

9-2017

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Scott Dodson

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Recommended Citation

Dodson, Scott (2017) "Civil Procedure: Certifying an Opt-In Class under Rule 23," *The Judges' Book*: Vol. 1 , Article 7.

Available at: <http://repository.uchastings.edu/judgesbook/vol1/iss1/7>

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Civil Procedure:
Certifying an Opt-In Class under Rule 23

Scott Dodson¹

In 1966, rulemakers amended Rule 23 of the Federal Rules of Civil Procedure to create the new (b)(3) class action with an “opt out” mechanism for establishing who is in the class. Previously, class actions followed an “opt in” mechanism, in which a person fitting within the scope of the class was by default not a class member unless she affirmatively joined the class. The current opt-out mechanism, by contrast, makes any person fitting within the scope of the class definition a class member by default unless she affirmatively excludes herself from the class.

Debates about the proper mechanism for determining who is in the class have tracked this history, resulting in a bimodal, either-or debate: advocates favor either an opt-in or an opt-out mechanism. I argue for a compromise approach: let the class choose whether to proceed on an opt-out or an opt-in basis.

Why Give the Class an Opt-In Option?

My approach reflects the reality that not all nonmandatory class actions have the same needs: some class actions might warrant an opt-out mechanism, while others might warrant an opt-in mechanism.

Take, for example, a class of individuals personally injured by a defective airbag. The claimants’ injuries vary significantly and have high expected values. They may prefer to litigate in various home-state forums around the nation rather than in a single forum. For this class, the high claim values and context-dependent nature of proof suggest deference to individual litigation autonomy. Thus, an opt-in class might be a good fit. Those who want to opt in are likely to do so, and the class then will be composed of only those claimants who have expressly consented to aggregate litigation. The class will be small but strong—it will not be diluted by unknown claimants with

1. Summarized and excerpted from Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171 (2016).

claims of unknown strength, and the defendant need not fear an overbroad class of faceless plaintiffs.

In contrast, in a class of shareholders of the company that manufactures the airbag, whose stock depreciated significantly after the airbag defects were made public, questions of liability are relatively uniform but many claimants' damages will be small. Location and other individualized litigation choices matter far less. This class may prefer an opt-out class, in which inertia works in favor of the many small stakeholders by keeping them in the class while allowing large stakeholders to overcome that inertia, if they wish to opt out. At the same time, the common focus on liability renders individualized litigant autonomy less important.

These classes demand different treatment, and the solution is to accommodate those differences through choice. The class is in the best position to know the needs of the class and the mechanism that best suits it, so the class should get to choose to proceed via opt in or opt out.

Is the Choice Real?

Why would a class ever elect to proceed as an opt-in class? Because certification should be easier. The greater cohesion and stronger representational qualities of opt-in classes necessarily affect the certifiability of class actions because opt-in classes present fewer ascertainability, cohesiveness, and representational concerns. In a nutshell, opt-in classes ought to meet the certification requirements more easily than opt-out classes simply because their class members have affirmatively opted in.

Ascertainability, for example, should be largely satisfied by opt-in claimants' self-identification, which effectively meets the class-administration goals of effective notice, administrative feasibility, and preclusion identification. The (a)(4) adequacy and (b)(3) superiority requirements also are more easily met by opt-ins, which signal stronger consent to the nature and arrangement of the class and its representatives, and which approximate joined individual actions, lessening any advantage individual actions might hold. All told, then, opt-in classes should have an easier time at certification than opt-out classes.

Are Opt-In Classes Lawful?

Some federal appellate courts have rejected the power of district judges to certify opt-in classes under Rule 23. The leading case is *Kern v. Siemens Corp.*, in which the Second Circuit held that Rule 23(c)'s express opt-out provision implicitly prohibits an opt-in class.²

With respect, *Kern* is wrong. Nothing in Rule 23 expressly prohibits opt-in classes or constrains the definition of the class, and nothing prevents a court from taking the opt-in status of class members into consideration when assessing certification. The class is free to write the class definition to include only those claimants who have affirmatively opted in.

Of course, the current rule does not permit the *replacement* of the opt-out right with an opt-in requirement. The elimination of an opt-out right in a Rule 23(b)(3) class is clearly contrary to the deliberate choices of the 1966 drafters and to the express language of Rule 23(c). But nothing in Rule 23 prevents the *addition* of opt-in features—such as a class definition with language requiring affirmative consent—if class members also have a right to opt out.

In addition, Rule 23(d) gives district courts authority to manage the class. One of Rule 23(d)'s specific grants of authority is to “giv[e] appropriate notice to some or all class members of . . . the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action.” Courts have interpreted Rule 23(d)'s general grant of authority broadly, extending to the power to require the defendant to bear the cost of notifying class members (despite the general rule that the class bears that cost) and the power to grant opt-out rights to class members of ostensibly “mandatory” classes certified under Rule 23(b)(1) and Rule 23(b)(2) (despite the lack of such express authorization in Rule 23). Rule 23(c) and (d) are thus broad enough to allow a class definition to be restricted to those who affirmatively include themselves in the class.

2. 393 F.3d 120, 124, 128 (2d Cir. 2004). The Fifth Circuit has followed *Kern*. See *Ackal v. Centennial Beauregard Cellular, L.L.C.*, 700 F.3d 212 (5th Cir. 2012).

How Should Courts Manage Opt-In Classes?

Rule 23 opt-out notices, and collective-action opt-in notices under the FLSA and related statutes, both follow the rule that any written evidence of the desire to opt in should suffice. No specific form is mandated; any consent made in writing bearing the person's signature and evincing an intent to join is valid regardless of its form, though the court should retain some discretion to require more formal opt-in notices, either generally or on a member-specific basis, if circumstances warrant.

As for timing, the earlier opt-in notices are filed, the more meaningful they are to certification requirements and class-definition choices. A class opting to proceed on an opt-in basis likely has some knowledge of the identity of many members at the outset. However, informed decisionmaking depends upon effective notice, so opt-in elections should take place after notice of some of the details of the class action, including the class definition, the representatives, the class counsel, the defendants, and the claims. This procedure is analogous to the established conditional-certification procedure in the collective-action context.

Conclusion

Opt-in classes are lawful under Rule 23 and should be used at the class's behest as a way to fit the right option mechanism to the right class action.