

**FRANK MUNSEY,
INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS
SIMILARLY SITUATED**

VERSUS

**COX COMMUNICATIONS OF
NEW ORLEANS, INC.**

*** NO. 2001-CA-0548
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-19571, DIVISION "E-9"
Honorable Gerald P. Fedoroff, Judge**

*** * * * ***

**Charles R. Jones
Judge**

*** * * * ***

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, and Judge Max N. Tobias, Jr.)

TOBIAS, J., CONCURS

T. Allen Usry
Lambert J. Hassinger, Jr.
Windi D. Brown
USRY, WEEKS & MATTHEWS
1717 St. Charles Avenue
New Orleans, LA 70130

-and-

Darleen M. Jacobs
LAW OFFICE OF DARLEEN M. JACOBS
833 St. Louis Street
New Orleans, LA 70112

-and-

Gerald Meunier

Irving J. Warshauer

Gary Roth

GAINSBURGH, BENJAMIN, DAVID, MEUNIER & WARSHAUER

1100 Poydras Street, Suite 2800

New Orleans, LA 70163-2800

-and-

Kirk J. Frosch

Albert J. Nicaud

J. Douglas Sunseri

Bridgette D. Kaczmarek

NICAUD, SUNSERI & FRADELLA

3525 North Causeway Blvd., Ste. 101

Metairie, LA 70002

-and-

Darryl Phillips

PHILLIPS & MITCHELL, LLC

1580 L.L. & E. Tower

909 Poydras Street

New Orleans, LA 70112

-and-

Paul E. Mayeaux

LAW OFFICE OF PAUL E. MAYEAUX

110 James Drive West, Ste. 118

St. Rose, LA 70087

COUNSEL FOR PLAINTIFF CLASS/APPELLEE

Ewell E. Eagan, Jr.

Martin E. Landrieu

Marcy V. Massengale

GORDON, ARATA, MCCOLLAM, DUPLANTIS & EAGAN, LLP

201 St. Charles Avenue, 40th Floor

New Orleans, LA 70170-4000

-and-

Richard R. Patch

Susan K. Jamison

Howard A. Slavitt

COBLENTZ, PATCH, DUFFY & BASS, LLP

222 Kearny Street, 7th Floor

San Francisco, CA 94108

**COUNSEL FOR COX COMMUNICATIONS,
INC./APPELLANT**

AFFIRMED

Defendant/Appellant, CoxCom, Inc., appeals the judgment of the district court granting the Motion for Certification of the Class filed by Frank Munsey, John Johnson, and Sandra Weems, individually and on behalf of all others similarly situated. Following a review of the record, we affirm the judgment of the district court.

CoxCom, Inc. (hereinafter “Cox”) provides cable television service to subscribers in the parishes of Orleans, Jefferson, St. Bernard, and St. Charles. Cox assesses a late fee, sometimes referred to as an “administrative fee” or “processing fee,” when a customer pays his or her bill after the due

date. Currently, Cox imposes a late fee of \$4.00 uniformly throughout the parishes in which it operates. The amount assessed is the same in each parish and the same for every consumer who subscribes to Cox's cable service.

Frank Munsey, John Johnson, and Sandra Weems, individually and on behalf of others similarly situated (hereinafter collectively "the class"), brought suit against Cox alleging that Cox's late fee scheme violates Louisiana law because the late fee does not come close to the actual cost Cox incurs when a subscriber pays his or her bill after the due date. The class also alleges that the standard contract issued to subscribers by Cox does not state a particular dollar amount that the parties agree Cox can impose in the event the customer is late paying the bill.

Frank Munsey, John Johnson, and Sandra Weems have been assessed late fees imposed by Cox. They have been recognized as the class representatives as defined by the district court.

The district court conducted a hearing on the class' Motion for Class Certification on July 11, 2000. On December 11, 2000, the district court granted certification and in its judgment defined the class as:

all residential subscribers who are or were provided cable television service by Cox and who were assessed and/or paid any late fee(s) in connection with that service in Orleans, Jefferson, St. Bernard and St. Charles Parishes, Louisiana.

Residential subscribers includes all non-bulk subscribers.

In the same judgment, the district court ordered that this action “proceed as a class action as it relates to La. C.C. arts. 2000, 2012, 2298, and 2299 only, with the proviso that plaintiffs’ fraud claims are excluded from class treatment.” This timely appeal follows.

The only issue to be considered is whether the district court erred in certification of the class.

The prerequisites for the maintenance of class actions according to La. C.C.P. art. 591 are:

- A. One or more members of a class may sue or be sued as representative parties on behalf of all, only if:
 - (1) The class is so numerous that joinder of all members is impracticable.
 - (2) There are questions of law or fact common to the class.
 - (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
 - (4) The representative parties will fairly and adequately protect the interests of the class.
 - (5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case.
- B. An action may be maintained as a class action only if all of the prerequisites of Paragraph A of

this Article are satisfied, and in addition:

- (6) The prosecution of separate actions by or against individual members of the class would create a risk of:
 - (a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - (b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (7) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (8) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include:
 - (a) The interest of the members of the class in

- individually controlling the prosecution or defense of separate actions;
- (b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
 - (c) The desirability or undesirability of concentrating the litigation in the particular forum;
 - (d) The difficulties likely to be encountered in the management of a class action;
 - (e) The practical ability of individual class members to pursue their claims without class certification;
 - (f) The extent to which the relief plausibly demanded on behalf of or against the class, including the vindication of such public policies or legal rights as may be implicated, justifies the costs and burdens of class litigation; ...

Cox presented several arguments in suggesting that the district court improperly certified the class. First, Cox raised the issue that the Voluntary

Payment Doctrine precluded class certification because Cox alleges that the class has no claim since they made a voluntary payment in response to the bill. Also, the potential that any and all members of the class can automatically allege duress as a defense to the Voluntary Payment Doctrine is unlikely. However, voluntary payment of the fee owed or a claim of duress to circumvent this rule are substantive issues that should be handled at trial.

At a hearing on class certification, the only issue to be considered by the court is whether the case is one in which the class action procedural device is appropriate. *Andry v. Murphy Oil, U.S.A., Co.* 97-0793, (La. App. 4 Cir. 4/1/98), 710 So.2d 1126, 1129. Thus, “the court is not concerned with whether the plaintiffs have stated a cause of action or the likelihood that they ultimately will prevail on the merits.” *Id.*, citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) and *Miller v. Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971).

Johnson v. Orleans Parish School Board, 2000-0825, p.6 (La. App. 4 Cir. 6/27/01), 790 So.2d 734,740.

A class action may be certified only if numerosity, adequacy of representation and commonality requirements are present. The initial burden is on the party seeking to maintain the class action to establish these elements. *Id.*, citing *Cotton v. Gaylord Container*, 96-1958 (La. App. 1 Cir.

3/27/97), 691 So.2d 760, 768.

Cox argues that under the Voluntary Payment Doctrine, the representative members do not have a claim because they voluntarily paid Cox for services rendered, and are therefore inadequate to represent the class for the lack of a claim. Once again, this is a substantive claim, and therefore not relevant here. Cox also claims that the representative members cannot adequately represent the class because the claims of the members were vastly disparate; specifically, questions as to the number of times the late fee was paid and the facts surrounding what specific representation by Cox the customers relied upon. However, it is feasible to have classifications established for the class members based on the number of payments made to determine the severity to which each party is aggrieved. Further, the record is insufficient to support that the district court erred and this issue is resolvable at trial.

Cox also argues that the difference in the number of late fees paid by the potential class members creates a conflict of interest within the class. We do not see where the division would occur, and once again a system of classification could assist with the management of this issue.

Cox further argues that Frank Munsey is not an adequate representative member because he shared a residence with lead counsel, who

could potentially become a witness to the action. Rules of Prof. Conduct, Rule 3.7 states that:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case, or disqualification of the lawyer would work substantial hardship on the client.

It is apparent that Attorney Frosch could potentially be a witness to the action because he wrote the check and paid the cable bill on behalf of Mr. Munsey. He was keenly aware of when payments were made late and why, as well as, what information that he and Mr. Munsey relied upon in making their decisions. These matters directly relate to the contested issues of this case. Also, there is a team of lawyers working on this case, who can adequately continue without Attorney Frosch.

However, Attorney Frosch could proceed as counsel if he were a party to the action. According to *Farrington v. Law Firm of Sessions, Fishman*, 99-1486 (La. 2/25/97), 687 So.2d 997, Rules of Prof. Cond., Rule 3.7 does not apply in cases where the lawyer is representing himself or herself. Counsel can therefore either become a party to the action or find a new representative member.

Cox argues that the basis for the claims raised by the class are vastly individual. Cox contends that each class member would be required to individually prove the following: 1.) the involuntary nature of payments made, 2.) his or her reliance on the alleged concealment or misrepresentations by Cox concerning the purpose of the fee, and 3.) duress from being compelled to make payments in order to retain cable services. However, there are limitations to how many reasons a customer can give for nonpayment, essentially, either the customer did not have the ability to pay, forgot to make a payment, did not receive a bill, or elected not to pay with maybe a few gradations thereof.

One “prerequisite for maintaining a class action established by La. C.C.P. art. 591(A)(1) is that members of the class be so numerous that joinder is impracticable.” *Billieson v. City of New Orleans*, 98-1232 (La. App. 4 Cir. 3/3/99), 729 So.2d 146, 154. Cox alleges that the class was not required to identify every member of the class before certification; however, they need to establish that a class exists and is definable. *Id.* In the instant case, the class can be quantified because Cox has a finite customer base. Therefore, the class is definable.

Cox also argues that the common issues do not predominate this claim. Cox cites three individual factual issues including circumstances

surrounding the payment, reasons for the tardiness of the payments, and whether the customer relied on any alleged misrepresentations. The class was able to set forth several issues relevant to the entire class, which we find to be valid.

Cox further argues that the class did not satisfy the requirements of La. C.C.P. 591(B)(1)(a), discussed *infra*, because as separate actions, the claims would never be brought since the individual damages are for such a small amount. However, the very purpose of the class action vehicle is to assist those who individually might not otherwise be able to bring their claim, because when those aggrieved are able to pool their damages together the claim becomes significant.

Therefore, we do not find that the district court erred in certifying the class.

DECREE

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED