A worker walks outside of a Boeing Co. facility in Everett, Washington, U.S., on Wednesday, May 27, 2020.
Photographer: David Ryder/Bloomberg

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Big Investors Bail on Class Actions in Pursuit of Bigger Payouts

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- *Cornerstone Research report documented recent hike in opt-outs*
- *Investors see direct suit incentives, downsides, attorneys say*

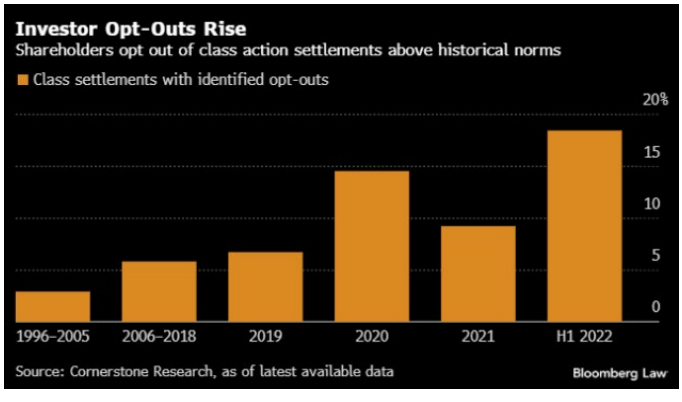
Large shareholders are opting out of class-action settlements more often than just a few years ago, chasing their own potential recoveries after a US Supreme Court ruling altered the timing calculus.

The spike in settlements that involve opt-outs from 2019 through the first half of 2022—the latest data available—changed a much more gradual 12-year trajectory, according to a Cornerstone Research report. Investors brought individual, or direct, actions in about a third of those more recent settling cases with opt-outs, Cornerstone found.

A new lawsuit against Boeing Co. over statements related to the safety of its 737 Max aircraft looks poised to join the trend. The Dec. 6 suit was brought by a firm that acquires shareholder litigation rights and thus may have issues fitting into an existing proposed class in a separate action over the same issue filed in 2019. An institutional investor sued separately in July 2022, with claims proceeding after a recent trim.

The cases where pension funds and other institutional investors have opted out tend to feature defendants with a greater ability to pay a settlement or judgment, the Cornerstone report said. They also tended to have more complex allegations than cases without any opt-outs or without institutional opt-outs, it said.

"As institutional investors get more sophisticated about the potential value of federal securities claims, it appears they and the plaintiffs' bar are focusing more on identifying cases where they might obtain a greater return by opting out, which could be a factor in the uptick," said James Beha II of Baker Botts LLP in New York. That's consistent with the report's findings, Beha said.



"It appears that more institutional investors are actively evaluating cases to see if filing an opt-out is worthwhile and are concluding that there's a benefit to opting out when there's enough money at stake and there's a defendant or an insurer with deep pockets," he said.

Some institutional investors "may decide they're not in the business of opt-outs," plaintiffs' attorney Michael Canty said. "But others look at their value loss and ask, 'Does it make financial sense?'" Canty is with Labaton Sucharow LLP in New York.

Clock Running Under *CalPERS*

Beha and one of the authors of the October Cornerstone report, **Latham & Watkins LLP's Christopher "Topher" Turner**, also pointed to the US Supreme Court's 2017 decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.* That decision said that a suspension, or tolling, of the statute of limitations during the pendency of a class action doesn't apply to statues of repose under securities laws. Statutes of repose prescribe hard deadlines for filing suit after the alleged violations—three years for Securities Act claims and five years for Exchange Act claims.

"Lots of securities cases last longer than three to five years," Beha said. "That means that, by the time a settlement is announced, in many cases, it will be too late for an absent class member who is dissatisfied with the proposed settlement to bring an individual claim."

But the costs and risks may have contributed to a counter-trend.

Attorneys thought there might be "a deluge" of opt-outs after that decision so that plaintiffs could preserve their claims, Turner said. But that large increase never manifested, he said. Beha said the Cornerstone report suggests that "opt-outs are still fairly rare, about 10% of cases that get to settlement." The CalPERS case didn't lead to reflexive opt-outs in every case, he said.

But they're increasing nevertheless.

Upsides, Downsides of Opting Out

It's hard to tell whether investors who file their own actions achieve a recovery "premium" over what they would have gotten in the class settlement, according to the attorneys.

That they're looking for such an advantage "is consistent with the report's findings that opt-outs are correlated with larger cases, with greater potential damages, and with defendants with 'a greater ability to pay,'" Beha said.

Nevertheless, "comparing returns to investors in class settlements versus opt-out settlements is very difficult—it's not apples to apples," he said.

Turner said the "upside" of opting out can be difficult to track "because many resolutions of direct actions threatened or filed by opt-outs aren't public." His firm has both discouraged opt-outs and defeated investors who opted out and brought direct actions, including in a win for General Electric Co., he said.

That case, *Touchstone Strategic Trust v. General Electric Co.*, recently affirmed by the Second Circuit, "was an important win for us," said **Colleen Smith**, global vice chair of the securities litigation practice at **Latham**.

"We also recently encountered a plaintiff who wanted to opt out *and* challenge the settlement," she said. "Of course, you can't do both."

Some of the firm's class settlements contain provisions that allow defendants "to terminate the settlement if too many investors opt out," **Turner** said. "There are a number of tools in a defendant's tool belt to limit and manage exposure to direct actions by opt-outs."

Canty, who represents institutional investors and other plaintiffs, also sees a possible deterrent effect, he said. "A lot of the opt-out cases that were filed haven't settled as far as we can tell from public dockets—after three, four, five years of litigation," he said. "They may have thought they could quickly settle at a premium after a class settlement because the defendant would want litigation peace."

But the longer time frame may mean it's not worth it, he said. "Defendants may be deciding to litigate rather than simply settling the opt outs" to deter others, he said.

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