

District Court Holds Antitrust Opt-Outs Not Allowed Back In The Class

A RECENT FEDERAL COURT DECISION highlights the significance of the decision to opt out of a class action; once the decision is made, there may be no opportunity to rejoin the class.

The United States District Court for the Northern District of California ruled earlier this year in the *In Re. Cathode Ray Tube (CRT) Antitrust Litigation*,

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MDL No. 1917 (N.D. Cal., April 1, 2014), that a group of opt-outs were not entitled to withdraw

their requests for exclusion from settlement classes. The decision serves as yet another reminder that the decision to opt out of a class, albeit often on tight timeframes and with imperfect knowledge of the merits of a case, should only be made with the help of experienced opt-out counsel and experts who can properly assess the upside (and downside) of pursuing litigation independent of the class. This is particularly true in antitrust cases where the stakes are typically high and where the legal and factual issues presented can be extraordinarily complex.

In *CRT*, a group of class members led by RadioShack and Unisys exercised their rights under the Federal Rules to opt out of settlements between the class seeking to represent them and defendants accused of participating in a price-fixing cartel. The opt-outs' notices of exclusion asked the Class Administrator to remove them and their affiliated companies "from any Class list that you have compiled or that you compile in the future" regarding the litigation. The Court then proceeded to certify settlement classes and entered final judgment in favor of the settlement class and against certain defendants for over \$70 million. Months later, for reasons not stated in their moving papers, the opt-outs filed a motion under Federal Rules 23 and 60(b) to withdraw their requests for exclusion from the class and to participate in the settlements.

Not surprisingly, the settlement defendants – who obviously had no incentive to deal with a raft of opt-out litigation and would not have to offer additional money to settle the class action regardless of the success of the opt-outs' attempt to rejoin the class – did not object. The settlement plaintiffs, however, objected, arguing that the Court's certification orders and judgment were final and should not be revisited.

The opt-outs made several potentially compelling equitable arguments in favor of the Court allowing them to opt back into the class. For example, they argued that allowing the opt-outs to return would permit the parties (defendants and themselves) to avoid further costly litigation and would not prejudice the settlement class, since there had not yet been any distribution of the settlement proceeds to class members. In support, the opt-outs cited to other cases in which courts used their inherent equitable powers to allow the withdrawal of opt-out notices on the ground that doing so would have no "detrimental effect" on the settlement class. They further stressed that their decision to opt out of the class could not have been relied upon by other class members in making their own decisions to remain in the class because those decisions were made contemporaneously with their own. The opt-outs also argued that courts typically have barred opt-outs from rejoining the class only in those instances where there is evidence that the opt-outs were trying to "game the system" by using their opt-out status to obtain settlements larger than those negotiated by the class. Finally, the opt-outs cited to precedent holding that class members who have filed timely claims would not be prejudiced by the opt-outs rejoining the class, since the class members have no "justifiable expectation" of any particular payout from the settlement, and would suffer at most the "loss of a windfall."

Unfortunately for the would-be "opt-back-ins," the Court did not agree. While acknowledging that

it had equitable authority to allow the opt-outs back into the settlement class, the Court rejected each of the opt-outs' arguments and concluded that under the particular facts of the case, allowing the withdrawal of the opt-outs' exclusions was not justified. The Court noted that the relevant inquiry is not solely whether allowing the opt-outs back into the class would be fair to the class but also the converse--whether the exclusion from the settlement "poses any unfairness" to the opt-outs. On the first point, the Court concluded that the reinstatement of the opt-outs into the already approved settlements could diminish payouts to other class members (since the opt-out's potential share of the settlement dollars would be significant), embolden other opt-outs to make similar motions and thereby further reduce class members' recoveries, and jeopardize the existing settlement and future settlements with defendants. On the second point, the Court concluded that requiring the opt-outs to pursue their own litigation is not fundamentally unfair since they "consciously chose to pursue separate litigations" based on the advice of "their highly skilled, experienced lawyers' reasoned decisions." While acknowledging the drain on judicial resources that opt-out litigation creates, the Court denied the opt-outs' motion, noting that "These parties are highly encouraged to pursue settlements of their own."

The *CRT* decision is not likely to be the last word on this subject, nor is it by any means the first court to confront a request of an opt-out plaintiff to rejoin a settlement class. Indeed, a year earlier, another judge in the same judicial district granted a motion by an opt-out to withdraw its exclusion from a settlement class in an antitrust case involving different products. See *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2013 WL 1222690 (N.D. Cal. Mar. 25, 2013). Importantly, the opt-out in the earlier case was permitted to rejoin the class because its share of the settlement distribution was less than 2% and therefore incapable of causing significant prejudice to other class members.

These two cases make clear that a class member with a large stake in a class action who decides to opt out of a class has an uphill climb if it reverses course and decides it wants to be part of a settlement class after all. Obviously, the best way to avoid this dilemma is to make a reasoned, informed decision before opting out of a class in the first place. Advice from experts

and counsel on the merits of the case and the potential outcomes of independent litigation is crucial to making an opt-out decision with confidence. In the event the opt-out plaintiff reconsiders its decision to leave the class, the best alternative is to move quickly to reinstate its status before the court enters a final, binding judgment on the class settlement. Depending on the likely impact such a motion to reinstate class member status may have on the *pro rata* shares of the settlement class members and on what has transpired between the opt-out decision and the motion to withdraw the notice of exclusion, the opt-out may or may not have some luck. The more prudent course is to avoid leaving such important matters to the vagaries of a particular Court's analysis by making the right decision in the first place.

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