

# Don't Throw Away That Class Action Notice: Opting Out Of Antitrust Class Litigation

**H**ave you ever received a notice informing you that you are a member of a class action lawsuit? More likely than not, you skipped the fine print and promptly threw it in the garbage.

But what if the notice comes addressed to you as in-house counsel and it identifies as defendants in the case several companies that you know are your company's suppliers? Obviously, you cannot simply throw that notice in the trash without examining its contents carefully.

Let's imagine that the notice informs you that your company is a member of a class action alleging price-fixing by the industry that supplies your company with one of its key inputs. The notice also informs you that your

company has thirty days to decide whether to remain in or opt out of the class. And, by the

way, class counsel has reached a proposed settlement with one or more of the defendants so, if you have objections to the settlement, you need to raise them within the next sixty days.

You have no idea whether the class action case has merit, how much of the product your company purchased from the defendants, or whether class counsel is going to adequately represent your client's interests. Moreover, everyone who was involved in purchasing the product has retired or left the company. What do you do next?

The first and most crucial step is to contact either class counsel or your own outside counsel to learn more about the case: What is the nature of the alleged conspiracy? How plausible is the theory of the case? Has the government secured guilty pleas or consent decrees from the defendants? Where is the case in discovery? Does the discovery to date suggest the allegations of conspiracy are well founded? Who are the key players (both in terms of class and defense counsel and the parties in the litigation)?

The second step is to work with your business people to determine whether it makes sense to opt out of the class and pursue your own lawsuit against the defendants. Key questions to consider include: How much of the product did your company actually purchase during the period of the alleged conspiracy? Were the purchases from the defendants or from other suppliers? What happened to the prices your company paid for the product during the alleged conspiracy? What business relationships does the company have with the defendants that may impact your decision to sue rather than remain in the relative anonymity of the class?

The third step is to evaluate the risks and rewards of opting out of the lawsuit: Does the proposed class settlement seem fair given what you know about the merits of the case? How much will it cost in terms of counsel fees, litigation expenses or company time to litigate the case on your own or as part of a direct action plaintiff group? How much is the company likely to recover by doing nothing and remaining in the class? Are there other large corporations who are planning to opt out of the class?

Given time constraints, it will be difficult to make a fully informed decision about whether or not to opt out of the class litigation. Here are some basic guidelines to use in reaching your decision:

- Beware the class action that has not been preceded by a Department of Justice or Federal Trade Commission investigation: Although there have been successful antitrust cases brought against industries that escaped the scrutiny of federal antitrust regulators, they are few and far between. Where there is enough smoke to draw the attention the antitrust authorities, there usually is fire.
- Exercise caution if class counsel is requiring you to decide whether to opt out of the class very early in the litigation or before any major settlement has been reached: Many class counsel will file a lawsuit

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and quickly settle the case with the aim of securing their contingent fee before they are required to make a large investment in developing the case. Although a natural instinct, this practice results in smaller settlements and lower returns for class members. If, on the other hand, the class has reached a settlement only after concluding fact discovery, that settlement is more likely to approximate a reasonable result for your client.

- Seriously consider pursuing your own direct action if your company's purchases are greater than \$10 million and there was an otherwise unexplainable spike in the prices your company paid for the product during the alleged conspiracy: If your client is or was a major customer of the defendants, defendants may be willing to settle with your company at a higher overcharge than the average class member obtains in settlement in order to obtain or preserve your company's business. In other words, if your purchases are large enough to warrant opting out of the class and hiring your own counsel, consider the class settlement a floor on what your company might obtain and incentivize your counsel to do better than the class settlements or judgments.
- Retain the services of experienced direct action counsel and an expert before making the final decision whether to opt out: For a relatively small investment, you should contact an outside lawyer experienced in representing opt-out plaintiffs to aid in your decision-making. You also should consult with an economic or industry expert. While there will not be sufficient time to conduct a full-scale overcharge analysis, an expert should be able to tell you in relatively short order whether industry pricing patterns are inconsistent with a competitive market and thus suggest a conspiracy. The expert can also provide you with a rough estimate of the overcharge you might claim as the basis of your antitrust damages.
- Ask class counsel and direct action counsel what their fee will be: Finally, make sure you know how much of your company's recovery on the case will go to either class counsel or your own direct

action counsel. If your upside is high enough to justify opting out, consider working out an hourly or modified contingent fee with your outside counsel so that counsel is properly incentivized to prosecute the case but not rewarded with a huge windfall in the event of a successful outcome.

Next time you receive a class action notice in an antitrust case, read the notice carefully and give serious thought to whether your company should remain in the class. Who knows? That little notice may just be your ticket to transforming your legal department into a profit center for the business – if you do your homework and make the correct decision about opting out of the class litigation and pursuing your own damage claim. If the success of direct action plaintiffs in recent price-fixing cases that began as class litigation is any indication, you could become a hero within your company by opting out.

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