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You've Been Tuh-minated: EarthLink Pays Up in Early Termination Fee Suit

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Atlanta-based Internet service provider EarthLink has settled a long-running class action suit alleging that it improperly levied early termination fees against its customers. Among the settlement conditions, EarthLink agreed to lower its current fees, refund half of the fees to as many as 850,000 potential class members, and drop any efforts to collect outstanding fees or report customers owing such fees to credit reporting bureaus.

The settlement also promises to pay \$3.7 million in attorney fees and expenses, and three class representatives will each receive \$7,500 in "incentive awards."

"We think the result is an excellent one for the class," said Page Perry partner David J. Worley, who served as local counsel in the action, along with Bruce V. Spiva and Kathleen R. Hartnett of Washington, D.C.'s Spiva & Hartnett.

Worley also had kind words for former Georgia Gov. Roy E. Barnes, who argued the plaintiffs' case before the Georgia Court of Appeals last year after a Fulton County Superior Court judge had thrown most of it out on a summary judgment motion.

"Gov. Barnes argued the appeal for us, and we thought it went very well in the Court of Appeals," said Worley.

Spiva agreed and said the resolution of the suit was a good result for the plaintiffs. "It has something for all members of the class," he said, "both current EarthLink customers and former ones who paid the fees, and who will have an opportunity to get half their money back if they send in the claim form."

EarthLink was represented by a team of McKenna Long & Aldridge lawyers including partners David L. Balsler, Nathan L. Garroway and Lawrence A. Slovensky, and of counsel Tracy L. Klingler.

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"This is a beneficial settlement that allows EarthLink to move forward without the costs and risks of further litigation," read a statement provided by Slovensky, who handled the settlement negotiations.

The case began in 2005, when plaintiffs Deborah Eaves, William O'Hara and David Tegart filed a class action claiming that EarthLink, which charged a \$149.99 early termination fee for customers who terminated their service agreement before one year had elapsed, had levied the fees despite all three having been EarthLink customers for a much longer term.

The plaintiffs said EarthLink had charged Eaves' credit card for the fee after she upgraded to DSL service and, dissatisfied, went back to dial-up service one week later despite having been assured she could switch back with no penalty. The suit said EarthLink restarted the clock on O'Hara each time he moved over a period of several years, even though he remained an EarthLink customer, and eventually hit him with the fee when he moved to a location where DSL was not available and he wanted to change to the provider's cable service. Tegart was charged the fee when he moved from one section of the city to another section, according to the suit.

In their complaint, the plaintiffs charged that EarthLink's billing practices were deceptive and designed to extract improper fees and to deter customers from seeking other Internet providers. They also characterized the amount of the fees as "unconscionable."

The suit sought monetary damages on behalf of customers who had been charged the fees, and injunctive relief seeking to modify EarthLink's practices regarding current and future customers.

In February 2009, Fulton County Superior Court Senior Judge Alice D. Bonner, sitting in the court's Business Division, ruled that the dissatisfied customers had voluntarily signed agreements with EarthLink that clearly stated the fees would be applied in the case of early termination and had provided their credit card numbers to the service provider as a means for it to collect any charges to their account.

Georgia's "voluntary payment doctrine," which declares that payments made "through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice" involved cannot be recovered, wrote Bonner, barred any damage claims made by the customers who had already paid the fees.

In their arguments to the Court of Appeals, the plaintiffs lawyers said that, contrary to EarthLink's position, the provider's contracts made no mention of automatically deducting the fees.

"Plaintiffs have cited numerous cases making clear that the voluntary payment doctrine applies only where -- unlike here -- customers are billed for charges and then choose voluntarily to pay the charges rather than dispute them," says the plaintiffs' brief filed with the appellate court.

"The voluntary payment doctrine is not a limitless device to prevent valid claims by customers, such as plaintiffs, who had no reasonable opportunity to dispute the charges at issue," it said.

"At the time of the settlement, the damage claim had been wiped out by Judge Bonner," said Spiva. "We felt confident that we were going to win that appeal ... [but] this was a disputed case, and any settlement involves an element of compromise on both sides."

Even so, he said, there are "significant benefits" to the plaintiff class. "[EarthLink] has agreed to drop their early termination fee for residential DSL from \$149.95 to \$90, so that's significant, and they've agreed to a comparable reduction in their other services."

In addition to that reduction, the terms of the settlement call for a similar reduction in EarthLink's DSL and home telephone fee, and a reduction from \$79.95 to \$48 for the company's home networking service.

After six months, the applicable fee will be cut in half for anyone who incurs such a fee.

EarthLink will discontinue any effort to collect outstanding fees and will "take steps to clear credit with respect to any prior ETF balances reported to credit and/or collection agencies," according to the agreement.

The provider also agrees not to restart the clock after a 12-month term has been completed for the same product, unless a new contract requires the installation of new equipment.

EarthLink already has mailed 859,664 notices to customers it has identified as having paid the fees, who will have four months from the date the settlement is finalized to send in a claim form or reply via a claims Web site; claimants whose forms are "substantially accurate" will be eligible to a refund of one-half of their fee.

Fulton County Superior Court Judge Melvin K. Westmoreland, filling in for Bonner, issued preliminary approval of the

settlement in February; a final approval hearing is set for May 21.

The settlement also provides for \$3.7 million in attorney fees and costs.

"We think the attorney fees are fair, given that we litigated it for five years," said Spiva. "We're also proud that the attorneys' fees don't impinge on the recovery; even if everyone makes a claim, everyone gets a recovery."

The case is *Eaves v. EarthLink*, No. 05-CV-97274.