# Third-party beneficiaries and nougat

## A recent Delaware Chancery Court decision shows the challenges of enforcing promises to preserve elements of an acquired business

**SOMETIMES, IT'S** helpful to think about words and phrases out of context to get a better picture of what is really being communicated. Other times, it isn't. When I hear the words "nugatory placation," I think of giving a Snickers bar to a toddler having a temper tantrum. But that's not actually what it means, as was clear in a recent Delaware Chancery Court decision about Third Party Benefits (which itself sounds like the name of a pornographic film way back when they were most readily available in hotel rooms and attempted real titles, not that I'd know).

The legal dispute arose from the acquisition by Altice N.V. of Cablevision Systems Corp. for cash consideration by way of a merger completed in December 2015; the deal was valued at U.S.$17.7 billion (including debt). The assets of Cablevision included a group of regional cable news television channels serving heavily populated areas of Connecticut, New Jersey and New York, known collectively as News12 Networks, LLC and known for its local 24-hour news coverage. Cablevision had been founded by members of the Dolan family with the proceeds of their sale of HBO. The Dolans, who were apparently very proud of News12, had sought to carve the News12 assets out of the Altice merger deal but eventually succumbed to pressure to include them in the deal. Still, the Dolans insisted that the merger agreement include a commitment from Altice that it would continue to operate the News12 stations in accordance with their business plan through at least the end of 2020.

After the closing of the merger, Altice started laying off News12 employees, contrary to the business plan. Several parties, including members of the Dolan family and two prize-winning News12 news anchors, sued, seeking specific performance of Altice's commitment. The lawsuit faces a number of challenges. First, the News12 covenant was not specified as one of the provisions that would survive closing. And second, neither the Dolans nor the star anchors were parties to the merger agreement, which, by its specific terms, disclaimed the existence of third-party beneficiaries. Altice moved to dismiss, arguing that the News12 provision was merely an aspirational, unenforceable expression of then-present intent (and/or a nugatory placation). The case, therefore, featured claimants suing under an agreement to which they weren't party and which disclaimed their interests seeking to enforce a provision that seemed not to have survived closing. The plots of those yesteryear porns were never that good, though I still wouldn't know.

The plaintiffs sued on a variety of creative bases — breach of an implied covenant of good faith, fraudulent inducement and equitable fraud — all but one of which were dismissed (the court noted that promissory estoppel might prevent Altice from making an extra-contractual promise on which the Dolans relied to their detriment). The hearing as to whether or not there was a triable issue was essentially considered on the basis of whether there might be a claim for breach of contract.

The Delaware court determined that in order to enforce the News12 covenant as third-party beneficiaries, the plaintiffs had to show that there was an intention to benefit them, either as a gift or satisfaction of an earlier obligation, and that such intent was a material part of the parties' purpose in entering into the agreement. The Dolan family was found to have met those tests, having only agreed to support the deal because of the commitment, though the news anchors failed. The court was also persuaded that the clear future orientation of the News12 commitment overcame, for purposes of the preliminary hearing, the boilerplate of the agreement (including non-survival provisions).

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Though only a determination that there is a triable issue, and not a judicial conclusion on that issue, the decision is a helpful caution to consider how contracts are intended to benefit third parties. In M&A contexts, vendors not infrequently are concerned about the "legacy" of their enterprises, but there are obvious challenges in enforcing any promises to preserve elements of the acquired business. All of this sounds like a lot of work, so I will be sure to arrange for nugatory nourishment for energy. CL

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