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California Court Allows Cable Network to Go Beyond Written Contract in Claims Against Distributor: “Red Herring” or “Alternate [U-verse]”?

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2015 and 2016 saw a wave of transactions among cable, satellite, and other linear programming distributors: AT&T & DirecTV, Altice and Suddenlink, etc. That transactional wave is beginning to spawn a litigation wave, principally over interpretation and application of the pre-existing licenses and contracts between networks and distributors. A recent ruling in one *California* case is noteworthy to the extent that it allowed a network to proceed against a distributor on multiple theories beyond the parties’ written contract.

In April 2014, Herring Networks and AT&T entered into a heavily negotiated, 37-page, written affiliation agreement for AT&T to carry Herring’s channels (the One America Network and AWE) on AT&T’s “U-verse” systems. Herring had no affiliation agreement with DirecTV. Indeed, its channels had never been carried on DirecTV.

After the FCC approved the AT&T/DirecTV transaction, Herring sued AT&T in federal court in Los Angeles alleging a host of claims about carriage on U-verse and on DirecTV. *Herring Networks, Inc. v. AT&T Services, Inc., et al.* Notably, none of those claims alleged breach of any of AT&T’s written contractual obligations. Herring instead asserted claims based on allegations that (1) AT&T had misrepresented its intent to expand U-verse when it allegedly intended to shrink it instead (by moving subscribers to DirecTV) and (2) AT&T had orally promised to carry the Herring channels on DirecTV if Herring publicly supported and lobbied in favor of AT&T’s acquisition of DirecTV.

AT&T moved to dismiss the claims, arguing that (1) the written contract precluded the claims and (2) the alleged oral promises were not actionable. The District Court denied the motion.[1]

First, the Court acknowledged that AT&T had a contractual right to shut down its U-verse systems entirely, in which case Herring would have received no further “per subscriber fees” at all. Nonetheless, the Court found that Herring had a viable claim for breach of the covenant of good faith and fair dealing if, instead of shutting down U-verse, AT&T took the ostensibly lesser step of actively soliciting subscribers to move from U-verse to DirecTV.

Second, despite ruling that shrinking U-verse would give rise to a contract claim, the Court also ruled that nearly identical conduct supported independent claims for fraud and misrepresentation. The

Court reasoned that Herring's fraud claims rested on alleged pre-contract misrepresentations about AT&T's U-verse intentions and that those misrepresentations were sufficiently "separate and distinct" from the contractual claim based on AT&T's alleged actions to shrink U-verse.

Third, AT&T also argued that there was no plausible theory of harm because, if Herring had not allegedly been "tricked" into signing the 2014 contract, it would have had no contract and no fees at all. The Court found, however, that it was plausible that Herring would have been able to negotiate a better deal with AT&T if AT&T allegedly had been more candid about its U-verse plans. The Court did not address how Herring would prove what AT&T allegedly would have agreed to (and seemingly ignored that AT&T had refused such a deal earlier in its negotiations).

Finally, the Court allowed Herring to proceed with its blockbuster $100 million plus claim that AT&T had orally promised to distribute the Herring channels to DirecTV's 20 million subscribers for five years if Herring lobbied the FCC in support of the AT&T/DirecTV transaction. The Court found that the alleged agreement was not an amendment of the existing AT&T contract, but a new contract and that the essential, material terms had been agreed to. The Court also ruled that there was no statute of frauds problem because Herring allegedly had performed its lobbying obligations.

Notably, Herring seeks only damages on this "lobbying" claim and not, for example, specific performance of carriage. One might wonder why Herring would not want actual carriage (as it has sought in the past in lengthy FCC program carriage proceedings) and the benefits of greater audience exposure and advertising revenues. Equally interesting is whether Herring was obliged to disclose to the FCC (or the DOJ or the members of Congress that it allegedly lobbied) that Herring was acting pursuant to an alleged specific contractual obligation to AT&T to lobby on AT&T's behalf, not just its own determination that supporting AT&T would redound to Herring's benefit.

The most important takeaways from this case will doubtless emerge after discovery when the facts can be assessed about negotiation tactics and practice – and how to make sure that the only promises your company is bound to are the ones that it actually signs. At this stage, the Court's decision is an important reminder for businesses of all shapes and sizes that written contracts do not always define the limits of your rights and liabilities (perhaps particularly in California).

[1] The District Court also denied a parallel motion by AT&T, Inc. to dismiss the claims against it for lack of personal jurisdiction.

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