

More Shareholders Are Opting Out Of Class Deals, Study Says

By **Katryna Perera**

Law360 (October 25, 2023, 8:39 PM EDT) -- A growing number of securities class action settlements in recent years have seen class members opt out from deals if they believe they could score bigger returns by bringing their own actions, according to a report released by Cornerstone Research and Latham & Watkins LLP on Wednesday.

The report found that from 2019 to June 2022, more than 11% of securities class action settlements had at least one identified class member opt out, as opposed to less than 3% of settlements reached between 1996 and 2005.

Class members seem to be opting out of recovery when they are interested in pursuing a direct action against the defendant, the report states. Of the 2,061 sampled cases from 1996 to June 2022, 115 had at least one opt-out, according to the report, and there were at least 10 confirmed direct actions from those cases.

The report states that many of the confirmed direct action suits were launched by institutional investors such as pension funds, mutual funds, hedge funds or other investment management firms.

In a statement, Topher Turner of Latham & Watkins LLP and one of the report's co-authors said the prevalence of institutional investor opt-outs bringing their own direct actions relates to their desire to secure a return on their investments. Many institutional investors also have established relationships with plaintiff law firms that can help them assess the risks and benefits of pursuing direct action versus remaining a class member.

"Some of these putative class members may decide that the anticipated return from bringing a direct action lawsuit in light of the size of the investor's ownership interests warrants the increased litigation costs," Turner said.

Class Member Opt-Outs

Over the past 25 years, the number of securities class action settlements that have had at least one class member opt out has more than tripled, from 2.9% in the early 2000s to over 11% since 2019.

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|---|-------------------|
| Class settlement years | 1996 to 2005 |
| Number of settlements | 726 |
| Percentage of settlements with identified opt-outs | 2.9% |
| Class settlement years | 2006 to 2018 |
| Number of settlements | 1,048 |
| Percentage of settlements with identified opt-outs | 5.8% |
| Class settlement years | 2019 to June 2022 |
| Number of settlements | 287 |
| Percentage of settlements with identified opt-outs | 11.5% |



Source: Cornerstone Research • Created with Datawrapper

The report also found that opt-outs tend to happen more often in cases with certain characteristics or attributes.

According to the report, as class action settlements increase in size, it is more likely there will be at least one opt-out. Additionally, opt-outs are more likely if the suit involves simplified metrics associated with higher potential damages; if the suit's allegations are more complex; or if there are indications that a defendant is financially healthy and can pay a potential settlement or judgment, the report states.

"This analysis suggests that potential class members carefully consider whether or not to opt out of a securities class action based on attributes of the case," Brendan Rudolph, a principal at Cornerstone Research and report co-author, said in a statement. "Our findings are consistent with opt-outs occurring more frequently when a putative class member might see an opportunity for a greater return on an individual claim."

Furthermore, the report states that class actions with identified opt-outs have usually been settled at later stages of the litigation, typically after a class certification ruling was issued.

Turner told Law360 this growing "trend" of opt-outs seems to result from investors wanting to control the pursuit of their claims.

He said it's "critically important" for class action stakeholders, including defendants, to be mindful of opt-outs and the risk and exposure they could create with any direct actions.

"By identifying conditions where class members have been more likely to opt out and pursue their own direct actions, our analysis helps those stakeholders recognize the risk and exposure created by those opt-outs and to prepare accordingly when defending or settling the class action," Turner said.

--Graphics by Ben Jay. Editing by Adam LoBelia.