a contract trumps a general one in order to argue that Section 6.4(f) trumps Section 9.8." However, the Court concluded that the "canon does not fit here" because "both sections are specific." Section 9.8, the Court found, "is specific in identifying who is and who is not intended to be a third-party beneficiary to the contract." Accordingly, the Court held that parol evidence was required to aid it in harmonizing Sections 6.4(f) and 9.8 and determining "what Section 6.4(f) was intended to mean and how, if at all, it has to be enforced." Again, this determination demonstrates the importance of careful contract drafting, particularly with respect to common terms found in most types of agreements that may lead to unintended consequences.

- **<u>The fact that the Dolans were allegedly controlling stockholders did not transform them into parties to the Merger Agreement</u>.** The Court rejected the Dolans' argument that, as former shareholders who participated in the negotiations and voted their shares to approve the Merger, they should be deemed *de jure* parties to the Merger Agreement. This conclusion, supported by well-settled Delaware law, underscores the need for parties to clearly and expressly articulate when and for what purposes a non-party will be considered a third-party beneficiary of a contract.

- **<u>Delaware courts may find, by relying on "canons of construction," a provision not specifically listed in a survival clause to be enforceable post-closing</u>.** One of Altice's primary arguments was that Section 6.4(f) was unenforceable because it was not listed in Section 9.1, which enumerates the provisions that survived the consummation of the Merger and that as a result, Section 6.4(f) was "simply a goodwill gesture and was in no way meant to bind Altice before or after the Merger closed." In response, Plaintiffs pointed out that the language of Section 6.4(f) "is not drafted as an expression of good will" but is instead drafted to state an obligation. In considering the interplay between these two sections and arguments, the Court held that there was sufficient ambiguity to deny Altice's motion to dismiss by using two canons of construction. *First*, the Court found that under Altice's theory, Section 9.1, the survival clause, would render Section 6.4(f) superfluous and that such a result is "inconsistent with the contractual cannon that discourages the court from construing a contract in a way that results in 'mere surplusage.'" *Second*, the Court found defendants' interpretation "also creates an arguably 'absurd result' by rendering meaningless the protections [Plaintiffs] allege they bargained for with respect to News12." Again, the parties could have avoided this uncertainty by clearly articulating in the Merger Agreement whether they intended for Section 6.4(f) to survive closing by, either, including it in Section 9.1 or indicating, via an "avoidance of doubt" provision, that it did not.

- **<u>Where there is an enforceable contract, Delaware courts will not entertain claims pled as alternatives to breach of contract, like breach of the implied covenant of good faith and fair dealing</u>.** Plaintiffs asserted six causes of action: breach of contract, breach of the implied covenant of good faith and fair dealing, equitable fraud, promissory estoppel, negligent misrepresentation and declaratory relief. The Court dismissed all claims except for breach of contract and promissory estoppel explaining that "if there is an enforceable contract upon which Plaintiffs may rest their claims, then there is no gap to fill with the implied covenant, there is no need to bootstrap fraud and contract claims, and there is no special relationship to support equitable fraud." In particular, the Court reinforced longstanding Delaware precedent that the implied covenant is a "limited and extraordinary" legal remedy which applies only when "the contract is truly silent with respect to the matter at hand, and only when the court finds that the expectations of the parties were so fundamental that it is clear that they did not feel a need to negotiate about them" – circumstances that the Court found were not present in *Dolan*. As Vice Chancellor Slights explained, the "Court 'will not rewrite contractual language covering particular topics [under the guise of the implied covenant] just because one party failed to extract as complete a range of protections as it, after the fact, claims to have desired during the negotiation process.'" On the other hand, plaintiffs' promissory estoppel claim survived because defendants denied that plaintiffs had standing to enforce the contract; as a result, plaintiffs were entitled to pursue promissory estoppel as an alternative to breach of contract.

*   *   *

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Jason Halper	+1 212 504 6300	jason.halper@cwt.com
Jared Stanisci	+1 212 504 6075	jared.stanisci@cwt.com
Nunu Luo	+1 212 504 6232	nunu.luo@cwt.com