

JANUARY 2016

HGT Law is a litigation boutique which represents individual and institutional investors, businesses, and consumers who are looking for creative, flexible and cost-effective litigation solutions. As well as serving clients in the United States, we serve clients from all over the world, including Asia, Australia and Europe.

NEW YORK OFFICE

250 Park Avenue
Seventh Floor
New York, NY 10177
Tel: (646) 453-7288
Fax: (646) 453-7289

GREAT NECK OFFICE

111 Great Neck Road
Suite 201
Great Neck, NY 11021
Tel: (646) 453-7288
Fax: (646) 453-7289

NEW JERSEY OFFICE

411 Hackensack Avenue
2nd Floor
Hackensack, NJ 07601
Tel: (646) 453-7292
Fax: (646) 453-7289

Hung G. Ta, Esq.
hta@hgtlaw.com

JooYun Kim, Esq.
jooyun@hgtlaw.com

Natalia Williams, Esq.
natalia@hgtlaw.com

Protecting Investors in Securities Fraud Litigation: Opt-Out Actions

When an investor sustains losses on the same security as other investors, it may decide to pursue recovery as part of a class action. Alternatively, the investor may seek to “opt out” of the class action and pursue recovery individually. An investor in an opt-out action frequently recovers more than an investor who is part of a class action. This memorandum addresses many of the frequently asked questions about opting out of securities class actions.

1) What is an opt-out action?

In a typical shareholder securities lawsuit, one or more institutional plaintiffs (like a pension fund) is appointed to represent an entire class of all similarly situated plaintiffs. The institutional plaintiff is called the “representative plaintiff” or “lead” plaintiff. The lawyer(s) for the lead plaintiff is also appointed to be the lawyer for the entire class. Thus, the vast majority of class members do not have any control over the class action. Importantly, they do not have any input in settlement negotiations. They entrust their interests to the lead plaintiff and the lead plaintiff’s lawyers.

An “opt-out” action is, as the name suggests, an action by an individual investor or group of investors who prefer not to stay in the class action, but to opt out of the class action. By bringing their own action, these opt-out plaintiffs have a direct relationship with their lawyer, and call the shots as to how to pursue their litigation, whether or not to settle and on what terms, and so forth.

2) Why should an investor opt out of a class action?

The principal reason why investors decide to opt out of class actions is to obtain a greater recovery than they would obtain if they stayed in the class action.

Based on historical experience, class actions typically settle for a fraction of the losses suffered by the class. For example, according to a report published by NERA Economic Consulting, for securities class actions filed in the period 1996-2012, which claimed losses of between \$100 and \$200 million, the median settlement value was only 3.5% of total investor losses, and the average settlement value was 4.2%.¹ In 2013 and 2014, the average settlement amounts declined by about 38% (excluding outsized settlements of over \$1 billion).²

In contrast, our own experience as well results from other opt-out cases show that investors who have opted out typically do much better than if they had stayed in the class. For example, in the AOL Time Warner securities litigation, the State of Alaska settled its \$60 million opt-out claim in 2007 for \$50 million, which they announced was “50 times what we would have recovered from the class.” In the

Qwest securities action, the Teachers Retirement System of Texas announced that it recovered \$61.6 million, which contrasted with an estimated \$1.4 million it would have received as a passive member of the class.

3) When can an investor opt out?

A plaintiff who belongs to a class can elect to opt out of the class at any point up until the date set forth in a notice of class certification (see Frequently Asked Question No. 4 below).

Once the notice of class certification is circulated, the date set forth in the notice of class certification is the final date for opting out.

4) What is a notice of class certification and when can an investor expect to receive the notice?

In all cases where a class action is filed in federal court, a critical event that is required to take place after the lawsuit is commenced is the step known as **class certification**. In a class action, the court is required to make a determination that the lawsuit satisfies the necessary requirements to allow it to proceed as a class action, and to define the parameters of the class.

Once the court has certified the class, the lawyers representing the class will then circulate a notice to all potential members of the class notifying them that a class action is pending; that the recipient of the notice may belong to the class; and that the recipient of the notice may remain in the class or opt out/exclude itself from the class.

5) How does an investor opt out from a class action?

A notice of class certification will describe the procedure for opting out of the class. Usually, the notice of class certification will require potential class members to opt out by sending a written communication setting forth their personal details, their positions in the security in question, and clearly stating their intention to opt out of the class.

6) After opting out, how are an investor's claims litigated?

After a person opts out of class action litigation, the person can pursue her or his own individual lawsuit. If a group of opt-out plaintiffs have banded together, they can pursue their claims collectively in the one opt-out lawsuit. This firm has recently litigated and settled an opt-out lawsuit on behalf of a group of approximately 30 plaintiffs. See *Bölling v. Dendreon Corp.*, No. 13-CV-872-JLR (United States District Court for the Western District of Washington).

7) Will each of the opt-out plaintiffs be required to give evidence during discovery, such as providing deposition testimony?

Yes. Every opt-out plaintiff will be required to provide discovery relating to her or

his claims. This means that each opt-out plaintiff will be required to provide all documents relating to her or his purchases of the securities in question. In addition, each opt-out plaintiff will be required to give deposition testimony if required by the defendants.

8) Whom can I contact if I wish to find out more about opt-out actions?

If you wish to learn more about opt-out actions, please contact us by email (hta@hgtlaw.com or jooyun@hgtlaw.com) or by telephone (+1 646-453-7290).

ENDNOTES

1. See Dr. Renzo Comolli, Dr. Ron Miller, Dr. John Montgomery and Svetlana Starykh, *NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2012 Mid-Year Review* (July 24, 2012) at 29.
2. See Comolli and Starykh, *NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review* (Jan. 20, 2015) at 25-26.