

The Opt Out Decision In Price Fixing Cases: Factors For the Corporate Legal Department to Consider

By Joseph W. Bell and Mitchell J. Rapp
Published in [Competition Law360](#)

As corporate legal departments look for ways to contribute to the bottom line, generating revenue through a recovery in a plaintiff side case can be appealing. At a minimum, this means paying attention to pending cases in which the corporation is a member of a putative or certified class. Beyond that, it means analyzing whether and when it makes sense for the corporation to become a direct action plaintiff. While the last decade or so has seen an increase in the number of corporations willing to pursue opt out or direct action cases (at least in the area of antitrust litigation), even in sophisticated legal departments there often is no real process in place for analyzing such opportunities. Optimally, a legal department should have a procedure for making sure that every class notice or settlement notice received by the corporation is brought to its attention, that the pros and cons of opting out or remaining in the class are carefully analyzed, and that appropriate steps are then taken. Ideally, where price fixing or market allocation is alleged and a corporation is a major direct purchaser of the product at issue, the legal department should be informed of the situation early enough to consider the filing of a direct action case concurrently with the inevitable class action filings. This article focuses on factors that should be considered in deciding whether and when to become a direct action plaintiff.

Such a decision generally occurs at one of three junctures. First, a company can decide to file suit at or around the same time the class cases are filed. This minimizes concerns about tolling, discussed below, and may allow the company's counsel to partner with class counsel in charting the future course of the litigation. Second, when a class case has been pending for some time, the class plaintiffs may settle with one or more defendants prior to any decision on certification of a litigation class. Typically in this scenario, a settlement class is certified and notice of the settlement is provided to members of that settlement class. A corporation receiving such a notice may decide to opt out of that settlement class and negotiate with and/or litigate directly against the settling defendant(s). Such a decision does not affect the corporation's membership in any future settlement class or litigation class that might be certified in that case. Finally, if a litigation class is certified, notice is usually provided to class members who then may choose to opt out of the class case for all purposes and pursue a direct action case.

A legal department should consider gathering information on potential cases through multiple channels. At a minimum as mentioned above, all class notices and settlement notices, which often are sent to manufacturing locations or procurement departments, should be sent immediately to the legal department. Such locations should also be instructed to report any communication from a supplier, rumor in the industry, or other information suggesting the existence of an ongoing antitrust investigation. Outside legal counsel should be encouraged to monitor new case filings

and other sources of information and bring potentially relevant cases to the attention of the legal department.

Once a relevant case has been identified, the most important factor in determining the feasibility of a direct action is the size of the company's purchases of the relevant product from potential defendants during the relevant time period. Prosecuting an antitrust case can be very costly, in large part because experts are necessary to prove damages, and sometimes liability as well. Often a group of direct action plaintiffs will join together to share counsel and/or experts to reduce costs. Regardless of whether the direct action plaintiff is paying costs itself or its counsel is advancing costs, there must be an amount at stake sufficient to justify the expense of litigation. Thus, the first two questions that must be asked within the company are "How much did we buy?" and "From whom did we buy it?" It is not essential to have precise figures in the early stages of the decision process, but it is necessary to at least have an "order of magnitude" number.

The other key to analyzing opt out decisions is information on the strength of the case. From a practical perspective, cases where liability is established, such as by guilty pleas in a prior government proceeding, involve less risk and less cost than cases in which liability is vigorously disputed. Most of the time, information regarding a government investigation is the first indication of a potential price fixing or market allocation case. This information may come from a press release from the government agency involved (e.g., the Department of Justice Antitrust Division, the Federal Trade Commission, the European Commission, or another jurisdiction), or from companies under investigation (usually in a 10K or other financial reporting document). While often general, the information can nonetheless be useful in preliminarily evaluating the strength of the case, and may include information about the stage of the investigation, whether the government has requested information from the parties being investigated and, if so, what kinds of information, whether a civil complaint or criminal information has been filed, and whether a party under investigation has applied for amnesty under the DOJ's corporate leniency program. As the investigation proceeds, further information is generally provided, including whether guilty pleas or consent decrees are entered by any of the defendants and/or their employees.

Class complaints are typically filed soon after a government investigation becomes public knowledge. If the potential direct action plaintiff lacks sufficient information about the strength of the case at that point, it may decide to wait and see how the class cases progress before making a decision. One advantage of waiting may be that it allows more time for the underlying government investigation to develop or other evidence to surface. If a settlement occurs in the class case, the preliminary approval motion can shed light on the views of class counsel and the settling defendant as to the strength of the liability case and the defendants' exposure. The disadvantage of waiting is that one has no control over the course of the litigation, including discovery. Courts will often preclude direct action plaintiffs from duplicating discovery taken in the class case prior to the opt out date. One alternative to waiting is to move to intervene in the class case for the limited purpose of obtaining access to discovery relevant to the decision whether or not to pursue a direct action. This could include, in addition to

discovery relevant to liability, information on the defendants' sales in the event the potential plaintiff's purchase records are incomplete.

If one is considering filing a direct action case at a time when the class litigation has been pending for a substantial period of time with no decision having been made on whether to certify a class, and if the claims involve conduct occurring more than four years in the past (plus any period of fraudulent concealment before the investigation became public or the class cases were filed), the issue of tolling becomes relevant. In *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974), the Supreme Court 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." This holding was extended in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983), which held 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."

There is some uncertainty, however, as to whether *American Pipe* tolling applies to plaintiffs who file individual suits before the decision on class certification. The Southern District of New York answered that question in the negative, but the Second Circuit reversed, finding that direct action plaintiffs have a right to file at the time of their choosing and denying tolling would diminish that right. *In re Worldcom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 451 (S.D.N.Y. 2003), *rev'd*, 496 F.3d 245, 256 (2d Cir. 2007).

Before the Second Circuit decision, the Sixth Circuit adopted the reasoning of the district court in *Worldcom*, holding that the purposes of *American Pipe* tolling "are not furthered when plaintiffs file independent actions before decision on the issue of class certification," and that those purposes are only furthered "when plaintiffs delay until the certification issue has been decided." *Wyser-Pratte Mgmt. co., Inc. v. Telxon*, 413 F.3d 553, 569 (6th Cir. 2005). Thus, a split in the circuits currently exists. The Ninth and Tenth Circuits have found the Second Circuit's reasoning persuasive and followed it. *In re Hanford Nuclear Reservation Litig.*, 521 F.3d 1028, 1053 (9th Cir. 2008); *State Farm Mut. Automobile Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1230 (10th Cir. 2008). In an earlier decision, the First Circuit expressed a view similar to that of the Sixth Circuit. *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983). Other circuits have yet to address the issue.

What this means as a practical matter is that if one is considering filing in a circuit where the availability of *American Pipe* tolling is uncertain, one needs to consider, in addition to all the factors discussed above, waiting until a settlement class or litigation class is certified and notice is given of a deadline for opting out, before deciding on such action.

Joe Bell is a partner with Zelle Hofmann in the San Francisco office of Zelle Hofmann. He has represented numerous direct-action plaintiffs in antitrust proceedings.