Turning Your Legal Dep't Into a Profit Center: Opting Out of Class Action Litigation

Every general counsel has seen it – the look of dread on the Board members' faces when the time comes for your quarterly report on the status of matters in the legal department. Typically, the best news you can deliver is word that the company has resolved the claims brought by a corporate or consumer plaintiff, but, even then, someone always groans at the announced cost of such a "victory." But what if you could report that the law department actually *collected* $10 million over the last year, as a result of a price-fixing lawsuit you authorized against the five largest manufacturers of widgets, a key input into your company's products? Not only would you have assisted in the enforcement of the antitrust laws and furthered their goal of unfettered competition in the marketplace, but you likely would have transformed yourself and your department from pariah to hero in the blink of an eye. So, you ask, where do I sign up?

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This story is actually not as improbable as it may seem, and it is one that has been repeating itself in corporations across the United States with increasing frequency in recent years. With the proliferation of conspiracy charges and price-fixing indictments emanating from the antitrust enforcement agencies, many corporations are discovering that their own purchasing departments may have been the victims of these crimes. This discovery is usually made through the trade press or in the form of a notice from class counsel that you are a member of a pending class action lawsuit. It is this latter notice to which you should pay particular attention.

When your company is the target of the lawsuit, class actions can be a thorn in the side for the in-house counselor. But, as Congress stated in the preamble to the Class Action Fairness Act of 2005, class actions arguably provide a benefit to the legal system, "permitting the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." And, when you discover that *your* company may have paid millions of dollars more than it should have because the class defendants conspired to restrict output or artificially inflate prices, participating as a member in the putative class action may be an attractive way in which to pursue your recovery. In many instances, however, it may be better to opt-out of the class and pursue your own direct action against the defendants.

Class participation may offer the anonymity that your business people desire because of your company's relationship with the alleged conspirators. Indeed, you may have determined that there are

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ways in which your suppliers could negatively and lawfully impact your business that make recovering through the relatively anonymous class vehicle more attractive than taking a stance as a direct action plaintiff. But that anonymity must bring with it the understanding that any damage recovery from your class participation will be limited to the least common denominator – a result that may be unacceptable to your shareholders if your company's purchases of the product at issue were significant. Moreover, by remaining in the class you will cede control of the litigation to class counsel, rather than working with your own attorneys who can maximize your company's results by tailoring the litigation strategy to meet your particular needs.

If you believe your company's recovery will be less than optimal if it remains in the class, be advised that class action notices often provide a limited time frame in which to make a determination as to whether to participate in the putative class or "opt out" to pursue your own direct action. Sometimes this critical analysis must be completed in as little as thirty days, unless you have done your homework in advance. In order to make the best decision possible in whatever window of time you are given, a careful examination must be conducted of the costs and benefits of class participation. Ideally this calculus should be performed with the assistance of experienced antitrust counsel, skilled in the art of conducting such an evaluation. Some initial variables to be considered include:

- A preliminary evaluation of the merits of the case. Even though the litigation may appear to be in its infancy, by the time class notices are distributed, there may be much information that can be gleaned about the nature of the case. As alluded to above, the class action may have followed a government investigation or even criminal indictments, unquestionably a strong sign that the case will have merit. Your own purchasing managers may also be a valuable source of information concerning the movement of prices during the period of the alleged conspiracy. Beyond these readily available sources of information, class discovery may have yielded a repository of information that can be accessed in order to assess the merits of the case. Remember, if your company's purchases represent a substantial percentage of the class purchases, class counsel will have the incentive to persuade you to remain in the class. Use this leverage to your advantage to obtain knowledge about the strengths and weakness of the potential case before deciding whether to participate or opt-out.

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- An understanding of the nature of your company's purchases. Sometimes easier said than done. Depending on the time frame in which the conspiracy is alleged and the sophistication of your company's recordkeeping, your purchasing data may be more or less accessible. In order to determine whether to opt-out of the class, however, the best available data must be quickly obtained to determine how much of the product your company purchased during the pe-

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riod of the alleged conspiracy. Also imperative is an analysis of who those purchases were from to determine whether your company's sources are alleged to have participated in the conspiracy. Do not rule out those purchases that appear to have been from non-participating industry members, however, as the trail of unnamed co-conspirators may extend farther than is presently known.

- A preliminary understanding of the potential "overcharge." Counsel should strongly consider engaging an economic expert at this stage of the analysis to perform a preliminary estimate of the amount the conspirators can reasonably be said to have "overcharged" for the product as a result of the conspiracy. This estimate can be extremely useful in determining the potential reward from opting out of the class, as any measure of damages – whether as proven at trial or as discussed in the context of potential settlement negotiations – will more often than not be driven by this "overcharge" figure.

- An understanding of the business relationships that may be impacted by your company's pursuit of a direct action claim. Deciding to sue your supplier is certainly not a decision to be taken lightly. There may be reasons beyond the estimated amount of damages your company can hope to recover that will counsel against opting out of the class. Even in those circumstances, however, your analysis and understanding of the value of the potential claim may be useful. For example, you may consider approaching one or more of the defendants with whom your company's purchases are particularly significant and explaining to your suppliers the realities of the case. By advising them you are leaning towards a decision to forego an action against them, you may be able to obtain favorable terms or other advantages in your ongoing supplier-purchaser relationship.

If an analysis of these and other factors does suggest that your company may be better off pursuing its recovery as a direct action plaintiff than as a member of the class, you will need to engage outside counsel with antitrust litigation experience to vigorously prosecute the case. In choosing that counsel, keep in mind that various models of representation exist, ranging from "mass representation" models to those with a more client-specific focus. Various fee structures should also be considered to maximize outside counsel's incentive to pursue the conspirators without setting up a disproportionately large fee award when the litigation proves successful.

With the increasing pressure on legal departments to cut costs and adhere to tighter and more restrictive budgets, the prospect of actually generating revenue for the corporation should appeal to most inside counsel. The key, of course, is to carefully analyze the opportunity and to pursue only those meritorious cases where your company has suffered damages. If you pass on those legitimate cases, not only will you run the risk of allowing the next conspiracy to go undeterred, but you may incur the ire of your shareholders, and you'll certainly miss the opportunity to turn some heads at the next Board meeting when you report on the returns from your direct action antitrust litigation.

Jason S. Dubner and James A. Morsch are partners in the Chicago office of Butler Rubin Saltarelli & Boyd LLP

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