

# The Advantages of Not Opting Out of Class Action Litigation

No company wants to learn that it has been the victim of an unlawful price-fixing conspiracy. However, it is never alone in that capacity. In such cases, your company typically would be one of hundreds or thousands (if not tens of thousands) of similarly-situated companies that also paid illegal overcharges to manufacturers that conspired to artificially inflate prices above what they otherwise would have been in a competitive market. In short, your company likely would be a member of a “class” of injured persons. This is one time where Groucho Marx’s quip “I don’t want to belong to any club that will accept me as a member” would not be apropos. When it comes to class action litigation, membership has its rewards.

In the October 2007 issue of *The Antitrust Counselor*, an article entitled “Turning Your Legal Department Into A Profit Center: Opting Out of Class Action Litigation” discussed the possible advantages of opting out of class action litigation. This article presents a contrary view. Being part of a class of companies that suffered similar harm allows those companies to aggregate their claims and litigate them together in the form of a class action. As Congress found when it enacted the Class Action Fairness Act of 2005, “Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action....” When a company discovers that it may have been the victim of a price-fixing conspiracy in violation of the antitrust laws, it basically has four options: (1) initiate a class action of its own as a named plaintiff and representative of the injured class; (2) be an “absent” class mem-

ber in a class action brought by another injured party; (3) opt out of the class in a class action and pursue its own private litigation against one or more of the conspirators (“opt-out” action); or (4) do nothing, *i.e.*, following a class settlement, you do not file a claim form for your share of a class settlement, nor do you opt out of the class to pursue your individual claims separately.

**While some may argue that opting out of a class action warrants serious consideration, the reality is that, in almost all circumstances, remaining in the class is the most effective and efficient means by which a company can potentially recover its losses.**

While there are a number of advantages, including potential financial ones, for a company that purchased a price-fixed good or service to step up, take the lead and file the initial class action complaint against the alleged conspirators as a class representative on behalf of all injured purchasers of those same tainted goods or services, in most cases a company does not file a complaint and is instead an absent class member. This means that it is a member of a class of injured persons in an action brought by another company on behalf of the class. In such cases, an absent class member may ask: “What can I do to maximize my recovery?” That is, it may want to determine whether it is better to stay in the class and receive its portion of the recovery, opt out of the class and forego all benefits by doing nothing or, instead, proceed with its own opt-out action against the same defendants. While some may argue that opting out of a class action warrants serious consideration, the reality is that, in almost all circumstances, remaining in the class is the most effective and efficient means by which a company can potentially recover its losses. There are a number of reasons why this is true:

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- **No risk.** In a class action, class counsel bear all of the litigation risk. They incur all of the costs and expenses in pursuing the litigation on behalf of the class, and only get paid if they settle or obtain a judgment. Members of the class, including the class representatives who file the cases, are almost never individually responsible for the costs of the litigation, even if the litigation is not successful. If your company opts out, however, it now bears the risk of litigation, and may be responsible for any fees and expenses incurred during the litigation.
- **Not subject to discovery.** As an absent class member in a class action, you are not subject to all of the expense, distractions and resources that must be dedicated to the discovery process, including producing documents, answering interrogatories and providing witnesses for deposition. However, as a plaintiff in an opt-out action, there is a strong likelihood that your company will be subject to the discovery process.
- **Anonymity.** Many companies prefer to recover any proceeds from a successful class action as an absent-class member because they remain anonymous. Your company may have a close working relationship with the companies being sued. If your company opts out of the class action litigation, and decides to proceed on its own in an individual action, you would then be litigating one-on-one against what may be one of your key manufacturer/suppliers in the industry.
- **Higher recovery possible.** There is a potential for a higher recovery if your company does not opt out of the class and files a claim against the settlement fund obtained in a class recovery. Typically, not all class members submit claim forms to participate in the recovery. Therefore, the recovery could be higher for those that do participate, to the extent that an opt-out would have received a similar recovery had it not opted out of the class. Those who fail to file a claim leave additional funds to be shared by those who do file claims, so very often claimants receive a higher percentage of their damages than opt-outs who obtain a pro-rata recovery.
- **Opt-out actions can be expensive.** In the overwhelming majority of price-fixing cases, your company's claims are the same as those of all the other members of the class, *i.e.*, you purchased price-fixed goods pursuant to an unlawful conspiracy. This is true even if your company has sustained larger losses than other claimants who are already actively litigating those same claims. Therefore, there is a little advantage to opting out of the class to bring your own separate action since your claims and issues are no different than other potential claimants. To the extent individual opt-out counsel does not work on a contingency basis, an opt-out action can be expensive, as your company likely could incur substantial legal fees and other expenses, such as those resulting from discovery and experts. Such additional expenses could quickly erode any putative financial benefit you might think you have in going it alone. Antitrust litigation is exceptionally complex and expensive litigation. Unless your company has suffered some unique damages, opting out of the class is usually not cost-effective.
- **Evaluating the economics of opting out can be expensive.** Even making an informed business decision as to whether or not opting out of a class is economically advantageous can be costly. A preliminary evaluation of the case could mean hiring attorneys and experts to review certain materials produced in the class action to weigh the merits of the case and any potential recovery. It

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could also include performing significant in-house work such as reviewing sales records to determine your own potential damages from overcharges. Again, these potentially substantial costs could quickly eat away any perceived additional recovery from an opt-out action.

Participating in the recovery of a class action settlement is a cost-free, risk-free and effective revenue-generating activity for any company. At a time when legal budgets in companies are stagnant or shrinking, companies should think twice before taking on significant risks and expenses for a dubious return on investment.

- May have to pay not only fees of personal counsel, but also legal fees of class counsel. Class counsel perform a variety of duties in their representation of the class, including preparing a case management plan, conducting and coordinating discovery, making court appearances, drafting all briefs and motions, developing legal and economic theory, moving for class certification and conducting settlement negotiations. Many courts have found that such work provides a cumulative benefit to the opt-out plaintiffs who coast along on the coattails of the efforts of class counsel. Therefore, some courts have ordered a certain percentage of funds from settlements or judgments in opt-out actions to be paid to class counsel because the opt-out plaintiffs obtained benefits from class counsels' work in managing the litigation, *i.e.*, the court wants to

avoid "free-riding" on the work of class counsel. *See, e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644 (E.D. Pa. 2003). This means that a potential opt-out could face not only the fees of its own attorneys in litigating an opt-out action (whether or not such fees are contingent), but also the attorneys' fees of class counsel who provided innumerable benefits to the opt-out action.

- Further salutary effects of class action mechanism. Many class action settlement agreements contain a "blow" provision that provides that the settlement will be void if enough class members opt out to make the settlement untenable. Defendants in a class action settlement are seeking "peace," *i.e.*, a release from the class of all claims against the settling defendants by all members of the class. If too many members opt out, the defendants would not get the peace they are looking for as there could be potentially large, outstanding claims that could be brought against them in opt-out actions. A blow provision that becomes operative derails the settlement for all class members. The primary benefit of the class action is to aggregate all the claims and resolve them all at once, thus lessening (or in most cases, eliminating) the burden and expense on all class members (as well as the court system) from having to litigate their claims separately. If a few opt outs can spoil the settlement for the entire class, it defeats the beneficial purposes of the class action device.

Participating in the recovery of a class action settlement is a cost-free, risk-free and effective revenue-generating activity for any company. There is no guarantee that opting out of a class action settlement will generate any more revenues for a company than staying in the class. Indeed, filing a claim in a class settlement can yield significant sums if your company's

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purchases were substantial. At a time when legal budgets in companies are stagnant or shrinking, companies should think twice before taking on significant risks and expenses for a dubious return on investment.



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