

## Saiber Helps Defend Hulu in Class Action Appeal

March 7, 2024

Along with lead co-counsel Wilson Sonsini Goodrich & Rosati, Saiber attorneys Arnold B. Calmann, Jakob B. Halpern and Catherine Soliman earned a significant victory on behalf of Hulu, LLC in connection with an appeal of the dismissal of a lawsuit filed against Hulu by plaintiffs and putative class representatives Borough of Longport and Township of Irvington.

The lawsuit alleged that Hulu and co-defendant Netflix, Inc. violated the New Jersey Cable Television Act (“CTA”) by failing to obtain a franchise and paying the associated franchise fees to Plaintiffs and other municipalities across the state. Hulu argued, among other things, that the CTA does not grant Plaintiffs a private right of enforcement, requiring dismissal of their claims. U.S. District Judge Stanley R. Chesler had previously agreed and dismissed the case, and plaintiffs appealed to the United States Court of Appeals for the Third Circuit.

Specifically, Judge Chesler determined that the CTA does not explicitly confer a private right of action to State municipalities, and thus considered whether such a right is implicit within the statutory scheme. The Court observed that the statutory framework governing the CTA demonstrated the Legislature’s clear intent to designate the Board of Public Utilities (“BPU”), the State’s local franchising authority, as the sole authority empowered to enforce the CTA. The Court also found that finding a private right of action for municipalities would interfere with the enforcement scheme established by the Legislature and usurp the BPU’s authority. Therefore, the Court held that there was no implicit right of private enforcement under the CTA.

On appeal, the case was heard by a panel consisting of Judges Jane Roth -- who authored the opinion -- Patty Shwartz, and D. Michael Fisher. In a unanimous precedential opinion dated February 29, 2024, the panel affirmed the district court’s ruling, reviewing the three factors identified by the 1975 U.S. Supreme Court ruling *Cort v. Ash* to determine whether an implied right of action exists. Here, the panel accepted Hulu’s argument that the second and third *Cort* factors weighed heavily against implying a private right of action. Reviewing legislative intent, the panel found it was “clear” that there was none in favor of plaintiff’s argument, and that instead the legislature made clear that the BPU was the sole enforcement authority for the CTA. It also observed that it was inconsistent with the CTA’s purposes to allow a private right of action, as it would create a patchwork of nonuniform enforcement decisions across multiple municipalities. Thus, it affirmed the district court’s judgment.

A copy of the Third Circuit’s precedential opinion can be found at the below link.