

Comcast seeks judicial halt to class action lawsuit

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JACKSONVILLE — Comcast Cable Holdings LLC has asked a federal court to order arbitration and halt a lawsuit seeking class action status and alleging breach of contract and deceptive trade practices related to Comcast's video-on-demand service.

Comcast argues the three Northeast Florida customers and plaintiffs waived their right to file any lawsuit against the company or to litigate as a class by virtue of not responding to a policy change sent with cable bills in July.

Comcast said it included a two-page insert with customers' bills in July titled "Notice from Comcast Regarding Arbitration." The policy says all disputes will be settled through arbitration and that no claims may be consolidated. Customers, however, were given 30 days from receiving the notice to opt out of the policy.

The plaintiffs' lawyer, Donald Pinaud of Kattman & Pinaud in Jacksonville, countered by saying the class action waiver provision is unenforceable "because it is unconscionable."

Comcast's effort to protect itself from class actions by writing policies to that effect and

mailing them with monthly bills or other correspondence is among a growing body of such cases.

"It's certainly a hot topic," said Sander Moody, an assistant professor at Florida Coastal School of Law.

Moody credits securities companies with effectively using arbitration agreements with class action waivers, which investors sign when opening brokerage accounts. The industry "has been so thoroughly successful in enforcing their arbitration clauses, that success was envied in other industries."

Although rulings have gone either way, several recent decisions, many at the appellate level, have favored plaintiffs' rights to form a class when the smallness of their claims makes them impractical to pursue individually.

A recent case involving Comcast in Georgia was ruled in the plaintiffs' favor by the 11th Circuit Court of Appeals, the same court that would hear any appeal in the Jacksonville case.

Lawyer Michael Freed, managing partner for Brennan, Manna & Diamond LLC's Florida offices, has argued for and against class

action waivers. In his experience, courts are more likely to find them unenforceable when they involve a corporation seeking to bar a consumer from pursuing a class action.

"It seems to me the trend is against enforcing them because it's usually an inequitable situation," Freed said.

Waivers and arbitration agreements sent with routine correspondence and declaring themselves in effect if customers continue to pay for services can be particularly problematic. "It looks like junk mail," Moody said.

One key is whether the court thinks "a reasonable consumer wouldn't perceive they're giving away an important right," Freed said. "The trend is to assume the consumer, who didn't draft the contract, is not going to understand it if [a waiver] is hidden in fine print."

Nevertheless, some mailed arbitration agreements with class action waivers have been upheld. Comcast's lawyer in the Jacksonville case, David Draigh of White & Case LLP's Miami office, argued that the notice in question is different from the one in Georgia in that the one here gave consumers 30 days to opt out. The notice said opting out "will have no adverse effect" on cable service.



Freed