business law today(/)

Securities Law (Https://Businesslawtoday.Org/Practice-Area/Securities-Law/)

Sitting at the Front of the Class: The Importance of Timely Opt Outs

8 Min Read

By: Jordan A. Goldstein (/author/jordanagoldstein/), Marina Olevsky (/author/marinaolevsky/)

| Feb 12, 2018

IN BRIEF

- A recent U.S. Supreme Court case held that the only way for a plaintiff to preserve its opt-out rights in light of statutes of repose is to opt out before the statute passes.
- The problem is that the statute often passes before the court rules on the merits of the class action suit.
- So how might a plaintiff preserve strong claims that may have greater recovery from an individual (non-class) lawsuit?

Should a plaintiff opt out of a class action and, if so, when? A recent U.S. Supreme Court decision has forced businesses and individuals to make that determination sooner than they would like. The rules governing class actions are

complicated, but are something that every business owner and investor must understand. For many individuals with small potential lawsuits, a class action permits them to aggregate their claims with other entities and individuals with similar claims, and to bring a lawsuit against a business that has harmed them. It's a win-win all around in that the individual plaintiffs get a recovery they wouldn't otherwise receive, the defendant resolves a single lawsuit rather than multiple piecemeal claims, and the plaintiffs' attorneys (sometimes referred to as class counsel) get a piece of the ultimate recovery, often as much as one-third.

For some businesses (and high-net-worth individuals), however, a class action is *not* a silver bullet. Being part of a class means giving up one's right to bring suit in one's own name. If a business or person doesn't want to be part of a class, it must opt out before a court-set deadline. Once that deadline passes, the potential opt-out plaintiff is stuck being part of the class. The deadline to opt out of a class typically is announced after a settlement has been reached, which may take years to achieve. The problem is that, by that time, it may be too late to opt-out.

First a little history. The modern version of class actions was created by Congress in 1966. Prior to that point, there was no mechanism for a large group of individuals to bring civil claims for monetary damages arising from a common set of facts. With the passage of the class-action rules (which are now codified at Rule 23 of the Federal Rules of Civil Procedure), a class can be formed for several reasons, including most commonly by a group of persons or entities who have been similarly harmed by an investment or product, provided that the common questions of law and fact for the class "predominate" over other questions, and that a class action is "superior" to other lawsuit types for the case.

But a person or entity doesn't have to be part of a class; they can instead opt out and choose to file their own lawsuit. As an initial matter, this choice doesn't make sense for small claims. For such plaintiffs, class actions are likely the only available vehicle for recovery. But for those who

hold significant claims (generally at least several hundred thousand dollars), an opt-out lawsuit may result in a far larger settlement than the plaintiff would receive as part of a class action.

In fact, a recent study indicates that in the average case with an opt-out, an additional amount of almost 13 percent is paid to plaintiffs who opt out, and in a number of cases, more than 20 percent was paid to opt-out plaintiffs. Recent settlements support the economic case for opting out of certain class actions. For example, our experience has shown that in securities cases, class-action settlements of under 10 percent of losses are typical, whereas opt-out plaintiffs typically recover multiples of this amount.

Recently, however, it has become more difficult for plaintiffs to take a "wait and see" attitude toward class actions. Many class actions are filed under securities laws that contain so-called statutes of repose, which act as a legal bar to how long someone can wait to sue. In many cases, these limits are three or five years from the date of the securities offering in question. Although that may sound like a lot of time, it's really not when one considers that the average length of a case that goes to trial in federal court is over two years, and that some cases take far longer to try.

What this means is that it may take five or more years before a court rules on the merits of a class-action complaint, or even decides if the case should have been filed as a class action. What if the court rules that the case should never have been a class action after the statute of repose has been filed? Then the individual plaintiff—who could have opted out years before if they had acted quickly—is out of luck. That's right, the person or business that has been patiently waiting for six years to see how the class action would turn out will be completely out of luck if the court tosses the suit *for any reason* because the claim will no longer be timely.

This unforgiving outcome is the result of a recently decided U.S. Supreme Court case, *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042

(2017) (*CalPERS*). In that case, the court held that statutes of repose are not subject to the doctrine of equitable tolling, which means that even if the class action is timely filed, that filing pauses only the statute of limitations, not the statute of repose, as to any class members who choose to opt out and bring their own action.

Because the *CalPERS* court recognized the need for "certainty and reliability" as a "necessity in the marketplace," it ruled that statutes of repose are designed to protect defendants against future liability and provide certainty that no further suits will be filed after a set period. With that logic in mind, the court held that the three-year statute of repose in the Securities Act of 1933 does apply to opt-out plaintiffs, and thus limited Securities Act suits to those filed within three years of the date of the last culpable act, even if the plaintiff has spent some part of that three-year period in a class action timely filed against defendants. Thus, under *CalPERS*, the only way for a plaintiff to preserve its opt-out rights in light of statutes of repose is to opt out *before* the statute of repose passes (and often before the court rules on the merits of the class action suit). It is no longer possible for a plaintiff to wait and see what a proposed class action settlement looks like before determining whether to opt out.

Opting out, as noted above, may have significant benefits. The opt-out plaintiff can drive case strategy independently without relying on the strategic decisions of class counsel; the opt-out plaintiff can choose to settle only when it most benefits him or her; the opt-out plaintiff can even pursue legal theories that might benefit just the opt-out plaintiff, but not necessarily all the other class members; and finally the opt-out plaintiff can sometimes extract a greater settlement by being the "squeaky wheel" that the defendants want to pay off to make go away. All these argue for opting out of class actions where the claims have merit and are sufficiently large.

Another reason to opt-out, which often isn't reported, is that an opt-out plaintiff can bring suit in state court, often relying on state securities claims that would not be available

in a federal class-action suit. These state claims often are superior vehicles for recovery than federal claims and permit few defenses, but they are underutilized because Congress—at the behest of supportive defendants—passed the Securities Litigation Uniform Standards Act of 1998 (SLUSA) and barred state securities claims from being part of class actions. The ability to assert state securities claims is another tremendous benefit of opting out of federal class actions.

Finally, opting out of lawsuits offers the possibility of a customized solution for a plaintiff—something not available to the general class of plaintiffs. For example, an opt-out plaintiff could agree to settle its claims sooner than the class does and therefore receive a settlement payment years before any class-action plaintiff sees a penny. All these factors may support the decision to opt out of a class action.

What this means for persons and companies receiving notice of a class action is that they must consult with an attorney promptly to identify whether the claim could support an opt-out lawsuit and the deadline for making that decision. Prior to *CalPERS*, class members could wait to opt out of a class action until a final settlement was proposed, but class members no longer have that luxury. Now, if they don't act quickly enough, they can find themselves limited to the general class outcome, having squandered the possibility of a much greater recovery from a separate litigation controlled by the opt-out plaintiff.

In light of *CalPERS*, class action plaintiffs—including pension funds and other large investors—are well advised to keep careful track of timing throughout the life of a litigation and to be mindful of time elapsed not only from the date an injury is discovered, but also of how much time has passed since the defendant's actual misconduct. Keeping an eye on this clock will permit potential opt-out plaintiffs to preserve strong claims that may have substantially greater payouts than those available to the rest of the class.

Searchable Keywords: Litigation (/?S=Litigation),
Litigation - Class Actions (/?S=Litigation+-+Class+Actions),
Securities Regulation (/?S=Securities+Regulation)

ABOUT THE AUTHORS


(/author/jordanagoldstein/)

New York City, NY

Jordan A. Goldstein

(/author/jordanagoldstein/)

Jordan A. Goldstein is a litigation partner at Selendy & Gay, PLLC, where he specializes in complex financial products and commercial transactions.

Jordan holds an M.B.A....

+ Follow

New York City, NY

Marina Olevsky

(/author/marinaolevsky/)

Marina Olevsky is an associate in Quinn Emanuel's New York

(/author/marinaolevsky/)

office. Ms. Olevsky's practice focuses on structured finance litigation and intellectual property litigation on behalf...

+ Follow