Legal and Practical Considerations Influencing Whether and When to Opt Out of a Class Action

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This paper reviews some of the key factors to be taken into consideration in a corporate class member's determination of whether to opt-out of a Fed. R. Civ. P. Rule 23(b)(3) price-fixing class action. Opt-out decisions are highly fact specific. Each case – and each party within a case – presents a unique set of considerations weighing in favor of or against a decision to opt out. The nature of the alleged misconduct, the structure of the industry, the amounts at stake, the class that is proposed, and the relationships involved all are a part of the mix. For a potential class member with a significant volume of affected purchases, the financial implications of the opt-out decision can be substantial, and the economics of opting out – as well as the ability to opt out at all – can be affected by the passage of time. Accordingly, potential opt-out plaintiffs are well advised to conduct an initial opt-out analysis early in the process, and to monitor the progress of the class litigation, periodically revisiting the pros and cons of opting-out and pursuing independent litigation.

A. Size of Financial Stake

A threshold consideration in the cost-benefit analysis behind an opt-out decision is the size of the plaintiff's financial stake in the case. Where a class member's purchase volume of the products at issue is low, the amount of overcharge damages – even after trebling – will likely not justify the costs and risks of litigation. This of course is a core rationale for the class action device – to provide a mechanism and incentive for collective recovery of such damages even where there is insufficient incentive on an individual basis. However, where a class member has purchased a high volume of the product in question, the potential for treble damages may support independent litigation.

The mere fact that a class member has a significant financial stake does not mandate opting out. In some cases, class counsel, through its investment in and working knowledge of the case, may be better positioned to secure recovery than opt-out counsel. The analysis turns on the relative costs and risks of representation under the two competing frameworks, the potential for achieving incremental damages or other benefits though the ability to manage and control opt-out litigation, and factors relating to the potential opt-out plaintiff's business relationships with the defendants.

B. Relative Costs and Risks of Pursuing Independent Litigation

1. Legal Fees.

Class counsel generally earns fees on a contingency basis, and there is no risk of a plaintiff incurring legal fees in excess of its recovery. An opt-out plaintiff with significant amounts at stake that engages its own counsel may be able to negotiate lower fees, especially if it can leverage established relationships with outside counsel and/or is willing to make some or all of the fees non-contingent. An opt-out will likely have a simpler case to put on than the class (for example, an early opt-out can dispense with the class certification phase altogether); it may have a more direct path to settlement with one or more defendants; and it may be able to achieve the same recovery with a more streamlined, efficient approach.

2. Discovery Burdens.

Antitrust defendants know well the ancillary and intangible costs associated with antitrust litigation. Document productions, depositions, interrogatories, and declarations in support of motion practice can combine to create a substantial financial burden, require significant commitment of internal executive, legal, and IT resources, and present an ongoing series of distractions for key employees throughout the life of a litigation matter. Whereas an absent class member will be subject to more favorable third-party discovery rules, a corporate class member who opts out and brings a direct action is a party that risks exposing its business to the full burdens of party discovery. The burden of litigating as a party will also include the significant costs associated with e-discovery and the retention of one or more experts to deal with liability and damages issues.

3. Litigation Risk.

The likelihood of ultimate success will bear directly on a class member's willingness to incur direct liability for legal fees and to bear the other burdens of direct litigation. While there is uncertainty associated with all litigation, some price-fixing cases are more predictable than others. For example, an opt-out plaintiff might reasonably conclude that there is a higher likelihood of success if the party from whom it made most of its purchases has pleaded guilty in a related criminal proceeding. Under such circumstances, the financial risk associated with

engaging separate counsel and foregoing the class counsel contingency fee arrangement may be lessened.

C. Ability to Control Litigation

Along with the different cost profile of a direct opt-out action comes the ability to control the legal strategy pursued in the litigation. In determining whether to opt out, a class member should consider whether and how much it would benefit from controlling the prosecution of its claims against the defendants. Such consideration is not without its own costs, as it calls for a thorough evaluation of the evidence by counsel and, where appropriate, economic experts.

1. Legal Strategy.

A potential opt out will want to consider whether the legal theories being pursued by class counsel represent the best approach for *this* class member, as opposed to the class as a whole. By opting out, can the class member increase its likelihood of recovery, or the likely amount of that recovery, by pursuing different legal strategies?

For example, it may be that, in defining a class, class counsel has made tradeoffs that disadvantage an individual class member. Class counsel may have narrowed the class to exclude certain time periods or geographic or product markets that present "common proof" challenges for the class, but not for the class member. A class member proceeding independently would be free to pursue the full range of conduct that impacted it, without concern for class cohesion or internal class conflicts. Conversely, class counsel may have pursued an overbroad class definition in an effort to maximize recovery, thereby weakening its ability to achieve class certification,[1] or to subsequently prove an antitrust violation. In either of these scenarios, a class member may well conclude that the amount or likelihood of recovery would be more favorable in an opt-out action.

Damages present another area where an individualized approach might enhance a class member's potential recovery. For example, a formula designed to

[1] Of course, an individual putative class member would be free to initiate its own claim following a denial of class certification, but such a denial may as a practical matter chill the prospects for individual follow-on litigation.

calculate damages on a classwide basis might involve industry-wide average "but-for" competitive prices that are higher than the but-for prices applicable to an individual class member. A given class member might benefit from using a different type of damages model (*e.g.*, using a time period benchmark versus a product benchmark), and depending on the nature of the model, key assumptions (*e.g.*, cost of capital, labor costs, production efficiency rates, inflation, etc.) may be different when calculated for a single class member than for the class.

Where class counsel has already reached a proposed settlement with defendants, a potential opt-out plaintiff is able to evaluate the bottom-line proposed recovery amount. In such cases, in addition to an assessment of the theories pursued by class counsel, the class member will want to assess the litigation risk discount implicit in the settlement figure. Does the class member share class counsel's view of the likelihood of success at trial? And would the class member be more or less likely to succeed if it proceeded individually?

2. Issue Conflicts.

A class member considering opting out might be influenced by its broader litigation portfolio. It may have taken contrary positions regarding key legal issues such as market definition in other litigation (*e.g.*, intellectual property cases or other antitrust cases), or it may be a frequent defendant in antitrust cases, with an interest in (and track record of) advocating for legal rules that are in tension with those being pursued by class counsel. Controlling an independent litigation might enable an opt-out to steer clear of such conflicting positions. However, the presence of potential issue conflicts will not always weigh in favor of opting out. Remaining in a class may allow a class member to passively – and anonymously – take legal positions that are in tension with its positions in other litigation, without the risk that those positions will be attributed to it. A more general, organizational philosophy (such as a reluctance to participate in class actions at all) may also influence a class member's decision.

D. Relationships with Defendants

The nature and significance of the business relationship between a class member and a defendant is an important consideration that can cut either way in an opt-out decision. As a general matter, the more significant the relationship (the greater the share of a defendant's sales made to a class member, and the greater the share of the class member's purchases made from the defendant) the more

impractical it may be to allow class counsel – which represents the interests of the class, and not protecting individual ongoing business relationships – to represent a potential opt-out's interests. Also, a strong, broad-based business relationship between an opt-out plaintiff and a defendant is likely to provide potential avenues for resolution of the dispute that are more efficient than class litigation, and are tailored to the ongoing partnership. This is an especially powerful consideration where class litigation threatens the financial viability of a key business partner – by opting out, a major class member can work to achieve a settlement that enables the business relationship to continue, and thereby avoid potential harm to its own business.

That said, the balance of power between a given class member and a given defendant – and the nature of the resolution offered by class plaintiffs – may create a scenario where the defendant wants to resolve the litigation on a classwide basis, and the class member wants to retain the relative anonymity of class membership, rather than initiating directly adverse individual litigation. Alternatively, in some situations it may be fruitful for a class member to involve key defendants in its deliberations over whether to opt out, using the opt-out decision itself as a point of negotiation. Where there is a strong business relationship, settlement may be possible before a class decision is made, thus obviating the need to make an opt-out decision. In such circumstances, there is likely to be more settlement flexibility before certification, between parties who share common interests, than after certification, when the court plays an ongoing supervisory role.

E. Timing

The best time to consider opting out will vary from case to case. The latest date for class members to opt out will be set by the court in the approved form of class notice. Waiting until this stage to consider opting out will provide a class member with the most complete information regarding the development of the class case, but there also may be advantages to a class member filing a separate suit at an earlier stage of the class litigation, and it is certainly advisable for a class member with a substantial stake in a class action to closely monitor the progress of the class litigation from the outset.

1. Advantages to Early Consideration of Opting Out.

Major advantages of opting out, such as the potential for cost savings and the ability to control the litigation, can be more fully realized by an early opt-out decision.

While it might seem that taking a wait-and-see approach is a cost-saving proposition (particularly in light of the costs that may be associated with a rigorous analysis of the opt-out question), a class member who waits to opt out can ultimately be charged with a portion of the costs incurred by class counsel in prosecuting the early stages of the case. A leading case on the topic is *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644 (E.D. Pa. 2003), in which the court established an escrow fund for the purpose of having opt-out plaintiffs compensate class lead and liaison counsel, from the proceeds of opt-out settlements and judgments, for so-called "common benefit" work performed by class lead and liaison counsel on behalf of all plaintiffs. *Id.* at 668. The court invoked its broad authority to manage multidistrict litigation, as well the "common fund doctrine" line of cases under which "courts have the right and the power to require those who benefit from a lawsuit to share in the costs of the litigation." *Id.* at 654. Significantly, in deciding that a compensation mechanism was warranted, the *Linerboard* court took note of the fact that in that case "major entities and their counsel awaited the development of the case by designated counsel and only filed suit on the eve of the conclusion of discovery." *Id.* at 661.

Thus, insofar as a class member's rationale for opting out is to avoid legal costs and pursue a more expeditious resolution of the litigation, it should not count on being able to walk away from costs incurred by lead class counsel after the fact. If a class member is relatively certain that it will ultimately opt out (*e.g.*, if it believes that direct negotiations with defendants will enable the parties to the reach a resolution), it should consider acting early in the litigation, before significant class counsel fees have been incurred.

A class member's goal of increased control over the litigation may also be advanced by an early decision to bring an independent action. Much if not all fact and expert discovery will have already taken place prior to class certification briefing, and certainly prior to a decision on class certification. The court presiding over a subsequent opt-out case (especially if it is the same MDL court presiding over the class case) will likely limit the opt-out plaintiff's ability to

revisit areas of discovery that were covered by class counsel. Thus, if a class member awaits a class certification decision before opting out, key opportunities to independently seek pertinent information, develop expert testimony, and cross examine opposing experts and witnesses can be lost.

2. Advantages to Later Consideration of Opting Out.

Awaiting a decision on class certification to make the opt-out decision has two major advantages. First, by the time of class certification the class member will have a substantial factual basis on which to assess the merits of the case. Documents, depositions, expert reports, and a number of substantive rulings by the court will give the class member a strong foundation for the key inputs to a litigation risk analysis – the amount at stake and the likelihood of success. Given the substantial legal and expert costs that might be incurred in a rigorous evaluation of whether to opt out, there are certainly efficiencies in awaiting the best available information before making such an investment.

Second, awaiting class certification allows an opt-out to avoid potential statute of limitations issues associated with early opt-outs. Under *American Pipe & Constr. v. Utah*, 414 U.S. 538 (1974), the statute of limitations is tolled for a class member who waits to opt out until a decision on class certification (or in most cases an earlier dismissal). However, a class member that files suit prior to such time will likely not receive the benefit of class tolling.[2] For an opt-out lawsuit filed at the outset of the class litigation, the absence of class tolling may not pose a problem, but with the passage of time the limitation period may run as to all or a portion of the conduct at issue, and will only be revived upon resolution of class certification. Awaiting a class certification decision to opt-out can revive expired claims that were viable at the time of the class action filing, eliminating uncertainty as to claims that may have been forfeited in the intervening period.

[2] *See*, *e.g.*, *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005) ("The purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided. . . . [In the latter case,] '[t]he parties and courts will not be burdened by separate lawsuits which, in any event, may evaporate once a class has been certified.'" (quoting *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 452 (S.D.N.Y. 2003))).

F. Monitoring the Progress of Class Litigation

Failure to carefully monitor the progress of class litigation can cause a class member to lose the opportunity to opt out of a class or to forfeit some claims altogether. Two recent cases illustrate the point.

The first case involves Intel's decision to opt out in *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-cv-01819, 2009 WL 2447802 (N.D. Cal. August 7, 2009). Through what Intel described to the court as "honest mistakes" and "miscommunications," it failed to take note of an April 6, 2009 opt-out deadline following class certification, and missed that deadline by more than two months. 2009 WL 2447802, at *1. Intel, a major purchaser of SRAM, had apparently agreed with a supplier to opt out of any certified SRAM class, failed to calendar the opt-out deadline upon receipt of the class notice, and was informed of the missed deadline several weeks later (on April 29) by the supplier. *Id.* Intel contacted class counsel on June 19 and filed a motion for enlargement of time to opt out on June 22. *Id.* The motion was opposed by class counsel. *Id.*

In evaluating whether to permit Intel to opt out late, the court applied the "excusable neglect" standard of Fed. R. Civ. P. 6(b)(2), describing the determination as "an equitable one, taking account of all relevant circumstances surrounding a party's omission." *Id.* at *2 (quoting *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993)). The court denied Intel's motion, noting both that Intel offered no elaboration on the "miscommunications" that led to the missed deadline, and that class counsel would be prejudiced because it had spent the four months between the opt-out deadline and the decision on the motion conducting discovery under the assumption that Intel would be a class member. *Id.*

In hindsight, of course, any number of measures might have allowed Intel to opt out – perhaps even just a faster response upon discovery of the missed deadline. But the larger lesson may be that the risk of forfeiture of the right to opt out is another factor weighing in favor of earlier action, where possible, on the part of a class member that knows it will want to opt out of any eventual class. This situation suggests that such a party should engage counsel and monitor the class litigation well in advance of the time for making an irreversible opt-out decision.

A second case, *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, No. 110cv-0564 (JG) (VVP) (E.D.N.Y. filed Feb. 4, 2011), is not an opt-out case, but nevertheless raises relevant issues. According to briefs filed in connection with a motion to dismiss,[3] United was named in a number of 2006 class action lawsuits related to air cargo price-fixing allegations. However, United announced in September 2006 that it had reached an agreement to be dropped as a defendant, and it was not named in the consolidated class action complaint filed in February 2007.

In February 2011, DHL brought a direct action against United. DHL relied on class action tolling to argue that its claims were within the statute of limitations; United argued that the claims are untimely even with class tolling, because once DHL was on notice that United would be dropped from the class case, it lost any benefit of class tolling as to United, and the limitation period began to run again. *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1380 (11th Cir. 1998) (class tolling ended when "putative class members [were] put on notice that they must act independently to protect their rights").

This issue is presently pending before the district court, along with other grounds for dismissal raised by United. But for present purposes the point is simple: it is important for a potential opt-out to pay close attention to developments in the class case. On the one hand, had DHL waited until the class certification stage to initiate its action, it would have forfeited its claim. On the other hand, DHL's failure to note and account for announcements that United would be dropped may still have put its claim at risk.

Like Intel's predicament in SRAM, DHL's Air Cargo claim against United demonstrates the importance to potential opt-outs of monitoring the progress of class litigation. Certainly a major purchaser of a product that is alleged to have been the object of a price-fixing conspiracy should consider engaging its own counsel immediately upon learning of the allegations to assess the prospects of an independent action and – if such an action is not pursued at the outset – to closely monitor developments in the class action.

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[3] *See* Defendants' Motion to Dismiss the First Amended Complaint, *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, No. 110cv-0564 (JG) (VVP) (E.D.N.Y. filed Sept. 15, 2011).

Bibliography of additional resources:

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The opinions expressed in this paper are those of the authors and do not necessarily reflect the views of Mayer Brown LLP or its clients.