

Presenting a live 90-minute webinar with interactive Q&A

Opting Out of Class Actions: Advantages, Risks, Procedural Pitfalls, Settlement Leverage

Timing and Adequacy, Venue, Lessons From Recent Case Law

THURSDAY, MARCH 11, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Opting Out of Class Actions:

Advantages, Risks, Potential Pitfalls,
Settlement Leverage

March 11, 2021

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Introduction: What Is An Opt-Out and Why Does it Matter?

- Class actions allow a representative plaintiff to sue on behalf of a large number of class members without requiring those “absent” class members to file their own lawsuits
- In most cases, class members are not active participants in the litigation
- In some cases, though, class members do not want to be bound by decisions made on behalf of the class – whether litigation or settlement decisions
- Absent class members have a due process right to exclude themselves from the class – “opt out”



Introduction: What Is An Opt-Out and Why Does it Matter? (cont.)

- An opt-out is no longer bound by the class action, but also can no longer make claims as part of class settlements
- Opt-outs may file individual lawsuits, which often are litigated in parallel to the class case
- Many factors to consider when deciding whether to opt out, e.g.:
 - Timing
 - Potential damages
 - Litigation burden on company
 - Relationship issues



Why Should You Care?

Recent Trends in Opt-Out Litigation

- Evidence suggests the rate of opt-outs is increasing (*see next slide*)
- Recent court rulings on tolling the statute of repose may have had the unintended effect of incentivizing preemptive opt-outs by large investors
 - *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS Inc.*
 - *CalPERS v. ANZ Securities Inc.*
 - *VEREIT/American Realty Capital Partners*
- Opt-outs remain more likely to occur in larger-dollar settlements and/or when institutional investors own large stakes in the company

Class Action Settlement Year	Number of Class Action Settlements	Number of Opt-Out Cases	Percentage of Opt-Out Cases to Class Action Settlements
1996	1	0	0.0%
1997	14	0	0.0%
1998	29	3	10.3%
1999	64	1	1.6%
2000	90	1	1.1%
2001	95	2	2.1%
2002	111	6	5.4%
2003	94	1	1.1%
2004	110	5	4.5%
2005	119	2	1.7%
2006	90	6	6.7%
2007	108	2	1.9%
2008	97	1	1.0%
2009	99	4	4.0%
2010	85	4	4.7%
2011	65	0	0.0%
2012	56	3	5.4%
2013	66	7	10.6%
2014	63	2	3.2%
2015	77	4	5.2%
2016	85	12	14.1%
2017	81	6	7.4%
2018	76	10	13.2%
TOTAL	1,775	82	4.6%

Source: Stanford Law School Securities Class Action Clearinghouse; Factiva; Lex Machina; Public Press; SEC Filings

What Factors Should You Consider?



Procedural Posture/
Strength of Case

Is there a DOJ/FTC investigation or pleas?
Has the class case gotten past a motion to dismiss?
Are there other opt-outs/individual cases?



Purchase Volume/
Potential Damages

Do your purchases/transactions justify bringing an individual case?



Appetite for Litigation

Business considerations
Benefits v. burdens of individual litigation

How Will Defendants Handle Opt-Outs?



Procedural Posture / Strength of Case

Has the class case gotten past a motion to dismiss?
Are there other opt-outs/individual cases?
Are there any unique aspects of your case that make it stronger/weaker?



Litigation Costs

Are costs covered by insurance?
Does the exposure to the opt-out justify defense expenses?

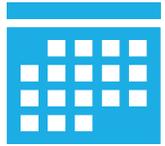


Appetite for Litigation

Interest in deterring litigation?
No similar “bet-the-company” threat

How Do You Do It?

Mechanics of Opting Out



Timing

Traditionally, opt-out decision was made when a settlement was announced

Changes in class action litigation in recent years have made potential opt-outs think about filing individual litigation earlier

Opting out vs. filing individual complaint pre-class settlement



Notice

Opt-out instructions in class settlement notice

Considerations for providing notice to class and defense counsel pre-settlement



Opting out of future settlements

What Are the Implications of Opting Out?

Settlement Leverage

- Pre-filing settlement discussions
- Settlement negotiations during litigation

Probability of higher recoveries than as a class member

- Opt-outs often recover multiples of what they would if they stayed in the class

More exposure and risk

- Expense
- Discovery
- Public acknowledgement of lawsuit

Opt-Outs and Blow Provisions



Opt-out threshold allows
Defendants to terminate settlement

Settlement only has value if it actually resolves
exposure

Typically does not require Defendants to terminate



Incorporated in supplemental
agreements

Non-public to conceal from absent class members

Avoids permitting large investors to leverage threshold



Threshold should be defined
carefully

Often ~5% of “damaged shares”

Lower portion of “shares outstanding” gives more
certainty



Objectors: An Alternative to Opting Out

- Absent class members who are unhappy with aspects of the class settlement but who do not wish to opt out can object to the settlement instead
- In federal court, objections filed directly with court, addressed at fairness hearing
- Common reasons for objections
 - Perceived unfairness or lack of adequacy
 - Procedural issues with settlement process



Objectors: Impact

- **Plaintiff perspective**
 - Objectors can delay the settlement process, frustrating the parties and the judge
 - In the best interest of the parties to resolve as quickly as possible
 - No real impact on opt-outs
- **Defense perspective**
 - Objections often arise from misconceptions about claims or settlement
 - Concerns often can be resolved through discussion before fairness hearing
 - If objections are raised to Court, settling parties often align to address them