

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC DAMBROSIO, et al. :
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COMCAST CORPORATION, et al. :

CIVIL ACTION
NO. 03-6604

MEMORANDUM

Padova, J.

December 27, 2005

Plaintiffs, cable television services customers of Defendants in the Philadelphia and Chicago regions, have brought this antitrust action against Defendants for damages arising out of Defendants' imposition of horizontal market constraints in the cable television market. Presently before the Court is Defendants' Motion to Compel Arbitration. This Court previously ruled that the Arbitration Agreements upon which Defendants rely in their Motion are unenforceable because Defendants failed to comply with relevant federal regulations. Defendants appealed, and on July 25, 2005, the United States Court of Appeals for the Third Circuit (the "Third Circuit") reversed and remanded the case for further consideration of whether enforcement of the Arbitration Agreements is barred by contract or other grounds not previously considered by this Court. For the reasons stated below, the Motion is granted in part and denied in part.¹

¹Also before the Court is Defendants' Motion to Strike Plaintiffs' Affidavits Containing Legal Conclusions (Docket No. 34), in which Defendants ask the Court to strike the Declarations of J. Owen Todd (Pls.' Br. Ex. 1) and Howard J. Sedran (Pls.' Br. Ex. 2) from the record. The Court has not relied upon those Declarations. Defendants' Motion is, therefore, dismissed as moot.

I. BACKGROUND

Plaintiffs, nine cable television services customers of Defendants in the Philadelphia and Chicago regions, have brought this antitrust suit, pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The Amended Complaint alleges that Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") imposed horizontal market restraints in the cable television markets in the Philadelphia and Chicago regions. (Am. Compl. ¶ 4.) Comcast allegedly divided and allocated cable television markets in those regions through agreements with other cable providers to "swap" customers. (Id.) The Amended Complaint further alleges that Comcast monopolized, or attempted to monopolize, the markets for provision of cable service to consumers in those areas. (Id. ¶ 5.)

Comcast seeks an order requiring Plaintiffs to submit their claims to arbitration and staying this proceeding until the completion of that arbitration. Comcast contends that Plaintiffs' claims are subject to Arbitration Agreements entered into between Plaintiffs and Comcast. Comcast relies on two form Arbitration Agreements, one of which applies to its customers in the Philadelphia region (the "Philadelphia Arbitration Agreement"), and

one of which applies to its customers in the Chicago region (the "Chicago Arbitration Agreement").

According to Comcast, Plaintiffs in the Philadelphia region are bound by an Arbitration Agreement that Comcast incorporated in pre-printed Work Order forms beginning in December 2001. This form Work Order purported to amend all prior customer subscription contracts and was phased in throughout the Philadelphia region over a period of 60 or 90 days. (09/07/2004 Tr. at 28.) It is Comcast's policy to distribute form Work Orders to its customers during each work visit that requires a Comcast technician to access the customer's residence. Comcast contends that all Comcast customers who received work visits at their residences after December 2001 would have received these new form Work Orders and are, therefore, bound by their Arbitration Agreement. The Agreement provides as follows: "**MANDATORY AND BINDING ARBITRATION - EXCEPT AS PROVIDED BELOW, ANY CLAIM OR CONTROVERSY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE SERVICES PROVIDED UNDER THIS AGREEMENT, SHALL BE SETTLED BY ARBITRATION.**" (Work Order § 13.) All of the Philadelphia area Plaintiffs received work visits at their homes between December 2001 and December 2003, and on those occasions allegedly were given, and consented to, the Arbitration Agreement on the back of the form Work Orders. (Defs.' Br. at 11-12.)

Comcast contends that Plaintiffs in the Chicago region are

bound by an Arbitration Agreement included in a booklet entitled "Policies & Practices - Notice to Customers Regarding Policies, Complaint Procedures & Dispute Resolution" (hereinafter "2002/2003 Policies & Practices"). Prior to November 2002, the Chicago Plaintiffs received their cable services from AT&T Broadband; when AT&T Broadband merged into Comcast on November 18, 2002, they became Comcast customers. The 2002/2003 Policies & Practices was allegedly sent to all AT&T Broadband subscribers in the Chicago area with their monthly bills for November 2002 and all Comcast subscribers in the Chicago area with their monthly bills for November 2003. (Funchess Decl. ¶ 4, Mar. 2, 2004.) The 2002/2003 Policies & Practices purported to amend customers' subscription agreements, and it provides in relevant part: **"MANDATORY AND BINDING ARBITRATION:** IF WE ARE UNABLE TO RESOLVE INFORMALLY ANY CLAIM OR DISPUTE RELATED TO OR ARISING OUT OF THIS AGREEMENT OR THE SERVICES PROVIDED, WE HAVE AGREED TO BINDING ARBITRATION EXCEPT AS PROVIDED BELOW." (2002/2003 Policies & Practices § 10.)

II. LEGAL STANDARD

Comcast contends that this Court must enforce the Philadelphia and Chicago Arbitration Agreements pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Section 2 of the FAA provides that:

[A] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Before a reluctant party can be compelled to arbitrate, the court must "engage in a limited review to ensure that the dispute is arbitrable - i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990), overruled by implication on other grounds, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002); see also Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 (3d Cir. 1980). In deciding whether an arbitration agreement was validly formed, courts look to the relevant state law of contracts. Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 264 (3d Cir. 2003).

III. DISCUSSION

Plaintiffs argue that the Philadelphia and Chicago Arbitration Agreements are not enforceable because they were not validly entered into by the parties, and because the Agreements contain several provisions that would render those Agreements unenforceable as a matter of public policy or because they are unconscionable. Plaintiffs further contend that, if the Arbitration Agreements are enforceable, their clauses are not retroactive in nature and,

therefore, do not apply to claims that arose before the Agreements came into effect. Comcast asserts that these issues should not be analyzed under state law because the Cable Television Consumer Protection Act (the "Cable Act"), 47 U.S.C. § 521 et seq., preempts state law in this area.

A. Preemption

Comcast argues that, because it is a cable operator, the validity of the Arbitration Agreements is governed by the Cable Act. Section 552(c) states that "[a] cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion." Id. The regulations implementing the Cable Act further provide that "the cable operator shall notify subscribers 30 days in advance of any significant changes in the [conditions of subscription.]" 47 C.F.R. § 76.1603(b). Moreover, the regulations implementing the Cable Act state that "the cable operator shall provide written information . . . at the time of installation of service, at least annually to all subscribers, and at any time upon request [on] . . . [p]rices and options for programming services and conditions of subscription to programming and other services." 47 C.F.R. § 76.1602(b)(2).

According to Comcast, the Cable Act preempts Pennsylvania and Illinois contract law. The doctrine of preemption emanates from the United States Constitution's Supremacy Clause, which provides

that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the land." U.S. Const. Art. VI, cl. 2. Accordingly, state laws that "'interfere with, or are contrary to,' federal law" are preempted. Hillsborough County v. Automated Med. Labs, Inc., 471 U.S. 707, 712 (1985) (quoting Gibbons v. Ogden, 22 U.S. 1, 211 (1824)). "[F]ederal pre-emption of state law can occur in three types of situations: where Congress explicitly pre-empts state law, where pre-emption is implied because Congress has occupied the entire field and where pre-emption is implied because there is an actual conflict between federal and state law." Pokorny v. Ford Motor Co., 902 F.2d 1116, 1120 (3d Cir. 1990).

Comcast maintains that the Cable Act and the regulations promulgated thereunder implicitly preempt state law of contract formation because state contract laws conflict with Congress's objective in passing the Cable Act. Implied preemption exists "where it is impossible for a private party to comply with both state and federal requirements . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (internal quotation omitted). "[T]he party claiming preemption bears the burden of demonstrating that federal law preempts state law." Green v. Fund Asset Mgmt., 245 F.3d 214, 230 (3d Cir. 2001).

Comcast asserts that the Cable Act and the regulations promulgated thereunder establish procedures for providing subscribers with written notices of changes in cable service, and recognize that valid forms of such notice include the use of bill stuffers, newspaper notices, and announcements on the cable system. See 47 U.S.C. § 552(c); see also 61 C.F.R. §§ 18968, 18973. Comcast contends that, by promulgating such regulations, Congress intended to provide cable operators with broad flexibility in amending subscription contracts that state contract law cannot circumscribe. See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc., 423 F.3d 1056, 1075 (9th Cir. 2005) (noting that determinations of whether state law claims are preempted by the Communications Act require courts to consider the theory of each claim and to decide "whether the legal duty that is the predicate" of that claim is inconsistent with federal regulations (quoting Cipollone v. Liggett Group, 505 U.S. 504, 523-24 (1992))). However, Congress itself noted that "[t]he purpose of the notice requirement is to ensure that consumers have sufficient warning about rate and service changes so that they can choose to disconnect their service prior to implementation of the change." H.R. Rep. No. 104-204 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 79. The Cable Act was, therefore, not intended to facilitate a cable operator's changes to subscription agreements, but rather to establish certain minimum standards that cable operators are bound

by when effecting any such changes.

The Cable Act expressly preserves state jurisdiction over cable services where that jurisdiction is consistent with the Act.² 47 U.S.C. §556(b). The Federal Communications Commission has confirmed that the Communications Act, of which the Cable Act is a part, "does not govern other issues, such as contract formation and breach of contract," In re Policy & Rules Concerning the Interstate Interexchange Marketplace, 12 F.C.C.R. 15014, 15057; 1997 WL 473330 (1997). See also Ting v. AT&T, 319 F.3d 1126, 1144 (9th Cir. 2003) (noting that the Communications Act "permits - indeed, depends upon - the imposition of state law"). The Court, therefore, finds that state contract law does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing the Cable Act. See English, 496 U.S. at 79. Accordingly, the Court concludes that the Cable Act does not preempt the application of state contract law to determine whether the Arbitration Agreements between Plaintiffs and Comcast were validly formed.

B. Contract Formation

In determining whether the parties entered into a valid agreement to arbitrate under state law, courts apply a standard of

²The Cable Act preempts and supercedes state law only when it is "inconsistent" with the Act, "a statutory formulation which suggests that state law not inconsistent with the Cable Act is not pre-empted." 47 U.S.C. §556(c); Cablevision of Boston Ltd. P'ship v. Flynn, 710 F. Supp. 23, 28 (D. Mass 1989).

review that is substantively identical to the standard used in reviewing motions for summary judgment under Federal Rule of Civil Procedure 56. Par-Knit Mills, 636 F.2d at 54 n.9. Under this standard, if there is any doubt concerning the formation of the arbitration agreement "the matter, upon a proper and timely demand, should be submitted to a jury. Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement." Id. at 54. The court must construe the evidence presented on a motion to compel arbitration in the light most favorable to the opposing party and draw all reasonable doubts and inferences that may arise in its favor. Id.

As the moving party, Comcast bears the initial responsibility for informing the Court of the basis for its motion and identifying the portions of the record it believes demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). To demonstrate that no genuine issues exist, the movant must present a factual scenario without any "unexplained gaps." Moore's Federal Practice, § 56.13 (Matthew Bender 3d ed.) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 (1970)). The movant must then establish that it is entitled to judgment as a matter of law on the basis of the undisputed facts. See Fed. R. Civ. P. 56(c). If the movant meets its burden, the non moving party must respond by setting

forth specific facts demonstrating a triable issue. See Fed. R. Civ. P. 56(e). The non moving party must offer "an unequivocal denial that the agreement [to arbitrate has] been made . . . and some evidence should [be] produced to substantiate the denial." Great W. Mortgage Corp. v. Peacock, 110 F. 3d 222, 231 n.36 (3d Cir. 1997) (quoting Interbras Cayman Co. v. Orient Victory Shipping Co., S.A., 663 F.2d 4, 7 (2d Cir. 1981)).

1. Philadelphia Plaintiffs

Comcast argues that it entered into valid Arbitration Agreements with all of the Philadelphia Plaintiffs because they all received work visits from Comcast after December 2001. Comcast contends that, in accordance with company policy, Plaintiffs were asked to sign a Work Order that contained the Arbitration Agreement and were left with a copy of the Work Order. (09/07/04 Tr. at 28.)

Plaintiffs maintain that Comcast did not consistently adhere to its own policies and procedures regarding Work Orders. For three of the five Plaintiffs, Comcast either could not produce copies of their Work Orders or could only produce Work Orders whose subscriber signature lines are blank. Plaintiff Barbi Weinberg subscribed to Comcast in 1995. She had six Comcast visits between January 2002 and January 2003, but Comcast could not locate Work Orders for any of those visits. (Gribschaw Decl. ¶ 8, May 5, 2004; 09/07/04 Tr. at 36.) Plaintiffs Stanford Glaberson and Kenneth Saffren initiated service with Comcast in 1991 and 1995. They had one and two Comcast work visits respectively after December 2001,

but on the copies of their Work Orders retained by Comcast, the subscriber signature line is unmarked. (Gribschaw Decl. ¶ 9-10, Ex. D-F, May 5, 2004; 09/07/04 Tr. at 37.) Plaintiff Marc Dambrosio subscribed to Comcast in 2000 and renewed his subscription in 2002 when he moved Philadelphia residences. There should be a signed Work Order from the 2002 installation of cable service at his second residence, but the only two Work Orders that Comcast produced for him are dated 2004. (Gribschaw Decl. Ex. A, July 12, 2004; 09/07/04 Tr. at 63.) Each of the 2004 Work Orders has a different signature, one of which is by someone with the initials "D.M.E," and Plaintiff Dambrosio has declared that neither signature is his. (09/07/04 Tr. at 33, 63; Dambrosio Decl. ¶ 7.) The only Plaintiff for whom Comcast had a properly signed Work Order is Plaintiff Caroline Cutler, and it was signed by her fiancé. (Gribschaw Decl. Ex. C, May 5, 2004; 09/07/04 Tr. at 29.) That Work Order is from Plaintiff Cutler's April 2003 initial installation. (Id.)

The Philadelphia Plaintiffs argue that the Arbitration Agreements in the post-December 2001 Work Orders cannot be enforced against them because none of them personally signed a Work Order. The Philadelphia Plaintiffs do not contest that written arbitration clauses offered as an amendment to an existing contract need not be signed by the contracting parties to be enforceable. See 9 U.S.C. § 2. They assert, however, that because the Work Orders at issue here specifically called for the subscribers' signatures, any

contractual amendments contained in the Work Orders cannot be enforced absent such signatures. The Third Circuit has held that agreements to arbitrate, in particular, must be "express" and "unequivocal." Par-Knit Mills, 636 F.2d 51, 54 (3d Cir. 1980). Where the arbitration clause is an amendment to a pre-existing contract, the Pennsylvania courts have found that "an arbitration agreement cannot be found by implication, and the parties intent to submit to arbitration must be clear." Universal Plumbing & Piping Supply, Inc. v. John C. Grimberg Co., 596 F. Supp. 1383, 1385 (W.D. Pa 1984) (citation omitted).

The fact that the Work Orders leave space for subscribers' signatures is not, however, enough to make their enforcement dependent upon Plaintiffs having affixed their signatures to them. Pennsylvania law is clear that signatures are not necessary to validate a contract unless such signing is "expressly required by law or by the intent of the parties." Shovel Transfer & Storage, Inc. v. Pa. Liquor Control Bd., 739 A.2d 133, 136 (Pa. 1999) (citing L.B. Foster Co. v. Tri-W Constr. Co., 186 A.2d 18, 19 (Pa. 1962); Pennsylvania Law Encyclopedia, Contracts § 29). Pennsylvania courts have held that the mere presence of signature lines does not dictate the conditions under which parties intended to be bound. Shovel, 739 A.2d at 138-39. Signature lines are only determinative when accompanied by more - for instance, terms that expressly provide that the contract's provisions do not

become enforceable until the parties affix their signatures. See e.g. id. at 139; Commonwealth v. On-Point Tech. Sys., 821 A.2d 641, 648 (Pa. Commw. Ct. 2003). Comcast's Work Orders lack such limiting language. Thus, subscribers' signatures on the Work Orders are important only to the extent they illuminate whether the parties agreed to the terms in question. Shovel, 739 A. 2d at 138.

Comcast acknowledges that it cannot produce any Work Orders for Plaintiff Weinberg and that it cannot produce signed Work Orders for Plaintiffs Glaberson and Saffren. Comcast maintains that these difficulties are simply the result of shoddy record keeping in a rapidly growing industry and technicians' failure to secure subscribers' signatures consistently before handing them their Work Orders. (09/07/04 Tr. at 34-35, 37.) Consequently, Comcast relies on the May 2004 Declaration of Andrew Gribschaw, Vice President of Finance for Comcast's Pennsylvania/Delaware Region, to support its contention that those Philadelphia Plaintiffs are bound by Arbitration Agreements in Work Orders. Gribschaw describes Comcast's policy and practice of leaving Work Order copies with its subscribers after any field installations, changes of service level or repairs. (Gribschaw Decl. ¶3, May 5, 2004.) Comcast argues that it necessarily adhered to this policy and practice and that it delivered to those Philadelphia Plaintiffs Work Orders containing an Arbitration Agreement, which

became binding upon them when they thereby received notice of the Agreement's terms. (09/07/04 Tr. at 35.)

The Court finds that Comcast has not met its initial burden of proving that Plaintiffs Weinberg, Glaberson and Saffren agreed to arbitration. The evidence on the record of this Motion fails to foreclose the possibility that where there are no Work Orders or no signed Work Orders, Plaintiffs never received notice of the Arbitration Agreement. Without such notice, there could not have been the meeting of the minds on the Agreement that Pennsylvania law requires.³ The Court, therefore, concludes that there are genuine issues of material fact regarding whether the subscriber agreements of Plaintiffs Weinberg, Glaberson and Saffren were amended to include an agreement to arbitrate disputes.

Comcast has produced two Work Orders for visits to Plaintiff Dambrosio's address with markings on the subscriber signature lines. (09/07/04 Tr. at 32.) Plaintiff Dambrosio denies that either Work Order contains his signature. (Dambrosio Decl. ¶ 7.) The markings on the January 6, 2004 Work Order are unintelligible and those on the January 13, 2004 Work Order appear to be the

³Comcast essentially admitted as much during the September 7, 2004 Argument. Comcast's counsel, in urging the Court to rely on the language of the Cable Act and not state law contract formation principles in determining the enforceability of the Arbitration Agreements, explicitly stated that if state law principles were used, there could be a genuine issue of material fact as to whether valid Agreements were formed. (09/07/04 Tr. at 39).

initials "D.M.E" and not the initials of Plaintiff Dambrosio. (Gribschaw Decl. Ex. A, July 12, 2004.) The line for the technician's signature is blank on both Work Orders, leaving open the possibility that the Comcast technician marked the subscriber line. (09/07/04 Tr. at 33.) Consequently, the evidence on the record of this Motion suggests that Plaintiff Dambrosio may never have received the Work Orders. The Court finds, therefore, that a genuine issue of material fact exists as to whether Plaintiff Dambrosio entered into an agreement to arbitrate with Comcast.

Comcast has produced a clearly signed Work Order containing an Arbitration Agreement from the date of Plaintiff Cutler's initial cable installation. (09/07/04 Tr. at 29-32.) Plaintiff Cutler, however, argues that she is not bound by the Arbitration Agreement in that Work Order because the Work Order was signed by her fiancé. (Id. at 64-65.) There are five circumstances under which nonsignatories may be bound to an arbitration agreement: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. Trippe Mfg. Co. v. Niles Audio Corp., 401 F.3d 529, 532 (3d Cir. 2005). Comcast asserts that Plaintiff Cutler is estopped from denying that she is bound by the Arbitration Agreement in the Work Order. (09/07/04 Tr. at 30-32.)

Under the doctrine of equitable estoppel, a nonsignatory to a contract containing an arbitration provision will be compelled

to arbitrate if he or she "knowingly exploits the agreement containing the arbitration clause despite never having signed the agreement." E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 199 (3d. Cir. 2001) (citing Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 778 (2d Cir.1995)). The policy behind this doctrine is to "prevent a non-signatory from embracing a contract, and then turning its back on the portions of the contract, such as an arbitration clause, that it finds distasteful." Id. at 200. If a party derives a direct benefit from a contract, she cannot then deny the arbitration clause it contains. Id.; see, e.g., Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) (holding non-signatory bound by contract under which it received the direct benefits of lower insurance and the ability to sail under the French flag).

The evidence of record establishes that Plaintiff Cutler arranged to have cable television service at her home address. (Cutler Decl. ¶ 2.) A Comcast technician installed cable for her under the terms of the Work Order signed by her fiancé. (Gribschaw Decl. ¶ 8, May 5, 2004.) From April 2003, Plaintiff Cutler enjoyed the benefit of Comcast's cable television programming. (Cutler Decl. ¶ 2.) The Court finds, accordingly, that Plaintiff Cutler is estopped from avoiding the Arbitration Agreement in the Work Order solely because her fiancé signed the

Work Order on her behalf. The Court concludes that she is, therefore, bound by its terms.

2. Chicago Plaintiffs

Comcast argues that it entered into valid Arbitration Agreements with the Chicago Plaintiffs because Plaintiffs Eric Brislawn, Joan Evanchuk-Kind, Michael Kellman and Lawrence Rudman all received the 2002/2003 Policies & Practices brochures, which contained arbitration clauses. Under Illinois law, a company's mailing of policy booklets containing an arbitration clause to its subscribers gives rise to a valid arbitration agreement. Ragan v. AT&T Corp. 824 N.E.2d 1183, 1188-89 (Ill. App. Ct. 2005) (holding customers' "silence and inaction" upon receipt of a consumer services agreement (CSA) from a carrier constituted acceptance of the CSA, including its arbitration provision). The arbitration agreements need not be signed to constitute enforceable contracts. Subscribers' acceptance is apparent from the fact that they could have rejected the arbitration agreements by canceling service with their carrier, and they failed to avail themselves of that choice. Id.

The Chicago Plaintiffs argue that the Arbitration Agreement contained in the 2002/2003 Policies & Practices should nonetheless not be enforced against them, because they have no recollection of having ever received or read the brochures. Where a company provides sufficient evidence that it mailed brochures containing

an arbitration clause to its subscribers, a subscriber's mere assertion that he or she did not receive or read the brochure is not enough to avoid arbitration. Id. at 1149. Sufficient evidence constitutes "evidence of actual mailing such as an affidavit from the employee who mailed the [brochures], or . . . proof of procedures followed in the regular course of operations which give rise to a strong inference that the [brochures were] properly addressed and mailed." Godfrey v. United States, 997 F.2d 335, 338 (7th Cir. 1993) (citing cases).

Janet Funchess, the marketing specialist who oversaw the annual legal notifications sent to Chicago area cable subscribers during 2002 and 2003, has declared that Comcast's predecessor, AT&T Broadband, included copies of the 2002 Policies & Practices with Chicago area subscribers' November 2002 monthly bills. (Funchess Decl. ¶ 4, Mar. 2, 2004.) Comcast repeated AT&T Broadband's practice after the two companies merged in late 2002, adding the 2003 Policies & Practices to the November 2003 bills. (Id.; 09/07/04 Tr. at 25-26.) Neither AT&T Broadband nor Comcast employees performed the mailings themselves. However, the outside company retained by both AT&T Broadband and Comcast to perform the job provided test envelopes to confirm that the mailings had been properly completed. (Funchess Dep. 158-60; 09/07/04 Tr. at 25.) The November 2002 and November 2003 bills were sent by first class mail and included a return address in the upper left hand corner

of the mailing. (Funchess Decl. ¶ 3, Mar. 2, 2004.) Comcast has no record of the November monthly billings containing either the 2002 or the 2003 Policies & Practices being returned for any of the Plaintiffs, and the fact that all Plaintiffs payed their November 2002 and 2003 bills suggests that they received those mailings. (Funchess Decl. ¶¶ 6, 8, 10, 12, Mar. 2, 2004; 09/07/04 Tr. at 26.) See Kennedy v. Conseco Corp., 2001 WL 938267, at *1 (N.D. Ill. 2001), rev'g 2000 WL 1760943 (N.D. Ill. 2000) (considering cardholder's payment of monthly bill when applying presumption of delivery to monthly statement containing arbitration clause). Accordingly, the Court concludes that Comcast's mailing of the 2002/2003 Policies & Practices, and the Chicago Plaintiffs continued subscription to Comcast's services upon receipt of those brochures, gave rise to the formation of an Arbitration Agreement between the parties.⁴

Both the Philadelphia and Chicago Plaintiffs argue further that, even if they received a post-December 2001 Work Order or the 2002/2003 Policies & Practices, Comcast has the burden of proving that the Arbitration Agreements contained therein complied with any provisions governing contractual amendments in Plaintiffs'

⁴Plaintiff Kellman disconnected his cable service in December 2003, but his use of cable services in the twelve preceding months binds him under the 2002 Policies & Practices Arbitration Agreement.

original subscription agreements.⁵ Plaintiffs contend that Comcast cannot meet its burden because it has not produced copies of Plaintiffs' original subscription agreements.

As the party seeking to compel arbitration, Comcast bears the burden of proving the existence of an agreement to arbitrate. See Sportelli v. Circuit City Stores, Inc., 1998 WL 54335, at *2 (E.D. Pa. 1998). If Plaintiffs' initial subscriber agreements did not permit amendments or permitted them only under restricted circumstances, then the Arbitration Agreements contained in the Philadelphia Work Orders and Chicago 2002/2003 Policies & Practices might not be binding upon the Plaintiffs. See Blue Cross & Blue Shield v. Woodruff, 803 So. 2d 519, 527-28 (Ala. 2001) (denying arbitration based upon original lease agreement providing that no other agreement would be binding unless signed and accepted by the parties). However, under both Pennsylvania and Illinois law, the burden of proof to establish a condition precedent is on the party alleging the breach. See Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1007-08 (3d Cir. 1980); MCM Partners v. Andrews-Bartlett & Assocs., 161 F.3d 443,

⁵The Court notes that these arguments apply to those Plaintiffs who initially subscribed to Comcast service in Philadelphia prior to December 2001, when Comcast began to include arbitration clauses in the Work Orders, and in Chicago prior to November 2002, when the Policies & Practices were amended to include the arbitration clause Comcast seeks to enforce. These arguments thus apply to all Plaintiffs except Caroline Cutler, who initially subscribed to Comcast service in the Philadelphia region in April 2003.

447 (7th Cir. 1998). Comcast's responsibility for demonstrating the existence of enforceable arbitration provisions does not, therefore, include eliminating any possibility that Plaintiffs' original subscription agreements disallowed amendments.

Plaintiffs have failed to produce any evidence that their original subscription agreements contained condition precedents that limited or restricted amendments. Indeed, Plaintiffs do not have copies of their subscription agreements. (09/07/04 Tr. at 57-58.) Instead, the record before the Court suggests that the initial subscriber agreements explicitly provided for amendments. Comcast has submitted copies of several years of agreements covering initial subscribers in Philadelphia and Chicago, and they consistently permit amendments. (Gribschaw Decl. Ex. B, May 5, 2004; Funchess Decl. Ex. B, July 12, 2004.) Accordingly, the Court finds that Plaintiffs have not met their burden of establishing a condition precedent to amendment of their subscription agreements. See *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002) ("a party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration rests; the party must identify specific evidence in the record demonstrating a material factual dispute for trial.") (citation omitted).

For the reasons stated above, the Court finds that Philadelphia Plaintiff Cutler and Chicago Plaintiffs Brislawn,

Evanchuk-Kind, Kellman and Rudman have valid Arbitration Agreements with Comcast and cannot avoid arbitration on grounds pertaining to contract formation. The Court further finds that there are genuine issues of material fact regarding whether Philadelphia Plaintiffs Weinberg, Glaberson, Saffren and Dambrosio entered into enforceable Arbitration Agreements with Comcast, and concludes that those Plaintiffs are entitled to trials on that issue.

C. Violation of Public Policy

Plaintiffs argue that the Arbitration Agreements are not enforceable because they are incompatible with the federal antitrust laws. Plaintiffs contend that the Philadelphia Arbitration Agreement (1) bars Plaintiffs' recovery of treble damages, attorneys' fees and costs of suit otherwise available to Plaintiffs under the Clayton Act, 15 U.S.C. § 15; (2) requires them to pay half of the arbitrators' fees and expenses; (3) limits discovery; and (4) bans class actions. Plaintiffs maintain that the Chicago Arbitration Agreement similarly restricts their rights under federal law and also impermissibly shortens the statute of limitations within which they may assert their antitrust claims by requiring them to notify Comcast of any claims against it within one-year or waive the claims. Plaintiffs maintain that these provisions prohibit them from vindicating their statutory rights under the antitrust laws and hence, violate public policy.

Under the FAA, agreements to arbitrate are “enforceable to the same extent as other contracts.” Alexander v. Anthony Int’l L.P., 341 F.3d 256, 263 (3d Cir. 2004) (quoting Seus v. John Nuveen & Co., 146 F. 3d 175, 178 (3d Cir. 1998)). Whether an arbitration agreement violates public policy is a matter of law to be decided by the court. Peltz v. Sears, Roebuck & Co., 367 F. Supp. 2d 711, 720 (E.D. Pa. 2005) (citing W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, 461 U.S. 757, 766 (1983)); see also Blair v. Scott Specialty Gases, 283 F.3d 595, 611 (3d Cir. 2002) (articulating scope of inquiry for district courts evaluating arbitration agreements: “first, whether there was an arbitration agreement, and second, whether that agreement was valid”). As previously mentioned, courts determine the validity of arbitration agreements by looking to the relevant state contract law. Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 275 (3d Cir. 2004) (citing Blair, 283 F.3d at 603). In both Pennsylvania and Illinois, courts decline to enforce contracts that are contrary to public policy. See, e.g., Bellevue Drug Co. v. Advance PCS, 333 F. Supp. 2d 318, 326 (E.D. Pa. 2004) (applying Pennsylvania law); Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp., 792 N.E.2d 488, 494 (Ill. App. Ct. 2003) (citing People ex rel. Callahan v. Marshall Field & Co., 404 N.E.2d 368, 373 (Ill. App. Ct. 1980)).

While this Court must demonstrate regard for the “liberal

federal policy favoring arbitration agreements," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983), it must also respect the "equally strong polic[y]" of invalidating arbitration agreements that preclude litigants from effectively vindicating their federal statutory rights in an arbitral forum. Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 213-14, (3d Cir. 2003) (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000)). "It is well established that arbitration is merely a choice of dispute resolution and does not infringe upon statutory protections." Spinetti, 324 F.3d at 216 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Mitsubishi, 473 U.S. at 628. The burden is on the party who seeks to avoid arbitration to show that his or her statutory claims cannot be vindicated in an arbitral forum. See Green Tree, 531 U.S. at 91-92. Where an arbitration provision would clearly deprive a party of the opportunity to vindicate his or her cause of action, courts should not enforce such a provision. Id.

1. Limitations on recovery of attorneys' fees, costs of suit and treble damages

Plaintiffs argue that the Philadelphia and Chicago Arbitration Agreements violate public policy because they

eliminate the possibility that they would be awarded the attorneys' fees, costs of litigation, and treble damages to which they are entitled by statute should they prevail. The Philadelphia Arbitration Agreement reads:

EACH PARTY SHALL BEAR ITS OWN EXPENSES AND FEES INCLUDING, WITHOUT LIMITATION, COUNSEL FEELS, INCURRED IN THE CONDUCT OF THE ARBITRATION. THE ARBITRATOR MAY NOT VARY THE TERMS OF THIS AGREEMENT, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING. IN NO EVENT SHALL THE ARBITRATOR HAVE AUTHORITY TO AWARD PUNITIVE DAMAGES OR ANY OTHER SUMS WHICH EXCEED THE PREVAILING PARTY'S ACTUAL DAMAGES, NOR SHALL ANY PARTY SEEK PUNITIVE OR OTHER DAMAGES RELATING TO ANY MATTER ARISING OUT OF THIS AGREEMENT IN ANY OTHER FORUM.

(Work Order § 13.) The Chicago 2002/2003 Policies & Practices states:

IN NO EVENT SHALL WE . . . HAVE ANY LIABILITY FOR PUNITIVE, TREBLE, EXEMPLARY, SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES RESULTING FROM OUR PROVISION OF . . . SERVICES OR EQUIPMENT TO YOU. . . . YOU ARE RESPONSIBLE FOR ALL COSTS THAT YOU INCUR IN THE ARBITRATION, INCLUDING, BUT NOT LIMITED TO, YOUR EXPERT WITNESSES OR ATTORNEYS.

(2002/2003 Policies & Practices §§ 8, 10.) Plaintiffs contend that these clauses are directly contrary to Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides that any person injured by a violation of the antitrust laws "shall recover threefold the damages sustained by him and the cost of suit, including a reasonable attorney's fee."

The Philadelphia and Chicago Arbitration Agreements must make

accessible to Plaintiffs the entire scope of remedies under the Sherman and Clayton Acts. See Spinetti, 324 F.3d at 216 (invalidating arbitration agreement requiring each party to pay its own attorneys' fees as contrary to the statutory provisions of Title VII). Comcast acknowledges that a prohibition on the recovery of statutory attorneys' fees and costs would violate public policy, but insists that the Arbitration Agreements permit their recovery. Comcast asserts that neither the Philadelphia nor the Chicago Arbitration Agreement restricts the ability of the arbitrator to award attorneys' fees and costs as part of the arbitral award. According to Comcast, the Agreements simply confirm the "normal rule" that each party must bear its own expenses as the arbitration proceeds. (Defs.' Rep. Br. 13, 24.) Comcast's argument is belied, however, by the plain language of the Agreements, which clearly states that each party must pay its own attorneys' fees and costs of suit. See Spinetti, 324 F.3d at 216 n.1 (rejecting argument that an arbitration agreement must be read in a manner consistent with federal law and so as not to preclude an award of attorneys' fees, where the arbitration agreement plainly precluded such an award); see also Parilla, 368 F.3d at 285 (noting that a party may not cure the unconscionability of challenged provisions in arbitration agreements by waiving the right to enforce them). This Court finds that the Philadelphia and Chicago Arbitration Agreements bar an award of attorneys' fees and costs of suit, and thereby violate public policy. The limitations on attorneys' fees and costs of

suit in the Agreements are thus unenforceable under Pennsylvania and Illinois law.

Comcast also argues that neither the Philadelphia nor the Chicago Arbitration Agreement bars the recovery of treble damages. The Philadelphia Agreement does not specifically discuss treble damages. Rather, it bars the arbitrator from awarding "PUNITIVE DAMAGES OR ANY OTHER SUMS WHICH EXCEED THE PREVAILING PARTY'S ACTUAL DAMAGES." (Work Order § 13.) The treble damages provision of Section 4 of the Clayton Act, 15 U.S.C. § 15, is "in essence a remedial provision." PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 406 (2003) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977)); see also Cook County v. United States ex rel. Chandler, 538 U.S. 119, 130 (2003) (stating "it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives"). Accordingly, this Court finds that the language barring recovery of punitive damages or sums in excess of actual damages does not clearly apply to Plaintiffs' antitrust claims for treble damages. Where language in an arbitration agreement limiting liability for damages does not necessarily bar the recovery of statutory treble damages, "the proper course is to compel arbitration." PacifiCare, 538 U.S. at 407. The Court finds, therefore, that the question of whether the Philadelphia Arbitration Agreement prohibits the recovery of treble damages under Section 4 of the Clayton Act is a question that must be left to the arbitrator. Id.

The Chicago Arbitration Agreement explicitly states that in no event shall Comcast have any liability for treble damages. (2002/2003 Policies & Practices § 8.) However, that language is qualified by a subsequent "savings clause," which reads: "IF CERTAIN REMEDIES, DAMAGES AND/OR WARRANTIES CANNOT BE WAIVED, LIMITED OR OTHERWISE MODIFIED, THE LIABILITY OF THE COMPANY AND ITS AFFILIATES IS LIMITED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW." (Id.) Plaintiffs cannot, as a matter of law, waive their right to treble damages under the antitrust laws. See, e.g., Mitsubishi, 473 U.S. at 637 n.19 (noting that if clauses of an arbitration agreement operated as "a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); Gaines v. Carrollton Tobacco Bd. of Trade, Inc., 386 F.2d 757, 759 (6th Cir. 1967) ("[I]t seems clear as a matter of law that such an agreement, if executed in a fashion calculated to waive damages arising from future violations of the antitrust laws, would be invalid on public policy grounds.") (citing Fox Midwest Theatres, Inc. v. Means, 221 F.2d 173 (8th Cir. 1955)). Consequently, the Court finds that the plain language of the Chicago Arbitration Agreement does not preclude Plaintiffs from recovering treble damages. The Court concludes that Plaintiffs have not demonstrated that the language disclaiming liability for treble damages in the Chicago Arbitration Agreement, once read in accordance with the "savings clause," violates public policy.

2. Costs associated with arbitration

Plaintiffs contend that the Philadelphia and Chicago Arbitration Agreements violate public policy by requiring them to pay prohibitively high arbitrators' fees and expenses to pursue their antitrust claims. The Philadelphia Arbitration Agreement states: "EACH PARTY SHALL BEAR ITS OWN EXPENSES AND FEES . . . INCURRED IN THE CONDUCT OF THE ARBITRATION." (Work Order § 13.) The Philadelphia Plaintiffs argue that this language requires them to bear their own costs of arbitration, including arbitrators' fees. The Chicago Arbitration Agreement provides that Comcast will "pay for all reasonable arbitration filing fees and arbitrator's costs and expenses," but it otherwise requires that "YOU [the subscriber] ARE RESPONSIBLE FOR ALL COSTS THAT YOU INCUR IN THE ARBITRATION" (2002/2003 Policies & Practices § 10.) The Chicago Plaintiffs maintain that this language subjects them to the prospect of paying whatever fees Comcast deems unreasonable. Thus, Plaintiffs argue, under both the Philadelphia and Chicago Arbitration Agreements, they would be exposed to the payment of arbitration costs in excess of the costs they would incur in court and which would exceed the amount of any potential recovery.

The Supreme Court has recognized that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her . . . statutory rights in the arbitral forum." Green Tree, 531 U.S. at 90. It would undermine litigants' ability

to achieve vindication to prevent them from “gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.” Blair, 283 F.3d at 606 (quoting Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1484 (D.C. Cir. 1997)). However, “[where] a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.” Green Tree, 531 U.S. at 92. Plaintiffs who are subject to cost-sharing provisions can meet their burden by establishing their inability to pay or the high cost of arbitration. Blair, 283 F.3d at 607-08; cf. Alexander, 341 F.3d at 269 (invalidating contract provision requiring the losing party to pay arbitration expenses in light of evidence submitted as to the rates of prospective arbitrators).

The Philadelphia Arbitration Agreement states that any claims shall be settled under American Arbitration Association (“AAA”) rules for the resolution of commercial disputes. (Work Order § 13.) Philadelphia Plaintiffs have presented evidence that, under AAA rules and fee schedules, they would each have to pay an initial filing fee of \$500, plus a “case service” fee of \$200. (Bullion Decl. ¶ 12.) They would also be responsible for half of the arbitrators’ fees, which would likely be \$800 to \$1400 per arbitrator per day. (Id. at ¶¶ 7-8, 12.) If a Plaintiff’s case were heard by a three-person panel and ran the twenty days that Plaintiffs predict (Pls.’ Br. 14), then each Plaintiff’s portion

of the arbitrators' fees for his or her case could amount to over \$30,000. The Plaintiff would also be obligated to pay half of the hearing room rental fees and other arbitration expenses. (Bullion Decl. ¶14.) The Court finds that the costs of arbitration that the Philadelphia Plaintiffs would be required to pay under the Philadelphia Arbitration Agreement are prohibitive, given that each Plaintiff only expects to recover damages that, when trebled, range from "hundreds of dollars to perhaps a few thousand dollars." (Woodward Decl. ¶ 2.) See Parilla, 368 F.3d at 278-79 (striking down provision of arbitration agreement that required "each party shall bear its own costs and expenses" with respect to Title VII and Virgin Islands law claims). Accordingly, the Court holds that the cost-sharing provision of the Philadelphia Arbitration Agreement violates public policy by effectively precluding Plaintiffs from vindicating their rights under the Clayton Act in the arbitral forum. The Court concludes, therefore, that this provision is unenforceable under Pennsylvania law.⁶

⁶Comcast contends that the Philadelphia Plaintiffs' argument with respect to arbitration costs is rendered moot by Comcast's current offer to pay for all reasonable arbitration filing fees and arbitrators' costs and expenses. The Third Circuit has rejected such "after-the-fact offers" as irrelevant to the cost inquiry where the arbitration agreement itself provides that the plaintiff is liable for arbitration fees and costs. Spinetti, 324 F.3d at 217 n.2 (refusing to consider defendant's offer to pay the costs of arbitration). "'If the provision, as drafted, would deter potential litigants, then it is unenforceable, regardless of whether, in a particular case, [the defendant] agrees to pay a particular litigant's share of the fees and costs to avoid such a holding.'" Id. (quoting Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 675 (6th Cir. 2003)).

The Chicago Arbitration Agreement commits Comcast to paying all reasonable arbitration fees, costs and expenses. The Chicago Plaintiffs have not presented the Court with evidence that any of the fees, costs and expenses incurred during arbitration will be "unreasonable." Accordingly, this Court finds that the Chicago Plaintiffs have not meet their burden of showing that they would incur prohibitive costs if required to arbitrate their claims pursuant to the Chicago Arbitration Agreement. The Court, therefore, does not find that the cost provision of the Chicago Arbitration Agreement violates public policy.

3. Limitations on discovery

Plaintiffs argue that the Arbitration Agreements violate public policy because of the limited nature of discovery available in arbitration. Plaintiffs maintain that this complex antitrust litigation will require the full array of discovery provided by the Federal Rules of Civil Procedure. The Philadelphia Arbitration Agreement requires mandatory arbitration "ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION UNDER ITS RULES FOR THE RESOLUTION OF COMMERCIAL DISPUTES" (Work Order § 13.) The Chicago Arbitration Agreement mandates arbitration before the AAA, the Judicial Arbitration & Mediation Service ("JAMS"), or the National Arbitration Forum ("NAF"). (2002/2003 Policies & Practices § 10.) Plaintiffs contend that the AAA, JAMS and NAF each place severe restrictions on discovery that will prevent them from properly litigating their claims. The AAA's Commercial

Arbitration Rules and Procedures, for example, state that an "arbitrator may place such limitations on the conduct of discovery as the arbitrator shall deem appropriate." AAA Procedures for Large, Complex Disputes, Rule L-4.

Plaintiffs have failed to demonstrate how the limitations on discovery will prohibit them from effectively litigating their claims in the arbitral forum. The Supreme Court has determined that "potential complexity should not suffice to ward off arbitration" of an antitrust matter. Mitsubishi, 473 U.S. at 633. Plaintiffs' attack on the procedures of arbitration must be rejected, as resting "on [a] suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants'" that is "'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)). The Court holds, accordingly, that Plaintiffs have not shown that the level of discovery available to them in arbitration violates public policy by preventing them from vindicating their statutory rights.

4. Prohibitions on class actions

Plaintiffs argue that the Philadelphia and Chicago Arbitration Agreements also violate public policy by prohibiting

class treatment of their claims. The Philadelphia Arbitration Agreement states:

EACH CLAIM OR CONTROVERSY SUBJECT TO ARBITRATION UNDER THIS AGREEMENT SHALL BE ARBITRATED BY THE CUSTOMER ON AN INDIVIDUAL BASIS AND WILL NOT BE COMBINED OR CONSOLIDATED OR MADE PART OF A CLASS ACTION WITH THE CLAIM OF ANY OTHER CUSTOMER.

(Work Order § 13.) The Chicago Arbitration Agreement similarly reads:

THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS SIMILARLY SITUATED UNLESS YOUR STATE'S LAWS PROVIDE OTHERWISE.

(2002/2003 Policies & Practices § 10.) Plaintiffs maintain that their individual claims are too small to allow them to vindicate their statutory rights under the Sherman and Clayton Acts except through a class action. They contend that it would not be economically feasible for an attorney to undertake complex antitrust actions in order to obtain recoveries amounting to a fraction of the costs of arbitration. See supra Part II.B.2 (discussing projected costs of arbitration and potential recoveries). Plaintiffs argue that the prohibitions on class actions in the Arbitration Agreements leave them without a remedy for Comcast's antitrust violations, and consequently violate public policy.

The Third Circuit examined whether a prohibition on class arbitration deprives litigants of the opportunity to adequately enforce their statutory rights in Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000). In Johnson, the Third Circuit held that claims under the Truth in Lending Act (TILA) can be referred to arbitration under an agreement that renders class actions unavailable, notwithstanding the plaintiff's desire to bring his claims as part of a class. Id. at 369. The test, according to the Third Circuit, was whether there was an "inherent conflict" between arbitration without the possibility of class action liability and the statute's underlying purposes. Id. at 371, 373. The Third Circuit examined the statutory text of TILA and its legislative history and concluded that class actions are not necessary to further the public policy goals of TILA. Id. at 373. Neither the statutory text nor the legislative history of TILA created an unwaivable right to proceed as part of a class, and the opportunity for plaintiffs to recover attorneys' fees meant they retained individual incentives to assert their statutory rights. Id. at 373-74. The Third Circuit noted that "when the right made available by a statute is capable of vindication in the arbitral forum, the public policy goals of that statute do not justify refusing to arbitrate." Id. at 374; see also Gilmer, 500 U.S. at 31 (stating that the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer "simplicity, informality, and expedition").

Plaintiffs in this case have not identified any language in the statutory text or legislative history of the antitrust laws that creates an unwaivable right to bring class actions. Instead, the "right" to proceed as part of a class "is a procedural one that arises from the Federal Rules of Civil Procedure." Johnson, 335 F.3d at 371. Section four of the Clayton Act, 15 U.S.C. §15(a), like TILA, expressly provides for the recovery of attorneys' fees and expenses, making the arbitral forum accessible to individual plaintiffs and allowing them to vindicate the full range of substantive rights granted to them by statute in that forum. Consequently, the public policy goals of the antitrust laws "do not justify refusing to arbitrate." Id. at 374. The Court finds, accordingly, that Plaintiffs have failed to satisfy their burden of establishing that the Arbitration Agreements' prohibitions on class actions violate public policy.

5. One-year notice period

Plaintiffs argue that a provision in the Chicago Arbitration Agreement, which obligates subscribers to present their claims to Comcast within one-year of the events providing the basis for their claims or forego them, violates public policy. The Chicago Arbitration Agreement requires: "YOU MUST CONTACT US WITHIN ONE (1) YEAR OF THE DATE OF THE OCCURRENCE OF THE EVENT OR FACTS GIVING RISE TO A DISPUTE" (2002/2003 Policies & Practices § 10.) If such timely notice is not given in the manner directed, the Agreement provides that subscribers "WAIVE THE RIGHT TO PURSUE

A CLAIM BASED UPON SUCH EVENT, FACTS OR DISPUTE." (2002/2003 Policies & Practices § 10.) Plaintiffs contend that this provision restricts their right to pursue their antitrust claims by severely shortening the four-year statute of limitations for claims brought pursuant to the Clayton Act, 15 U.S.C. §15b.

Parties may agree upon notice periods shorter than the statute of limitations, but such periods must be reasonable. See Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 608 (1947) (noting that a contractual provision may validly limit the time for bringing an action, but only if "the shorter period itself shall be a reasonable period"). A contractual notice period that makes it unnecessarily burdensome for plaintiffs to seek relief by denying them sufficient time to develop a well-supported claim would be unreasonable. Cf. Alexander, 341 F.3d at 267. The Third Circuit has also recognized that a one year notice period may be unreasonable if it deprives plaintiffs of the continuing violations doctrine. Id. at 267 (citing Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175 (9th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002)).

The Court notes that considerable time may elapse between when a company violates antitrust laws and when that violation becomes known to customers through, e.g., monopolistic pricing. A one-year notice period could, therefore, deprive Plaintiffs of

a cause of action before they became aware that they were injured. Moreover, enforcement of the notice period would prevent Plaintiffs from taking advantage of the continuing violations doctrine, which is an integral part of antitrust law.⁷ See, e.g., 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 320c (2d ed. 2002); see also Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502 n.15 (1968); In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1171-72 (3d Cir. 1993). Consequently, the Court finds that the notice provision in the Chicago Arbitration Agreement unreasonably restricts Plaintiffs' ability to bring claims under the Clayton Act. The Court holds that the provision thereby violates public policy and is unenforceable under Illinois law.

D. Unconscionability

Plaintiffs argue that, even if the Court does not find that the prohibitions on class actions in their Arbitration Agreements violate public policy, the Court should hold that they are unconscionable. "An agreement to arbitrate may be unenforceable based on a generally applicable contractual defense, such as unconscionability." Alexander, 341 F.3d at 264. Pennsylvania and

⁷As applied in antitrust law, the continuing violations doctrine allows a plaintiff to recover for anti-competitive conduct that would ordinarily be time-barred as long as the conduct represents an ongoing unlawful practice that includes violations within the limitations period. See 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 320c (2d ed. 2002).

Illinois law furnish the relevant contract principles. In Pennsylvania and Illinois, the party challenging a contract provision has the burden of establishing both "procedural" and "substantive" unconscionability. Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999) (citing Germantown Mfg. Co. v. Rawlinson, 491 A.2d 138, 145 (Pa. Super. Ct. 1985)); Zobrist v. Verizon Wireless, 822 N.E.2d 531, 540-41 (Ill. App. Ct. 2004). "Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language." Harris, 183 F.3d at 181. Substantive unconscionability "refers to contractual terms that are unreasonably or grossly favorable to one side" Id. Courts will enforce the terms of a contract unless the challenging party can prove both facets of unconscionability. Id.; Zobrist, 822 N.E.2d at 540.

Plaintiffs have not shown that the prohibitions on class actions in their Arbitration Agreements are substantively unconscionable. The Third Circuit noted in Johnson that an arbitration clause containing a class action ban is not unconscionable so long as the clause does not "create an arbitration procedure that favors one party over another." Johnson, 225 F.3d at 378 n.5. The class action bans in the Philadelphia and Chicago Arbitration Agreements allow Plaintiffs to vindicate their statutory rights, see Part II.B.4 supra. Thus,

they are not unduly favorable to Comcast. The Court finds, accordingly, that the class action bans in Plaintiffs' Arbitration Agreements are not unconscionable.

E. Severability

The Court has concluded that the restrictions on the recovery of attorneys' fees and costs of suit and the allocation of arbitrators' fees and expenses, in the Philadelphia Arbitration Agreement, are unenforceable. The Court has further found that the restrictions on the recovery of attorneys' fees and costs of suit and the one-year notice requirement, in the Chicago Arbitration Agreement, are unenforceable. The Court must next consider whether those provisions that are unenforceable may be severed, or whether the Philadelphia and Chicago Arbitration Agreements are unenforceable in their entirety.

Severability is analyzed pursuant to state contract law. Spinetti, 324 F.3d at 214 (citing First Options v. Kaplan, 514 U.S. 938, 944 (1995)). "Pennsylvania courts have held that if an *essential* term of a contract is deemed illegal, it renders the entire contract unenforceable by either party." Id. (citing Deibler v. Chas H. Elliot Co., 81 A.2d 557, 560-61 (Pa. 1951)) (emphasis in original). The "make-or-break task" is to decide "whether the stricken portion of the . . . arbitration agreement constitutes 'an essential part of the agreed exchange' of promises." Id. (quoting Restatement (Second) of Contracts § 184(1) (1981)). Under Illinois law, the inquiry turns on the

extent to which the enforceable and unenforceable portions of the agreement "operate independently of each other." Abbott-Interfast Corp. v. Harkabus, 619 N.E.2d 1337, 1344 (Ill. App. Ct. 1993). Courts should enforce those contractual provisions that are valid "unless they are so closely connected with unenforceable provisions that to do so would be tantamount to rewriting the [a]greement." Id.

The Court concludes that the primary purpose of the Philadelphia Arbitration Agreement was not to deny subscribers attorneys' fees and other costs of suit or to share the costs of arbitration. Rather, it was to provide an alternative forum for resolving disputes between Comcast and its subscribers. As such, the unenforceable provisions are not an essential part of the Philadelphia Arbitration Agreement. See Spinetti, 324 F.3d at 214 (noting that "'provisions regarding payment of arbitration costs and attorney's fees represent only a part of [the arbitration] agreement and can be severed without disturbing the primary intent of the parties to arbitrate their disputes.'" (quoting Spinetti v. Serv. Corp. Int'l, 240 F. Supp. 2d 350, 357 (W.D. Pa. 2001))). The Court further finds that, in the Chicago Arbitration Agreement, the language providing for the arbitration of disputes does not depend for its efficacy upon the clause holding subscribers responsible for their own attorneys' fees or the clause imposing a one-year notice period. Those clauses can, therefore, be severed from the Arbitration Agreement without

rewriting the remainder of the Agreement.⁸ Consequently, the Court strikes the following provisions from the Philadelphia and Chicago Arbitration Agreements: in the Philadelphia Agreement, Work Order § 13, the provisions that 1) limit Plaintiffs' recovery of attorneys' fees and costs of suit, and 2) impose upon Plaintiffs their costs of arbitration; and in the Chicago Agreement, 2002/2003 Policies & Practices § 10, the provisions that 1) limit Plaintiffs' recovery of attorneys' fees and costs of suit, and 2) require Plaintiffs to comply with a one-year notice period when pursuing claims against Comcast.

F. Retroactivity

Plaintiffs argue that, even if the Philadelphia and Chicago Arbitration Agreements are enforceable, the Agreements do not govern those of Plaintiffs' claims that arose before the Agreements took effect. The Plaintiffs who are subject to valid Arbitration Agreements have, however, failed to establish that they have any claims against Defendants that predate their Arbitration Agreements. The only Philadelphia Plaintiff for whom

⁸Plaintiffs argue that the unenforceable provisions of the Arbitration Agreements so permeate the Agreements with illegality that they preclude severance. The Court has found that there are but two provisions in each of the Philadelphia and Chicago Arbitration Agreements that are unenforceable. See Spinetti, 324 F.3d at 214 (holding that two unenforceable provisions could be severed from an arbitration agreement). Accordingly, the Arbitration Agreements do not represent an "integrated scheme to contravene public policy" and severance is appropriate. Parilla, 368 F.3d at 288 (quoting Graham Oil Co. v. ARCO Prods. Co., a Div. of Atlantic Richfield Co., 43 F.3d 1244, 1249 (9th Cir. 1994)).

the Court has found a valid Arbitration Agreement is Caroline Cutler. Plaintiff Cutler was bound by an Arbitration Agreement as of her April 2003 initial cable instillation; hence, she cannot have any claims that predate her Arbitration Agreement. The Chicago Plaintiffs have valid Arbitration Agreements as of November 2002, when AT&T Broadband sent them each a copy of the Agreement with their monthly bills. November 2002 is the same month the Chicago Plaintiffs became Comcast subscribers, due to the merger of AT&T Broadband's cable business into Comcast. (Am. Compl. ¶ 49.) Thus, any claims the Chicago Plaintiffs have against Comcast arose after they became bound by the Arbitration Agreements. The Court holds, therefore, that the Plaintiffs with valid Arbitration Agreements have not met their burden of showing that they have claims that are unsuitable for arbitration.

IV. CONCLUSION

For the reasons stated above, Defendants' Motion to Compel Arbitration is denied with respect to Philadelphia Plaintiffs Dambrosio, Glaberson, Saffren and Weinberg. The Court has found that there are genuine issues of material fact as to whether their subscriber agreements were amended to include an Arbitration Agreement. Accordingly, each of those Plaintiffs is entitled to a trial on whether he or she is a party to an Arbitration Agreement with Comcast.

Defendants' Motion to Compel Arbitration is granted with respect to Philadelphia Plaintiff Cutler and Chicago Plaintiffs

Brislawn, Evanchuk-Kind, Kellman and Rudman. The Court has held that Comcast validly formed Arbitration Agreements with them. The Agreements, however, are only enforceable to the extent they accord with public policy by allowing Plaintiffs to vindicate their statutory rights in the arbitral forum. The Court concludes that the language in the Philadelphia Arbitration Agreement that (1) prevents Plaintiffs from recovering attorneys' fees and costs of suit, and (2) requires Plaintiffs to split the costs of arbitration, is unenforceable as against public policy, and the Court strikes it from the Agreement. The Court further concludes that the provisions of the Chicago Arbitration Agreement that (1) bar the recovery of attorneys' fees and costs of suit, and (2) impose a one-year notice period upon Plaintiffs, violate public policy and are stricken.

Defendants, as part of their Motion to Compel Arbitration, have asked the Court to stay this matter pending arbitration of Plaintiffs' claims. The FAA provides that "whenever suit is brought on an arbitrable claim, the Court 'shall' upon application stay the litigation until arbitration has been concluded." Lloyd v. Hovensa LLC., 369 F.3d 263, 269 (3d Cir. 2004) (quoting 9 U.S.C. § 3). The Court accordingly stays the litigation between Comcast and the arbitrating Plaintiffs. Though it is within the Court's discretion to stay the litigation between Comcast and the non-arbitrating Plaintiffs as well, Moses H. Cone, 460 U.S. at 21

n.23, the Court notes that the trials between Comcast and the non-arbitrating Plaintiffs, regarding whether they have validly formed Arbitration Agreements, involve individual questions of fact that will not be informed by the arbitration proceeding. Consequently, the Court finds that considerations of judicial economy do not militate in favor of staying the entire action.

An appropriate Order follows.

Courtroom 17A

d. Plaintiff Weinberg, February 14, 2006, 3:00 pm,
Courtroom 17A

2. Plaintiffs Caroline Cutler, Eric Brislawn, Joan Evanchuk-Kind, Michael Kellman and Lawrence Rudman are to **PROCEED** with arbitration, as required by the Philadelphia and Chicago Arbitration Agreements, as amended by Para. 3-4 of this Order. (Work Order § 13; 2002/2003 Policies and Practices § 10.)
3. The language in the Philadelphia Arbitration Agreement that requires "EACH PARTY SHALL BEAR ITS OWN EXPENSES AND FEES INCLUDING, WITHOUT LIMITATION, COUNSEL FEES, INCURRED IN THE CONDUCT OF THE ARBITRATION" is unenforceable as a matter of public policy and, therefore, **STRICKEN**;
4. The language in the Chicago Arbitration Agreement that provides "YOU ARE RESPONSIBLE FOR ALL COSTS THAT YOU INCUR IN THE ARBITRATION, INCLUDING, BUT NOT LIMITED TO, YOUR EXPERT WITNESSES AND ATTORNEYS" and "YOU MUST CONTACT US WITHIN ONE (1) YEAR OF THE DATE OF THE OCCURRENCE OF THE EVENT OR FACTS GIVING RISE TO A DISPUTE . . . OR YOU WAIVE THE RIGHT TO PURSUE A CLAIM BASED UPON SUCH EVENT, FACTS OR DISPUTE" is unenforceable as a matter of public policy and, therefore, **STRICKEN**.

5. Litigation between Defendants and Plaintiffs Cutler, Brislawn, Evanchuk-Kind, Kellman and Rudman is **STAYED** pending arbitration of the claims raised in the Amended Complaint. The Court **RETAINS** jurisdiction over the claims asserted by Plaintiffs Cutler, Brislawn, Evanchuk-Kind, Kellman and Rudman. Upon completion of the arbitration proceedings, the prevailing party in each such proceeding shall bring the results of the arbitration to the attention of the Court so that an appropriate order may be entered.

BY THE COURT:

John R. Padova, J.