Pointers For Tackling Antitrust Class Action Set-Aside Orders

By **William Reiss and Laura Song** (August 7, 2023)

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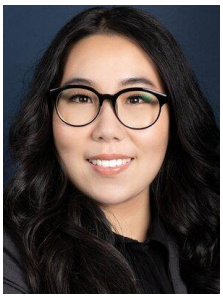

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While set-aside orders have traditionally been awarded to lead counsel in mass torts cases, a growing trend has emerged in which courts have been increasingly willing to enter set-aside orders for the benefit of class counsel in antitrust class actions.

Set-aside orders in antitrust class actions require class members that opt out of a settlement to place in escrow a percentage of any monies they receive in individual settlements.

The purpose of this set aside is to create a fund to reimburse class counsel for work product and expenses incurred by class counsel that benefit opt-outs.

The court later determines how much, if any, of the escrow proceeds should be redistributed to class counsel based on the work performed and the benefits conferred.

Not surprisingly, disputes over the propriety of set-aside orders have arisen in the antitrust class action context. These disputes have created tension and strife between counsel for the class, opt-outs and defendants.

This article summarizes recent court opinions on this issue and analyzes the arguments both in favor of and against granting set-aside orders in antitrust class actions. We conclude by providing guidance to attorneys navigating this thorny issue.

The Common Benefit Doctrine

In the U.S., absent a statute or an enforceable contract, each litigant is generally responsible for bearing its own costs. But the U.S. Supreme Court created a long-recognized exception to the so-called American Rule in Boeing Co. v. Van Gemert in 1980, where an attorney's efforts on behalf of one client benefits others.[1]

This exception, dubbed the common benefit doctrine, empowers courts to order those who benefit from a lawsuit to share in the litigation costs, including attorney fees.[2] Thus, set-aside orders are intended to ensure that counsel whose work benefits others are appropriately compensated for their efforts.

Courts have typically applied the common benefit doctrine in limited contexts, such as mass torts cases, where lead counsel is appointed by the court and frequently bear a disproportionate burden in the litigation on behalf of all plaintiffs.

In mass torts cases, lead counsel is frequently charged with marshaling discovery and spearheading motion practice. Without a mechanism for redistributing attorneys' fees, there is a risk that other plaintiffs will enjoy a windfall benefit from lead counsel's work at lead counsel's expense.

Several courts have recognized that class counsel in antitrust class actions play a similar

role as lead counsel in mass torts cases.

As the U.S. District Court for the Northern District of California court noted in In re: Lidoderm Antitrust Litigation in 2017, in both the mass tort and antitrust class action context, lead counsel "are responsible for pushing the cases forward, marshaling the evidence and discovery, and at least initial rounds of motion practice."[3]

In those circumstances where an opt-out plaintiff in an antitrust action seeks to piggyback off the work performed by class counsel, some courts have held that set-aside orders are appropriate.

Arguments For and Against Set-Aside Orders in Antitrust Class Actions

The question of whether set-aside orders are appropriate in antitrust class actions has been hotly debated by counsel for class plaintiffs, opt-outs and defendants.

Class counsel argue that set-aside orders should be granted to deter free-riding, while opt-outs argue that set-aside orders function as a penalty that deter class members from pursing individual actions and lead to administrative chaos.

Those defendants that dared to weigh in have argued that set-aside orders chill settlement efforts and needlessly puts defendants in the middle of these disputes. Courts are therefore left to struggle with how to handle set aside motions amidst these competing arguments.

Free Rider Problem

The leading justification for set-aside orders posited by class counsel is that they prevent opt-outs from free riding. Antitrust class actions are often complex multidistrict litigations that take years to litigate. Class counsel in antitrust cases often obtain significant discovery and favorable rulings before an opt-out even files a case.

Yet, opt-outs later seek to rely on the very discovery and rulings obtained by the class to benefit their cases. Thus, without a set-aside order, opt-outs are often incentivized to wait until the last possible minute to file so that they may rely on the record developed by class counsel and reap the savings in legal fees.[4]

Opt-outs, on the other hand, contend that set-aside orders are inappropriate in antitrust class actions. In mass torts cases, a set-aside fund is the only mechanism for lead counsel to recover fees for thousands of litigants that benefit from their work.

But in antitrust cases, class counsel litigate claims worth potentially hundreds of millions of dollars and can recover attorney fees under Federal Rule of Civil Procedure 23(h), which provides the court discretion to award attorney fees in class actions. If successful, the argument follows, class counsel face little risk of being undercompensated.

In response, however, class counsel argue that the size of the recovery is immaterial to whether they can seek compensation for their work that benefited other litigants.

A set-aside order ensures that those who benefit from another litigant's efforts contribute to the costs. Opt-outs would only be required to contribute the amount they benefited from work performed by class counsel.

Set-Aside Orders Function as Penalties

Opt-outs further maintain that set-aside orders function as a penalty deterring class members from pursuing individual actions because they require opt-outs to pay both their counsel and class counsel.[5] Similarly, some defendants have argued that a set-aside order imposes a tax on defendants and chills settlement efforts.[6]

In response, class counsel has countered that a carefully crafted set-aside order would only require opt-outs to ultimately contribute money following a detailed showing that their counsel relied upon class counsel's work product and any such financial obligation would be commensurate with the benefit conferred.

There is no risk of opt-outs paying double, so the argument goes, because the work performed by class counsel and relied upon by opt-out counsel should have resulted in significant savings in opt-out attorney time and effort.

Administrative Chaos

Finally, opt-outs have criticized set-aside orders as leading to administrative chaos.[7] Specifically, they argue that the task of calculating the benefit conferred by class counsel to additional parties, particularly in cases with multiple opt-outs, would be herculean and lead to significant delay and distraction.

Indeed, opt-outs contend that even attempting to make such determinations would involve a complex administrative process with one or more appointed administrators and multiple filings by the parties.

Several defendants have similarly opposed set-aside orders, such as in In re: Lidoderm, on grounds that it would "unnecessarily embroil the court in virtually every putative settlement or judgment obtained by opt-out[s]," and "needlessly put[s] defendants in the middle of these disputes by requiring defendants to pay into the escrow fund."[8]

In contrast, class counsel assert that set-aside orders reduce burdens on class counsel and provide litigants with clarity.

If courts decline to enter set-aside orders prior to settlement or judgment being entered in the opt-out case, class counsel face the real possibility of being required "to pursue separate compensation claims in any number of jurisdictions around the country," according to the U.S. District Court for the Eastern District of Virginia's 2022 ruling in In re: Zetia (Ezetimibe) Antitrust Litigation.[9]

The Courts Weigh In

Courts analyzing the propriety of set-aside orders in antitrust cases have considered: the work and resources expended by class counsel; the benefits received by opt-outs; the advancement of the litigation, e.g., whether a class has been certified; and class counsel's ability to recover under Rule 23(h).

Courts are more apt to grant set-aside orders where a class has been certified and significant discovery has taken place before opt-out plaintiffs file their case.

In In re: Linerboard Antitrust Litigation, for instance, the U.S. District Court for the Eastern District of Pennsylvania in 2003 granted a set-aside order where classes had been certified and opt-outs filed their action the night before discovery closed. The court held that class

counsel obtained extensive discovery and received favorable rulings that ultimately benefited opt-outs.[10]

In Lidoderm, the district court ordered future opt-outs to place 10% of their recovery into escrow, where classes had been certified and extensive discovery had taken place in the three years that class counsel litigated the case before any opt-outs filed suit.[11] In granting the order, the court noted the "equitable free rider problem" where opt-outs could unjustly benefit from the work of class counsel.[12]

Similarly in Zetia, a court ordered opt-outs to set aside 5% of their recovery where a class had been certified and class counsel had been litigating the case for over four years.[13]

In contrast, courts have denied set-aside orders where the record suggested opt-outs received minimal benefits from class counsel's work, a class had not been certified, and/or on grounds that class counsel could recover full compensation for their fees and costs under Rule 23(h).

In In re: TFT-LCD (Flat Panel) Antitrust Litigation, the Northern District of California in 2011 denied a set-aside motion during a hearing where at least one opt-out plaintiff had been actively participating in the case for four years and did not obtain discovery from class counsel.[14]

In In re: Generic Pharmaceuticals Antitrust Pricing Litigation, the Eastern District of Pennsylvania in 2019 denied a set-aside order where a class had not been certified and "the scope of the parties that would be affected by the orders" could not be established.[15]

Similarly, in In re: Packaged Seafood Products Antitrust Litigation, the U.S. District Court for the Southern District of California found in 2021 that a set-aside order was premature as class certification was pending appeal and putative class members had not received "notice of class counsel designation, the proposed set-aside, or their right to opt-out."[16]

In the latter two cases, the courts' denials were animated by their conclusions that class counsel could be compensated under the traditional mechanisms of Rule 23(h).[17]

Practitioners' Points

Given the contentious arguments raised by the parties and the varying rulings from district courts across the country, the propriety of set-aside orders in antitrust class actions has become a hotly debated issue.

If class counsel harbor concerns about opt-outs free riding off their work product, they should consider seeking a set-aside order at the earliest practicable time. Waiting too long may risk forgoing compensation, particularly where opt-outs settle early with defendants.

But class counsel should be wary that courts may deny a set-aside motion as premature if class counsel seeks such relief prior to performing substantial work in the case or reaching significant milestones — e.g., completion of discovery, summary judgment and/or a certified class.

Opt-outs should be strategic in determining the timing of filing an individual action. Several considerations come into play. Opt-outs can minimize the amount they may be required to compensate class counsel by filing early.

Doing so will enable opt-outs to play a proactive role in the litigation, shaping strategy and discovery, as opposed to relying on the record developed by class counsel.

Filing early also presents opt-outs with opportunities to share costs with other plaintiffs, including but not limited to, experts, discovery review platforms, court reporters and even attorney work product such as document coding and briefing motions that are applicable to multiple parties.

Conversely, waiting to file until after the litigation is significantly advanced may limit opt-outs' opportunities to take individualized discovery and influence litigation strategy and leave them reliant on a record that was not developed according to the individualized needs of their case.

At the same time, filing later may have certain advantages such as enabling opt-outs to sit back, assess risk and see how the litigation progresses before making the often-times expensive and risky decision to initiate litigation.

Finally, shortly after the filing of an opt-out action, class counsel and opt-out counsel should pick up the phone and explore opportunities for the sharing of costs and work product pursuant to a joint prosecution agreement.

This may include the reciprocal exchange of work product or an agreement whereby class counsel — subject to applicable protective orders — provides opt-out counsel with its work product in exchange for compensation. Additional cost sharing opportunities include, but are not limited to, costs related to experts, court reporters, document management platforms and other litigation vendor services.

Engaging in cooperation will often obviate the need for litigation and set-aside orders while providing the benefits of offsetting costs, enhancing resources, and gaining critical insight and strategy from diverse perspectives.

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[1] Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980) (citing collecting cases).

[2] Id.

[3] In re Lidoderm Antitrust Litig. ("Lidoderm"), No. 14-MD-02521-WHO, 2017 WL 3478810, at *1 (N.D. Cal. Aug. 14, 2017).

[4] In re Zetia (Ezetimibe) Antitrust Litig. ("Zetia"), No. 2:18-MD-2836, 2022, WL 18108387, at *4 (E.D. Va. Nov. 8, 2022) (internal alterations omitted).

[5] Id. at *5.

[6] Lidoderm, 2017 WL 3478810, at *2.

[7] In re Packaged Seafood Prod. Antitrust Litig. ("Packaged Seafood"), No. 315-MD-02670-DMS-MDD, 2021 WL 5326517, at *3 (S.D. Cal. Nov. 16, 2021).

[8] Lidoderm, Def. Opp. to Set-Aside Order, ECF No. 788, at 5.

[9] Zetia, 2022 WL 18108387, at *6.

[10] In re Linerboard Antitrust Litig. ("Linerboard"), 292 F. Supp. 2d 644, 658-59 (E.D. Pa. Sept. 5, 2003) (Class counsel obtained 414 boxes of documents and took between 30 to 40 depositions).

[11] Lidoderm, 2017 WL 3478810, at *2.

[12] Id. at *2-3.

[13] Zetia, 2022 WL 18108387, at *7.

[14] Transcript of Oral Argument at 16, In re TFT-LCD (Flat Panel) Antitrust Litig., No. 07-md-01827 (N.D. Cal. Mar. 11, 2011).

[15] In re Generic Pharm. Pricing Antitrust Litig. ("Generic Pharm. Pricing"), No. 16-MD-2724, 2019 WL 6044308, at *1 (E.D. Pa. Oct. 7, 2019).

[16] Packaged Seafood, 2021 WL 5326517, at *3

[17] See Generic Pharm. Pricing, WL 6044308 at *1; see also, Packaged Seafood, 2021 WL 5326517, at *3.