

## OPTING OUT OF CLASS ACTION LITIGATION

Companies frequently receive notices informing them that they are a member of a class action lawsuit. Often, these notices are ignored and thrown in the trash. If not, many companies remain in the class and take whatever settlement comes along. After all, there is no cost to remain in the class, and most of these class actions are only worth a few pennies on the dollar or some kind of coupon, right? Wrong. Many companies are wasting a chance to maximize their recovery by not opting out of class actions to pursue individual litigation. This article explains why companies should not throw those notices away, but should instead take them seriously and consider opting out of many class actions to pursue their own claims.

Opting out of class action lawsuits presents the potential for greater recovery with little downside risk to a company. By remaining in a class action, a company may not have to spend any money on litigation, but it risks leaving millions of dollars on the table as a result of a poor class settlement. As an example, consider the recent *In re Vitamins Antitrust Class Actions*, (D.D.C.) litigation, where many of the world's vitamin manufacturers were sued for a variety of anticompetitive behavior. The vitamin companies agreed to settle the class for \$1.17 billion. However, several companies, representing over 75 percent of the vitamin market, opted out, thereby driving the class settlement down to approximately \$300 million; whereas the opt-out plaintiffs recovered in excess of \$2 billion, a huge recovery compared to the class settlement.

Opting out of class actions also allows a company to control the litigation to suit its own interests, rather than relying on the unknown plaintiffs' counsel to represent its interests along with the rest of the class. If a company is one of the larger members of a potential class, it runs the risk of losing the influence and control that it should have since the plaintiff's counsel has hundreds or even thousands of other client's interests at stake, as well as the company's. Also, when a judge certifies a class settlement, it is judged on a "fair, reasonable, and adequate" standard for the class, meaning that a large company may sacrifice some of its recovery "for the common good." Finally, a company that breaks from a class can control its own litigation to account for political or business concerns that may not affect the case legally, but may affect the goodwill of the company or its relationships with clients and partners.

By having a good system in place to review class actions and opting out when appropriate, a company can use class action settlements to its advantage, by using the settlement as a base for its own individual litigation. The litigation costs can be minimized by choosing cases wisely, and through the use of contingency agreements and other incentives when outside counsel are brought in to litigate the claim. This places the financial risk largely on the outside firm, while ensuring that the company has an individual voice in the litigation rather than being lumped into the class.

As the trend to opt out of class actions has caught on in recent years, particularly in the antitrust arena, there have been a number of "success stories" illustrating the value of opting out. For example, opt-out plaintiffs in many cases, including the *In re Vitamins Antitrust Class Actions*, (D.D.C.); *In re Methionine Antitrust Litigation*, MDL No. 00-1311 CRB; and *In re Amino Acid Lysine*, MDL No. 1083 class actions have recovered significantly higher damages settlements than they would have had they remained in the class. By some estimates, the recoveries numbered four to five times the expected class recovery. Quaker Oats opted out of two antitrust class actions in the late 1990's and recouped three times the amount it would have received as a class member.' In addition, Tyson Foods recovered five times its estimated claim by opting out of the class in the vitamins price fixing litigation.<sup>2</sup>

If companies want to capitalize on this trend of opting out of class actions, what should they do to get started? First, set up a system to review every class action settlement notice that is received. Often, class notices are sent to departments throughout a company, never to be seen by the legal department. A company must coordinate with its executives to have all class action notices forwarded to the legal department or to designated outside counsel for review.<sup>3</sup> This will keep potentially valuable claims from being ignored or missed because of a very short deadline, which is common with class actions. For example, DuPont assigns a senior paralegal to receive the notices, review them, and track them by case, jurisdiction, and filing or opt-out deadline.<sup>4</sup>

Second, when the legal department receives the class action notice, it should contact outside counsel or class counsel to learn about the case. Find out facts such as what the case is about, who the key players are, what stage the litigation is at, and if appropriate, whether or not there have been any guilty pleas or other government investigations that preceded the lawsuit. In general, classes that are settling in the very early stages of litigation tend to result in lower returns for class members. The class action plaintiff's lawyer may have an incentive to settle the case early to reap a large contingent fee without having to spend much money in litigation expenses. The more favorable class cases have been through thorough fact discovery. In antitrust cases, class actions that have been preceded by Department of Justice or Federal Trade Commission investigations tend to be more successful. While an inexact science, a quick, low- cost assessment of the actions will help weed out the cases not worth spending resources on.<sup>5</sup>

<sup>1</sup> Krysten Crawford, *No More Mr. Nice Guy*, Corporate Counsel, June 1, 2004.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> James A. Morsch & Jason S. Dubner, *Don't Throw Away That Class Action Notice: Opting Out of Antitrust Class Litigation*, Corporate Counsel, December 2003 at A5.

Third, after receiving notice of the class and learning about the basics of the case, the next step is to determine whether or not to opt out. Executives, in-house and outside counsel have several issues to consider when deciding whether to opt out. Sometimes, the potential of a greater recovery is outweighed by the risk of alienating a key client or supplier. The company will also want to consider the extra time it may take to litigate the case as an individual plaintiff, such as time for corporate executives to attend depositions, time spent on the case by the in-house legal department, and a greater disruption within the company due to additional discovery. The company should get an estimate of what the potential damages could be in pursuing the case as an individual plaintiff versus collecting as part of a class settlement. Generally, the larger the company's stake in the litigation, the more likely it is that opting out will be a benefit. If the damages are worth pursuing individually, it is important to get an estimate of what the costs of litigation will be and how to pay for them. This includes costs for outside counsel, litigation expenses, and other miscellaneous costs incurred as a result of a large lawsuit.

Finally, once a company has determined that it is worth opting out of the class and pursuing individual litigation, it must determine which cases should be handled in-house and which cases should be given to outside counsel. Giving the larger cases to outside counsel can allow a company to reap the benefit of keeping its individual voice in the action while shifting the risk of loss onto the outside counsel by arranging a contingent fee or per diem with incentives.

Armed with the simple advice in this article, a company will be better-prepared to deal with the litany of class action notices coming into its offices. By setting up a system to receive and review the class action notices, analyze and opt out of the cases worth pursuing individually, and cooperating with in-house and outside counsel to manage the litigation, a company can turn class action notices from a stack of worthless coupons into a meaningful profit center for the company.

---

Bibliography:

Bruce Carton, Puncturing the Myths of Opting Out, Securities Litigation Watch, December 2003 <[http://slw.issproxy.com/securitieslitigation\\_blo/2003/12/puncturing\\_the\\_.html](http://slw.issproxy.com/securitieslitigation_blo/2003/12/puncturing_the_.html)>

James A. Morsch & Jason S. Dubner, *Don't Throw Away That Class Action Notice: Opting Out of Antitrust Class Litigation*, Corporate Counsel, December 2003 at A5.

Kenneth Adams, *The Opt-Out Option*, Litigation 2004, A Supplement to The American Lawyer & Corporate Counsel, October, 2004.

Krysten Crawford, *No More Mr. Nice Guy*, Corporate Counsel, June 1, 2004.

*The content of these articles should not be taken as legal advice or as an expression of the views of the firm, its attorneys or any of its clients. We hope the articles spur discussion in the legal community with insight into the experience of the authors. We expressly reserve the right in the future to become wiser or simply change our mind.*