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Breaking Down The Cox Set-Top Box Antitrust Bellwether

By **Brandon Lowrey**

Law360, Los Angeles (October 2, 2015, 9:04 PM ET) -- A bellwether antitrust trial over Cox Communications Inc.'s alleged practice of tying premium cable services to its set-top box rentals in Oklahoma City is set to begin Oct. 13. In the case, cable subscribers allege Cox uses its market power to force them into renting the company's hardware in order to access premium services like pay-per-view or video-on-demand.

Here, Law360 takes a look at the case in advance of the trial.

What's at Stake

Lead plaintiff Richard Healy is seeking about \$49 million in damages on behalf of the class of cable customers in Oklahoma City. If he's victorious, that figure would be trebled to \$147 million, plus attorneys' fees.

The case comes at a pivotal time for the cable industry, which is facing decline and transformation as granular Internet-based video streaming services lure away customers from often pricier cable-box bundles.

In addition to this bellwether trial, there are similar lawsuits in Arizona and Louisiana that have been rolled into the multidistrict litigation. However, it's unclear to what extent the outcome of this trial could influence the other cases as each individual market presents different competitive circumstances.

Case History

The dispute dates back to 2009, when several of Cox's premium cable subscribers sued the company for allegedly tying the service to its box rentals, according to court records. The suits were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to Oklahoma, but in 2011, the court ruled that the case couldn't proceed as a nationwide class.

The plaintiffs then refiled similar suits around the country, but sought to certify classes for isolated geographic regions.

Healy's complaint, filed in November 2012, alleged violations of the Sherman Act and Oklahoma antitrust law, as well as a claim for unjust enrichment.

Although Cox moved to dismiss the suit brought by Oklahoma City market customers, U.S. District Judge Robin J. Cauthron denied the motion in January 2013, rejecting Cox's argument that the plaintiffs had failed to present facts demonstrating the existence of a properly defined geographic market.

About a year later, the judge certified a class for certain Cox premium cable subscribers in the Oklahoma City market who had purchased the service from Feb. 1, 2005, to the present. Many of the plaintiffs then refiled virtually identical actions around the country, but sought to certify classes for isolated geographic regions, according to court documents.

Other similar suits filed in Louisiana and Arizona federal courts have been rolled into the larger MDL. Each complaint alleged that Cox forced premium cable subscribers to rent set-top boxes in order to access all the services they purchased. The suits alleged violation of the Sherman Act as well as relevant state laws.

It's unclear, though, whether the Louisiana and Arizona cases will ever make it to trial.

Cox last year sought to compel arbitration as to much of the Oklahoma City class members. The district court denied the motion on grounds that Cox had waived its right to arbitration by extensively participating in the Healy litigation. However, the court granted motions to compel arbitration in the Louisiana and Arizona cases.

The Tenth Circuit upheld the decision to deny arbitration of Healy's case in Oklahoma. Appeals are still pending for the Louisiana and Arizona cases.

Plaintiff's Position

Healy contends Cox violated antitrust laws by tying pay-per-view and video-on-demand programming to set-top boxes. In other words, if consumers don't rent Cox's own set-top boxes, they can't access those video services.

Cox has substantial market power in Oklahoma City, where the local government has awarded it a franchise, thereby limiting its competition for cable provider services. Healy contends that Cox used that market power to force customers to also rent its hardware, which was required to take full advantage of the provider's services.

Thus, the premium services are tied to the rental of set-top boxes that only Cox provides, the plaintiffs argue.

Plaintiffs' attorney Allen Kanner of Kanner & Whiteley LLC told Law360 that during the time period at issue in this case, cable television providers still faced little competition, and weren't yet threatened by the Web-based services that now undermine the industry.

"People were not breaking the tie between digital video and set-top boxes," Kanner said

Cox's Position

Cox contends that it cannot force "premium cable" consumers to rent its set-top boxes because the same services are available through other providers, including AT&T, DISH Network, and DirecTV. Furthermore, the company argues that consumers can buy third-party set-top boxes such as TiVo or Moxi products to access many of the same Cox services, although not those that require two-way communication with Cox such as pay-per-view or on-demand viewing.

However, set-top boxes or other devices capable of accessing Cox's two-way services weren't available in the Oklahoma City area during the time period at issue.

In a pretrial report, Cox said that this wasn't its fault.

"Cox contends that although it has helped actual and potential manufacturers develop set-top boxes capable of accessing Cox's two-way services that manufacturers could sell to consumers at retail, those manufacturers have decided for their own reasons not to do so,"

the company said.

Attorneys for Cox declined to give a statement about the case.

Cox is represented by Margaret M. Zwisler, Jennifer L. Giordano and Alfred C. Pfeiffer, Jr. of Latham & Watkins LLP and D. Kent Meyers of Crowe & Dunlevy and Robert G. Kidwell of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

The plaintiffs are represented by Schneider Wallace Cottrell Brayton & Konecky LLP, Rachel Lawrence Mor PC, Michael J. Blaschke PC, Randall Sullivan PC, Woska Hasbrook & Dowd, Kanner & Whiteley LLC, Schneider Wallace Cottrell Brayton & Konecky LLP, Schneider Wallace Cottrell Brayton & Konecky LLP and Whatley Kallas LLP.

The case is In re: MDL 2048 Cox Enterprises Inc. Set-Top Cable Television Box Antitrust Litigation, case number 5:12-mj-02048, in the U.S. District Court for the Western District of Oklahoma.

--Additional reporting by Vin Gurrieri, Jacob Fischler, and Alissa Wickham. Editing by Kelly Duncan.

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