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# Opting Out Of A Class Action

By Thomas J. Wiegand and Lucas Walker

# Opting Out Of A Class Action

## Timing Crucial For Plaintiff Companies

By Thomas J. Wiegand and Lucas Walker

Corporations often consider class actions from the perspective of a defendant corporation under attack by the plaintiffs' bar, which is suing on behalf of consumers, small shareholders or employees with modest individual claims. But in some kinds of class actions, there can be more corporations on the plaintiff side than on the defense side. For example, a single defendant in a securities case or a handful of defendants in an antitrust conspiracy case might be pitted against a plaintiff class containing hundreds of corporations or large investors.

Corporate class members are distinct from consumer or employee class members, both in their financial might and the dollar value of their claims. A corporation that has been paying inflated prices for raw material due to a price-fixing conspiracy, or a state pension fund that holds millions of shares of stock that is the subject of a securities fraud suit, can have a claim for tens of millions of dollars or more.

If a court allows a damages case to proceed on a class basis, class members have two basic options: staying on the sidelines and accepting their share of any recovery obtained by class

counsel, or "opting out" of the class in favor of filing a separate action. Class members with small claims, such as consumers or employees, do not have enough at stake to make opting out viable. Corporations and large investors face a much different question. Their potential recovery can be substantial, and they have the resources and sophistication to pursue it in an individual lawsuit.

Almost 300 opt-outs decided not to join the Tyco International securities class settlement of December 2007, and, most recently, thousands of retailers with over 100,000 locations have opted-out of the proposed $7.25 billion class settlement in the *Visa/Mastercard Interchange Fee* case.

An opt-out plaintiff can often obtain a greater recovery than settling class members, as shown in research such as Columbia Law School Professor John Coffee's 2008 article, *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice."* Professor Coffee found that plaintiffs opting out of securities and antitrust class settlements routinely earned payments several times, in some cases even 50 times, what they would have recovered in the class settlement. A plaintiff who files a separate action also enjoys control over both case strategy and settlement discussions.

This article accepts as given that sometimes it is smart for a class member with significant potential damages to file its own lawsuit. Despite that accepted wisdom, there is a lack of uniform guidance about when opt-out decisions need to be made.

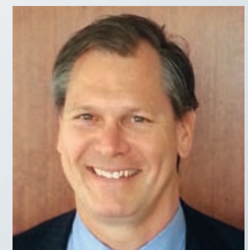
### CLASS NOTICE AND TOLLING THE STATUTE OF LIMITATIONS

Once a class is certified, Federal Rule of Civil Procedure 23(c)(2) requires notice to class members informing them of the lawsuit, their right to opt out of the class, and the deadline for doing so. Because it often takes years before class certification is decided, the statute of limitations could potentially expire before class notice is sent out, effectively negating class members' ability to opt out.

To avoid the problem – and to stave off multiplicative "placeholder" lawsuits by class members concerned about limitations problems – nearly 40 years ago the Supreme Court held in *American Pipe & Construction v. Utah* that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."

If a district court denies class certification, the statute of limitations clock starts to run again, even if the named plaintiff appeals that decision. Denial of class certification does not mean that the underlying claims fail, but rather that there are procedural reasons why the claims cannot be litigated on a class basis. Thus, where there is solid evidence supporting the claims against the defendants, a putative class member with substantial claims of its own will likely want to file a standalone suit. And because the statute of limitations starts running again immediately upon the denial of class certification, that putative class member should prepare a complaint in advance of the certification decision.

The potentially brief window for bringing a timely individual action might cause some to consider filing suit before a decision on class certification. That approach carries significant risks of its own. The First, Sixth, and D.C. Circuits have held that a plaintiff that files its own action before a decision on class certification does not receive the benefit of American Pipe tolling, reasoning that a



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plaintiff that files prematurely was not relying on the pending class action. The Second, Ninth, and Tenth Circuits, however, have reached the opposite conclusion, allowing tolling in that situation. It is difficult to predict how other courts might decide the issue, so waiting to opt out until class certification is decided is the prudent path.

What happens if the trial court does certify the class? The logic of American Pipe suggests that tolling would not end automatically upon a grant of class certification, because all class members (including those who later opt out) continue to have their claims pending. A class member would likely have at least until the opt-out deadline announced in the Rule 23(c)(2) class notice to file its own lawsuit, while still having the statute of limitations tolled. The Ninth Circuit has expressly so held, and the language of the Supreme Court's decision in *Eisen v. Carlisle* supports that result.

It is prudent, however, to hold off on filing an opt-out complaint until after receiving the Rule 23(c) notice. By using the court-approved opt-out window, plaintiffs should avoid a later court finding that they "jumped the gun" and therefore are not entitled to tolling.

***Corporate class members are distinct from consumer or employee members, both in their financial might and the dollar value of their claims.***

### *OPTING OUT OF A SETTLEMENT*

If class counsel and the defendants reach a settlement, Rule 23(e)(1) requires that class members be given notice of the terms. In practice, a single notice is often sent announcing both the certified class and the proposed settlement, because once a class is certified settlement can be fast in coming. But when an opt-out notice already has been sent to class members and the opt-out deadline has passed, it is important to know that the later settlement notice does not have to -- and probably will not be -- accompanied by another opportunity to opt out. Neither due process nor Rule 23 requires that class members be given a second chance to opt out of a class action.

The parties are unlikely to include an opt-out provision in a settlement agreement on their own accord. Both class counsel and defendants have incentives to include as many potential plaintiffs in the final class settlement as possible. District courts have discretion under Rule 23(e)(4) to "refuse to approve a settlement unless it affords a new opportunity" to opt out, but they rarely exercise that authority, even though the Advisory Committee notes to the Rule recognize that a "decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known."

Second chance opt-out requests have been rejected not only where a settlement was reached after the initial opt-out period, but even where settlement terms announced to class members during the first period later changed. Courts have also refused second-chance opt-outs even where a settlement swept more broadly than the class litigation itself, releasing parties or claims not identified in the class complaint. A company thus should not rely on the possibility of a second opt-out opportunity.

Claims asserted in a putative class action can be a significant asset to class members with large claims of their own. To take advantage of that asset, however, advance preparation is indispensable. Any member of a putative class that might want to pursue its own claims should consider engaging counsel to investigate the issues involved, assess potential recovery, and plan a course of action before a decision on class certification. That approach will facilitate moving swiftly on an individual action once certification is decided. ■

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