

Judge Doubts Pixel Owner Can Escape Arbitration In 5G Fight

By **Thy Vo**

Law360 (July 27, 2023, 5:21 PM EDT) -- A Colorado federal judge was skeptical Thursday that the owner of a Google Pixel 5 could dodge an arbitration agreement and sue the company over 5G functionality issues, with the plaintiff's lawyer admitting he faces an "uphill battle."

Magistrate Judge N. Reid Neureiter opened a hearing by citing a 2021 ruling from a California court that validated the same type of agreement. The California judge had found the lead plaintiff in a putative class action against Google LLC over data-harvesting had to arbitrate as an individual because his device was covered by the agreement.

"So I think you need to explain to me why the Northern District of California got this wrong and why the District of Colorado should come out differently in interpreting the exact same kind of arbitration agreement," Judge Neureiter asked an attorney for the plaintiff.

"It's a tough argument to get out of these arbitration agreements. We have an uphill battle," Spencer Sheehan of Sheehan & Associates PC responded.

Steve Nichols filed a proposed class action against Google in April over a March software update to his Pixel 5 phone that apparently removed support for accessing 5G wireless networks. Nichols said he wouldn't have purchased the phone had he known it wouldn't be able to access 5G networks and alleged Google misrepresented its products.

The tech giant hit back in June with a motion to force the dispute to arbitration and stay the litigation, citing company records showing Nichols accepted the arbitration agreement on three different devices and didn't affirmatively opt out of the agreement. The agreement says users can't bring class actions over issues with their phones and must arbitrate as individuals.

In a brief, Nichols argued the agreement is confusing and "fundamentally incompatible" — and therefore unenforceable — because Google requires a user to hit "I accept" in order to continue setting up their device, while allowing them to opt out through a separate process. The link to the opt-out form is listed in the text of the full arbitration agreement.

He also claimed the agreement contains misrepresentations, such as a statement that describes arbitration as "the quickest and most cost-effective way" to resolve disputes.

At Thursday's hearing, Judge Neureiter asked an attorney for Google how many people opt out of the

agreement.

"Five, 50 or 5,000? Because that would be indicative of if this is a meaningful or clear explanation of the rights to opt out," the judge asked.

Amber R. Gonzales of Crowell & Moring LLP said she wasn't sure how many people opt out of the agreement. She said the entire pact is "conspicuously" linked in bolded blue letters on the page where users are prompted to accept it, with the opt-out instructions and an online form to opt out listed under a bolded heading in the agreement.

"There hasn't been some clever plaintiffs' lawyer who has bought this phone, given it to their relative and had their relative opt out so they can bring a class action lawsuit?" Judge Neureiter asked.

"I'm sorry, I'm not aware of any circumstance like that," Gonzales responded.

Gonzales also echoed Sheehan's admission that the plaintiff has an "uphill battle" to climb to avoid arbitration.

"This is a very straightforward textbook motion to compel arbitration. As your honor has pointed out, this is the same agreement in McCoy vs. Google ... nothing will differentiate this case with McCoy," Gonzales said, citing the 2021 decision.

Judge Neureiter said he will issue a recommendation on the motion to U.S. District Judge Regina M. Rodriguez.

Counsel for the parties and a Google representative did not immediately respond to requests for comment on Thursday.

Steve Nichols is represented by Spencer Sheehan of Sheehan & Associates PC.

Google is represented in-house by litigation counsel Justin Cohen and by Meshach Y. Rhoades, Amber R. Gonzales and Ashleigh Kaspari of Crowell & Moring LLP.

The case is Steve Nichols v. Google LLC, case number 1:23-cv-01022, in the U.S. District Court for the District of Colorado.

--Editing by Philip Shea.