

Why Wilmer Is the Real Winner in Washington AG's Suit Against Comcast

To hear the Washington state attorney general's office tell it, Prosecutors crushed Comcast at trial. They didn't.

By Jenna Greene
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Of all the unsympathetic defendants a lawyer might represent—murderers and kidnappers and thieves—the brave souls at Wilmer Cutler Pickering Hale and Dorr went to bat for some of the most despised of all: Comcast customer service representatives.

To hear the Washington state attorney general's office tell it, prosecutors crushed Comcast at trial last week, winning a \$9.1 million penalty for consumer protection violations. "Comcast sent an army of corporate lawyers into court to try to avoid accountability," AG Bob Ferguson said in a news release. "My legal team demonstrated that we're capable of meeting the world's largest corporations in court—and winning."

Mmmm. ... No, not exactly.

Actually, I'd say the Wilmer team—litigation practice chair Howard Shapiro, securities litigation co-head Matthew Martens, partners David Gringer and Alejandro Mayorkas, and senior associate Ariel Warner, plus co-counsel from Davis Wright Tremaine—more than held their own in the six-week bench trial before King County Superior Court Judge Timothy Bradshaw.

Because while the AG's office boasted that the \$9.1 million penalty "represents the highest trial award in a state consumer protection case, even before including restitution," what they don't mention is that they went into trial seeking \$215 million. That means they won less than 5% of what they asked for. (As for restitution, we're talking about 900 or so customers. It'll barely change the total payout.)

Suddenly it doesn't look like such a glorious win. But don't just take my word. The judge specifically declined to award the plaintiffs their attorneys' fees and costs—which had the AG's office substantially prevailed, it would have been entitled to collect.

A little background: Comcast gets about 20,000 calls a day from customers in Washington, according to court



April 2017: Comcast Service Center. Comcast is a multinational mass media company XIII

papers. About 70% of the time, the phone representatives at what Comcast with a straight face refers to as its "centers of excellence" can solve the problem remotely. (In my experience, their invariable response is to tell you to disconnect your router, let it sit for five minutes, and then turn it back on. Which admittedly does sometimes work.)

Where it gets tricky is if Comcast has to send a technician out for a repair. Comcast promises that "We won't charge you for a service visit that results from a Comcast equipment or network problem."

But if the issue stems from the wiring inside your home, or maybe your television is broken and that's why the picture looks funny, or maybe you don't understand how to work your electronics and need someone to show you how to connect to the wifi, well, then, Comcast will charge you between \$30 and \$70.

Don't want to risk getting hit with a fee? Comcast sold an add-on service protection plan (discontinued in 2018) for

\$.99 to \$5.99 per month. Per Comcast, the plan let customers “enjoy worry-free maintenance” and avoid paying for otherwise chargeable visits.

According to the state of Washington, Comcast misrepresented the scope of what was covered by the plan and improperly charged for service calls.

“This case is a classic example of a big corporation deceiving its customers for financial gain,” Ferguson said when the first-of-its kind complaint was filed in 2016. “I won’t allow Comcast to continue to put profits above customers—and the law.”

As an elected official, it’s a great soundbite. Who doesn’t want to stick it to the cable company? But on closer inspection, much of the state’s case fell apart. And I have to admit, after reading Bradshaw’s 73-page opinion, I actually wound up thinking more highly of Comcast.

Part of the problem was the state fixated on not-very-compelling exceptions to Comcast’s we-won’t-charge-you-if-our-equipment-is-to-blame guarantee.

For example, the AG’s office said that if a Comcast tech came out and there were two problems—one based on faulty Comcast equipment, and another on the customer’s end—well, then, the customer could get charged. This happened on about 1% of service visits from 2011 to 2016.

Except at trial, the state called 13 Comcast customers as witnesses, and none of them said they thought such visits would be free. “The state offered no evidence that a reasonable consumer, reading the Comcast guarantee, would have had the net impression that they would not be charged for multi-purpose service visits,” Bradshaw ruled.

The state also said Comcast didn’t explain it could charge customers for replacing HDMI and coaxial cables, jumpers and splitters. But the judge noted that this equipment, “even if initially supplied by Comcast—becomes the customer’s property, which the customer can continue to use even if the customer cancels its Comcast service.”

And again, none of the state’s witnesses said they thought otherwise. Plus the state didn’t present evidence that any customers in Washington were ever actually charged to replace this equipment, assuming it was originally provided by Comcast (as opposed to something the customer bought or got from another company).

Also, in a tiny handful of cases, Comcast charged customers for repairs due to intentional vandalism. Which again, no witnesses said they thought would be a freebie.

Moreover, the judge found none of these exceptions to the Comcast guarantee were even material.

So fail, fail, fail and fail.

As for the service protection plan, personally it strikes me as a lousy deal. But that’s not to say it was worthless.

Customers with the plan made twice as many service calls as those without, receiving a total of 281,429 service visits from 2011 to 2016. Without the plan, they’d have paid a combined \$13.4 million.

Still, Comcast did wrongly charge for 202 visits, or .07%, so bad on them for only getting it right 99.93% of the time.

The AG’s office also complained about sales and billing practices, and there, they got more traction.

Bradshaw found Comcast agents “repeatedly failed” to disclose the recurring monthly fee to consumers, especially when Comcast in 2013 ran a promotion offering one month free but didn’t mention you’d get charged automatically after that.

Also, some agents added the plan to people’s accounts without their knowledge or consent, in violation of Comcast policies and guidelines. Between 2014 and 2016, the judge found that about 20,000 people in Washington were enrolled this way.

“The court accordingly finds that Comcast, as a general practice, did not sufficiently ensure that calls between its agents and customers where products and services were added were done only with customers’ consent,” he wrote.

Bradshaw found that 18,660 customers were wrongly charged recurring monthly fees for an average of 11 months—205,260 violations of the consumer protection act. While the state wanted \$100 per violation, Bradshaw went with \$15, for a total fine of just over \$3 million.

As for those who got the plan added without their consent? That cost Comcast about \$6 million, though the state wanted \$24 million.

Bradshaw also declined to impose injunctive relief, seeing as Comcast doesn’t offer the plan anymore and “has implemented new technologies and processes that require active, affirmative consent from customers before they can be enrolled in any new service.”

The Wilmer team referred a request for comment to Comcast, which in a statement said it was “pleased that the court ruled in our favor on several of the Attorney General’s key claims and awarded less than 5 percent of what he was seeking in damages. The judge recognized that any issues he did find have since been fully addressed by Comcast through the significant investments we have made in improving the customer experience and consent process, and that throughout Comcast acted in good faith.”

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