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Opting Out of an Antitrust Class Action: Should Your Company Do It and, If So, When?

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In *Phillips Petroleum Company v. Shutts*, the Supreme Court recognized the due process right of a class member "to remove [itself] from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."[1] While *Shutts* gives class members the right to opt out, the question remains in every class action *whether* that right is one worth exercising. Answering this requires a careful risk-reward analysis – especially in antitrust class actions where the corporate plaintiff must weigh, among other things, the potential risk of being thrown into potentially invasive discovery in the direct action against the potential reward of a large, treble damage recovery. And once a corporate plaintiff makes the decision to opt out, the analysis continues to the next big (and, in some respects, more difficult) question of when to formally exit the class and file the direct action.[2] This article considers both questions.

Deciding *Whether* To Opt Out and File A Direct Action

The potential risks and rewards to a company opting out of a class action and filing a direct action are fairly straightforward. Perhaps the most significant risk is that as a direct action plaintiff, the company is open to full-fledged discovery and accompanying interruptions to business. This means gathering and producing documents (many of which may be proprietary and confidential in nature); answering interrogatories; and preparing and producing employees for deposition. By contrast, when a company chooses not to opt out and remain an unnamed class member, the company is generally immune from discovery that occurs in the class action.[3]

A second risk is that the company may achieve a worse result by pursuing a direct action than by staying in the class. For example, the class could prevail in its antitrust action, while the company fails in its direct action. Or, both the class action and direct action are successful, but the pro-rata share of the class verdict/settlement the company could have obtained had it remained in the class is larger than what the company achieved in the direct action verdict/settlement.

Given these risks, why would a company opt out and file a direct action? There are several reasons, but the predominant one is money. In antitrust actions where the corporate plaintiff has incurred significant damages as a result of anticompetitive conduct, the company may have a better shot at obtaining a recovery closer to its actual damages in a direct action than as a member of a class action. This results from a number of factors, including that class counsel is focused on developing a one-size-fits-all damages model for the class as a whole, not on recovering every dollar owed to each class member. Determining a corporate plaintiff's full measure of antitrust damages requires more than simply knowing the price and volume of goods bought or sold by the company. Where the company is based or incorporated and bought/sold goods can have an enormous impact. For example, under the unique antitrust laws of Kansas, direct and indirect

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1 472 U.S. 797, 812 (1985); *see id*. at 811 n.3 (noting that holding is limited to claims "wholly or predominantly for money judgments," as opposed to class claims seeking injunctive relief only).

2 Of course, the company could opt out and not file a direct action, which might be done for business reasons where, for example, the antitrust defendant(s) is an important supplier or customer of the company.

3 *See, e.g., In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 212 (M.D. Fla. 1993) ("Absent a showing of such particularized need, the Court will not permit general discovery from passive class members.").

purchasers recover "the full consideration or sum paid" for goods affected by anticompetitive conduct (which amount is then trebled).[4]

A good illustration is *In re Linerboard Antitrust Litigation*, where two classes of direct purchasers of corrugated containers and sheets alleged that twelve manufacturers of linerboard conspired to raise prices by restricting production and/or curtailing inventories in violation of Section 1 of the Sherman Act.[5] Ultimately, the class (which was estimated to consist of 80,000 companies) settled with defendants for $202,572,489, with class counsel taking 30% of the settlement (approximately $60M) as their fee.[6] This equates to a total recovery for each class member of approximately $1,772.[7]

Thirteen groups of class members opted out of the linerboard class action and filed direct actions, which eventually settled.[8] While not all of the opt-out settlements are public, available documents show that the opt-out plaintiffs likely fared significantly better than the class. For example, the opt-out plaintiffs obtained a $25,000,000 settlement from *one* of the twelve defendants – Weyerhauser Company.[9] This represents a gross recovery for each opt-out group of $1,923,076. In other words, each opt-out group collected substantially more from one defendant ($1,923,076) than each class member received from all defendants ($1,772).[10]

In addition to possibly recovering more as an opt-out plaintiff than as a class member, other reasons may motivate companies to file direct actions. *First*, while the class may seek only monetary relief, it may be of critical importance to the company to achieve both monetary and *injunctive* relief. *Second*, the company may have been sued by class counsel in previous, unrelated litigation and not wish to be represented as a class member by the same counsel. *Third*, the company may want greater control over the antitrust case, and unless the company is a named class representative, the company will have little, if any, say in the strategy of the class litigation, including development of the damages model.

The strategy of opting out late in the class action litigation (e.g., after the court decides class certification) typically allows the opt-out plaintiff to benefit from any merits discovery conducted by class counsel. But there may be significant trade-offs in opting out late.

Deciding *When* To Opt Out and File a Direct Action

Deciding *when* to opt out of an antitrust class action requires answering difficult strategic and legal questions. The strategy of opting out late in the class action litigation (e.g., after the court decides class certification) typically allows the opt-out plaintiff to benefit from any merits discovery conducted by class counsel. But there may be significant trade-offs in opting out late. *First*, the opt-out plaintiff faces a risk of being restricted in conducting merits discovery of its own, on the basis that the antitrust defendant(s) should not be forced to undergo the same discovery already conducted by class counsel.[11] *Second*, courts may require the late opt-out plaintiff to set aside a

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[4] KAN. STAT. ANN. §50-115. Courts have interpreted the Kansas statute to mean the plaintiff is entitled to recover the total amount paid for the finished good – not just the amount paid for a component part or the price differential caused by the anticompetitive conduct. See, e.g., In re W. States Wholesale Natural Gas Antitrust Litig., 633 F. Supp. 2d 1151, 1159-1160 (D. Nev. 2007)

[5] *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *1 (E.D. Pa. June 2, 2004).

[6] *Id*. at *1, *5.

[7] This assumes for simplicity that the 80,000 class members stayed in the class and shared equally in the settlement fund (net of attorneys fees).

[8] *In re Linerboard Antitrust Litig.*, No. MDL 1261, 443 F.Supp.2d 703, 707 (E.D. Pa. 2006).

[9] *See* Weyerhauser Company, Current Report (Form 8-K), at 2 (Dec. 27, 2005).

[10] Many of the same linerboard manufacturers were named as defendants in a 2010 antitrust class action filed by direct purchasers raising similar allegations as the linerboard class action a decade earlier. *See Kleen Products LLC et al. v. Packaging Corp. of Am. et al.*, No. 10-CV-5711 (N.D. Ill.). The new class action survived motions to dismiss and discovery is underway.

[11] *See, e.g., In re Visa/Mastercard Antitrust Litig.*, 295 F. Supp. 2d 1379, 1380 (J.P.M.L. 2003) (transferring, under 28 U.S.C. § 1407, six direct actions by opt-out plaintiffs to the district court that had a "seven year involvement" with the class action so as "to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings" and to achieve "coordinated or consolidated pretrial proceedings with the [class] actions pending.")

portion of any settlement or recovery to compensate class counsel under the common-benefit doctrine.[12] A plaintiff that opts out earlier in the process lessens these risks.

While a company might prefer an early opt out for strategic reasons, the final decision requires a careful legal analysis regarding potential statute of limitations problems. Federal and state courts agree that the filing of a class action tolls the statute of limitations for the opt-out plaintiff to bring its own direct action after class certification is either granted or denied. But courts are split as to whether "class tolling" applies to opt-out actions that are filed *before* a decision on class certification.[13] The split results from differing interpretations of two decades-old Supreme Court decisions. The first case, *American Pipe & Construction Co. v. Utah*, held 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."[14] In C*rown, Cork & Seal Co. v. Parker*, the Supreme Court explained further that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action."[15]

While a company might prefer an early opt out for strategic reasons, the final decision requires a careful legal analysis regarding potential statute of limitations problems.

The Sixth Circuit has interpreted *American Pipe and Crown, Cork & Seal* narrowly, holding that class action tolling is available only *after* the class certification decision: "a plaintiff who chooses to file an independent action without waiting for a determination on the class certification issue may not rely" on the class tolling doctrine.[16] A number of federal district courts and state courts have adopted the same rule.[17] The Second, Ninth, and Tenth Circuits, however, have reached the contrary conclusion, holding that class tolling under *American Pipe* "applies also to class members who file individual suits before class certification is resolved."[18]

A brief hypothetical illustrates the importance of this split. Suppose an antitrust class action is filed one month before the end of the statute of limitations period. Under *American Pipe*, the class filing tolls the statute for all putative class members. And in the district courts in the Second, Ninth, and Tenth Circuits, putative class members can safely opt out and file a direct action at any stage through the class certification decision. But if that class action were filed in the Sixth Circuit or in one of the many other jurisdictions that applies the same rule, putative class members would have only a one-month window to determine whether to opt out early or else be forced to wait until after a class certification decision is made, potentially years into the litigation. If the class member in such a jurisdiction opted out by filing a direct action after the hypothetical one-month mark but before the class certification decision, its claims could be dismissed as outside the statute of limitations.[19]

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[12] *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 668 (E.D. Pa. 2003) (establishing "escrow fund to provide for equitable allocation of counsel fees and costs" from the opt-out actions to provide compensation "for common benefit work performed by designated counsel" in the related class action).

[13] *Compare, e.g., In re Enron Corp. Sec.*, 465 F. Supp. 2d 687, 716 (S.D. Tex. 2006) (concluding that class tolling "applies only to opt-out plaintiffs *after* the district court makes the class certification determination, regardless of whether it denies or grants certification"), *with State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1224 (10th Cir. 2008) (concluding class tolling is available "when an individual member of a putative class pursues an independent, individual claim before the district court has decided the class certification issue but after a non-tolled statute of limitations would have run").

[14] 414 U.S. 538, 554 (1974).

[15] 462 U.S. 345, 353-54 (1983).

[16] *Wyser-Pratte Management Co. v. Telxon Corp.*, 413 F.3d 553, 568-69 (6th Cir. 2005) (citing cases).

[17] *See, e.g., Lester v. Exxon Mobil Corp.*, 42 So. 3d 1071, 1075-76 (La. Ct. App. 2010) (adopting rule that "plaintiff filing an individual action may not benefit from class action tolling if he files suit prior to a decision on class certification") (quotation omitted); *In re Enron Corp. Sec.*, 465 F. Supp. 2d 687, 715-16 (S.D. Tex. 2006) (citing cases).

[18] *In re WorldCom Sec. Litig.*, 496 F.3d 245, 254-55 (2nd Cir. 2007); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1224 (10th Cir. 2008); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2008) ("conclud[ing] that members of the plaintiff-class who have filed individual suits are entitled to benefits of *American Pipe* tolling"); *see also Lehman v. United Parcel Serv., Inc.*, 443 F. Supp. 2d 1146, 1150-52 (W.D. Mo. 2006).

[19] *See, e.g., Kozlowski v. Sheahan*, 05-5593, 2005 WL 3436394, at *3 (N.D. Ill. Dec. 12, 2005) (dismissing on statute of limitation grounds a direct action brought by putative class members because the court in the

Accordingly, in evaluating whether to opt out at an early stage in class action litigation by filing a direct action, the opt-out plaintiff must investigate both whether tolling is necessary to avoid a statute of limitations problem and whether the applicable jurisdiction permits *American Pipe* class tolling for plaintiffs who file suit before the class certification decision.

Conclusion

The decisions as to whether and, if so, when to opt out of an antitrust class action involve assessing multiple risks and rewards. As shown by the linerboard antitrust litigation discussed above, the rewards of opting out and pursuing a direct action can be substantial. Companies that are members of putative antitrust class actions should give careful consideration to whether their circumstances weigh in favor of opting out and filing a direct action.

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class action "has not ruled on class certification" and the doctrine of class action tolling "should not be applied to a putative class member who multiplies proceedings by filing a new action while class certification is pending"); *Irrer v. Milacron, Inc.*, 04-72898, 2006 WL 2669197, at *6-7 (E.D. Mich. Sept. 18, 2006) (granting summary judgment on statute of limitations grounds because "[p]utative class members like Plaintiffs, who choose to file individual actions before there is a decision on class certification, are not entitled to the benefit of the class action tolling rule").