



CORNERSTONE RESEARCH

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Opt-Outs in Securities Class Action Settlements

2019–H1 2022 Update

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Introduction

This report provides a comprehensive, quantitative analysis of publicly available information regarding “opt-outs” from securities class action settlements.¹ Opt-outs occur when at least one putative class member excludes itself from the class, often to pursue a separate direct action against the defendant.²

This report supplements Cornerstone Research’s prior studies with information about the prevalence of opt-outs from securities class actions with settlement hearing dates between January 1, 2019, and June 30, 2022.³ Our database of class action settlements now identifies 115 class action cases with at least one opt-out from January 1, 1996, through June 30, 2022.⁴

This report also presents new empirical analysis of how certain class action case characteristics—including certain simplified metrics associated with potential damages, indicators of complexity of the case, and indicators of greater issuer ability to pay—relate to opt-outs.

Executive Summary

After peaking in 2019, “core” securities class action filings—those excluding M&A filings—remained slightly above the post-PSLRA average rate through 2022.⁵ Historically, the majority of such class actions have ended in a dismissal or a settlement. Putative class members may opt out of the class action, and one common reason for doing so is to preserve their right to bring a direct action—defined as a lawsuit filed by an individual or small group of plaintiffs with allegations that have substantial overlap with the allegations at issue in the class action. Direct actions may be brought even before a class action settlement is reached.⁶

Figure 1 shows that of the 287 securities class action settlements (“class settlements”) in the 2019–H1 2022 period covered by this update, 33 (or 11.5%) had at least one opt-out. More broadly, Figure 2 shows that of the 2,061 class settlements in the database for the entire 1996–H1 2022 period, 115 (or 5.6%) had at least one opt-out. Unless otherwise specified, the opt-out and direct action counts presented in this report reflect the number of class actions for which at least one opt-out or direct action lawsuit was identified (not the number of individual opt-outs or direct action lawsuits).

This report also separately identifies the subset of opt-outs that involved direct action lawsuits (based on confirmation of a specific direct action lawsuit filing). For 2019–H1 2022, Figure 1 shows that 10 of the 33 class settlements with identified opt-outs (or 3.5% of all class settlements during this same period) had one or more confirmed direct action lawsuit(s) based on publicly available information. In each of these 10, at least one of the direct action lawsuits was brought by an institutional investor.

Our research shows that opt-outs are more prevalent in class action cases with certain attributes. Figure 3 shows that as class settlements increase in size, the defendant is more likely to face at least one opt-out. Figure 4 shows that the presence of opt-outs, and especially institutional investor opt-outs, is positively associated with certain class action case characteristics, including simplified metrics associated with higher potential damages, indicators of greater complexity of class action allegations, and indicators of greater ability for the issuer to pay a potential settlement or judgment. These data suggest that if potential damages are large, allegations are complex, and the issuer is financially healthy, it is more likely that at least one putative class member will opt out of a class settlement.

**Figure 1: Class Settlements with Opt-Out(s) and Direct Action(s)
2019–H1 2022**

Class Settlement Year	Number of Class Settlements	Class Settlements with Identified Opt-Out(s)	Percentage of Class Settlements with Identified Opt-Out(s)	Class Settlements with Confirmed Direct Action(s)	Percentage of Class Settlements with Confirmed Direct Action(s)
2019	75	5	6.7%	2	2.7%
2020	76	11	14.5%	6	7.9%
2021	87	8	9.2%	0	0.0%
H1 2022	49	9	18.4%	2	4.1%
TOTAL	287	33	11.5%	10	3.5%

Source: Cornerstone Research; Stanford Law School Securities Class Action Clearinghouse; Factiva; Lex Machina; Public Press; SEC Filings

Incidence of Opt-Outs and Direct Actions

Figure 2 identifies 115 cases during 1996–H1 2022 in which at least one putative class member opted out, representing 5.6% of the sample of 2,061 cases.⁷ Over this period, the proportion of opt-outs has generally increased. From 1996 through 2005, the rate of opt-outs in settlements was around 2.9%. From 2006 through 2018, 5.8% of class action settlements had opt-outs. During the 2019–H1 2022 period, this proportion increased to 11.5%.

Requests to opt out of a class settlement do not necessarily result in a direct action lawsuit.⁸ In the direct action lawsuits identified in our research, direct action plaintiffs are most often institutional investors, such as pension funds, mutual funds, hedge funds, or other investment management firms (as opposed to individual shareholders, trusts, or corporations).

Relatedly, our research shows that, when institutional investors opt out of class settlements, direct actions are often brought. In 2019–H1 2022, there were 11 class settlements where an institutional investor opt-out could be identified, and 10 of those instances also had at least one direct action brought.

Figure 3 shows that as class settlements increase in size, the likelihood of one or more opt-outs increases. In 2019–H1 2022, 29% of cases with class settlements over \$20 million had identified opt-outs, more than 2.5 times the proportion across all settlements (11.5%). For class settlements over \$100 million, 62.5% of cases had opt-outs. Of the two class settlements over \$500 million, both had opt-outs.

In 2019–H1 2022, there were nine class settlements over \$20 million with one or more confirmed direct action lawsuit(s) based on our research. The number of individual direct action lawsuits brought for each class settlement varied substantially, ranging from one to 36, with a median of four direct action lawsuits. The number of individual direct action lawsuits brought tended to be higher for larger class settlement amounts—class settlements over \$100 million and \$500 million had a median of 15 and 26 direct action lawsuits, respectively.⁹

Figure 2: Class Settlements with Opt-Out(s)
1996–H1 2022

Class Settlement Year	Number of Class Settlements	Class Settlements with Identified Opt-Out(s)	Percentage of Class Settlements with Identified Opt-Out(s)	Class Settlements with Institutional Investor Opt-Out(s)
1996–2005	726	21	2.9%	14
2006–2018	1,048	61	5.8%	34
2019–H1 2022	287	33	11.5%	11
TOTAL	2,061	115	5.6%	59

Figure 3: Class Settlements with Opt-Out(s) and Settlement Amounts above \$20 Million
2019–H1 2022

Class Settlement Amount	Number of Class Settlements	Class Settlements with Identified Opt-Out(s)	Percentage of Class Settlements with Identified Opt-Out(s)	Class Settlements with Confirmed Direct Action(s)	Number of Individual Direct Action Lawsuits (Median [Range])
>\$20 million	69	20	29.0%	9	4 [1 to 36]
>\$100 million	16	10	62.5%	5	15 [1 to 36]
>\$500 million	2	2	100.0%	2	26 [15 to 36]

Source: Cornerstone Research; Stanford Law School Securities Class Action Clearinghouse; Factiva; Lex Machina; Public Press; SEC Filings

Opt-Outs and Class Action Characteristics

Figure 4 provides detail on how opt-outs relate to certain class action case characteristics. This analysis focuses on class actions that were settled in 2006–H1 2022.¹⁰ Of the 1,335 class settlements during the 2006–H1 2022 period, there were 94 class settlements with at least one identified opt-out (of which 45 had at least one institutional investor opt-out). This research finds that class settlements with at least one identified opt-out, and especially cases where at least one institutional investor opted out, tend to have higher simplified metrics of potential damages, indicators of greater complexity of the class allegations, and indicators of greater ability for the issuer to pay a potential settlement or judgment.

Simplified Metrics of Potential Damages

Class settlements with opt-outs tend to have higher simplified metrics of potential class action damages, based on Maximum Dollar Loss (MDL), Dollar Disclosure Loss (DDL), and “Simplified Tiered Damages” measures.¹¹ For class settlements where at least one opt-out has been identified, the median MDL (\$7.0 billion), DDL (\$1.1 billion), and “Simplified Tiered Damages” (\$1.9 billion) are each more than 10 times the medians for the corresponding metrics across all class settlements. For class settlements with institutional investor opt-outs, MDL (\$19.4 billion), DDL (\$1.4 billion), and “Simplified Tiered Damages” (\$3.8 billion) are even higher.

Complexity of Class Allegations

Class settlements with opt-outs also tend to involve more complex allegations, as proxied by the number of years in the class period, years between filing and settlement of the class action, presence of Section 11 or Section 12 claims, presence of non-common-stock purchasers in the class (e.g., bonds, options, or other securities¹²), presence of a corresponding SEC action, and presence of criminal charges.

Ability to Pay

Defendant issuers also tend to have a greater ability to pay—as proxied by the issuer’s book asset size, market capitalization, and whether the issuer was in bankruptcy or distressed¹³—in class settlements with identified opt-outs.

Class settlements with at least one identified opt-out tend to have higher simplified metrics of potential damages, indicators of greater complexity of the class action allegations, and indicators of greater ability for the issuer to pay a potential settlement or judgment.

Figure 4: Class Action Case Characteristics Associated with Class Settlements with Opt-Out(s)
2006–H1 2022
(Dollars in Millions)

Class Action Characteristic	Metric	Statistic	All Class Settlements	Class Settlements with Identified Opt-Out(s)	Class Settlements with Identified Institutional Investor Opt-Out(s)
Simplified Metrics of Potential Damages:	MDL	Median	\$667	\$6,975	\$19,349
	DDL	Median	\$70	\$1,059	\$1,432
	“Simplified Tiered Damages”	Median	\$138	\$1,927	\$3,796
Complexity of the Class Allegations:	Years in Class Period	Median	1.5	1.8	2.3
	Years between Filing and Settlement	Median	3.1	3.9	4.5
	Section 11 or Section 12 Claims	Percent	27.0%	30.9%	40.0%
	Non-common Stock	Percent	20.7%	38.3%	48.9%
	SEC Action	Percent	21.2%	28.7%	42.2%
	Criminal Charges	Percent	9.9%	23.4%	40.0%
Ability to Pay:	Asset Size	Median	\$721	\$9,267	\$47,059
	Market Capitalization	Median	\$373	\$6,183	\$10,293
	Bankruptcy/Distressed	Percent	13.3%	2.1%	2.2%

Source: Cornerstone Research; Stanford Law School Securities Class Action Clearinghouse; Factiva; Lex Machina; Public Press; SEC Filings

Stage of Case at Class Settlement

Figure 5 provides further detail on the stage of the case at the time of the class settlement (where available) for 1,289 cases settled during the 2006–H1 2022 period. The figure shows four broad stages during which settlement occurred: (1) before a motion to dismiss (MTD) ruling, (2) between an MTD ruling and a class certification (CC) ruling, (3) between a CC ruling and a motion for summary judgment (MSJ) ruling, and (4) after an MSJ ruling.

Class actions with identified opt-outs tend to have settled at later stages: nearly half of the class action cases with identified opt-outs settled after a CC ruling was issued, compared to less than 20% across all settled class actions.

Direct Action Settlements

Settlement or judgment amounts for direct action cases are not frequently disclosed publicly. Furthermore, our research has identified fewer public disclosures of resolution amounts in direct action cases in recent years. Thus, there is insufficient information for a systematic comparison of the recovery that plaintiffs in direct actions achieved relative to what those plaintiffs would have achieved had they remained in the class.

One notable recent matter with publicly available direct action settlement information involves VEREIT, a successor to American Realty Capital Partners (ARCP). The company entered into settlements totaling \$281.4 million to resolve 15 direct actions, including a \$90 million settlement with Vanguard funds.¹⁴ These direct actions were settled between September 2018 and September 2019, before the class action settled for \$1.025 billion in January 2020. The direct action settlements thus represented 27.5% of the size of the class settlement.

Another recent example with publicly available information involves First Solar, which entered into a settlement with Maverick Fund LDC for \$19 million in July 2020.¹⁵ By comparison, the *First Solar* class action settled for \$350 million. Accordingly, the direct action settlement represented 5.4% of the size of the class settlement.

The largest group of publicly disclosed direct action settlements related to a single class action case, in terms of total dollar value, remains *AOL Time Warner Inc.*, where the direct action settlements totaled \$764 million, or 30.6% of the size of the \$2.5 billion class settlement in 2006.¹⁶ Based on publicly disclosed data, the largest direct action settlement as a percentage of the class settlement remains *Qwest Communications International Inc.*, where \$411 million in direct action settlements totaled 92.4% of the size of the class settlement (both of these cases were discussed further in our 2013 publication).¹⁷

Figure 5: Stage of Case at Time of Class Settlement
2006–H1 2022

Stage of Case at Class Settlement	All Class Settlements		Class Settlements with Identified Opt-Out(s)		Class Settlements with Identified Institutional Investor Opt-Out(s)	
	Count	%	Count	%	Count	%
Before MTD Ruling	374	29.0%	18	19.8%	9	20.5%
Between MTD and CC Ruling	659	51.1%	30	33.0%	12	27.3%
Between CC and MSJ Ruling	200	15.5%	34	37.4%	16	36.4%
After MSJ Ruling	56	4.3%	9	9.9%	7	15.9%
Total	1,289	100%	91	100%	44	100%

Source: Cornerstone Research; Stanford Law School Securities Class Action Clearinghouse; Factiva; Lex Machina; Public Press; SEC Filings

Note: MTD refers to “motion to dismiss,” CC refers to “class certification,” and MSJ refers to “motion for summary judgment.”

Conclusion

This report, building on our prior research, provides additional information and quantitative analyses of publicly available opt-outs.

The likelihood of a defendant facing at least one opt-out has generally increased over recent years. Between 1996 and 2005, the rate of opt-outs in class action settlements was 2.9%, compared to 5.8% during 2006–2018, and 11.5% during 2019–H1 2022.

Overall, our research on securities class action settlements indicates that opt-outs remain a small yet meaningful part of the overall securities class action landscape. In larger cases, opt-outs are a more common occurrence, with opt-outs occurring in 29% of all class settlements above \$20 million and 62.5% of all class settlements above \$100 million in 2019–H1 2022.

Furthermore, analysis in this report shows that opt-outs are positively associated with class settlements that have larger simplified metrics of potential damages, indicators of greater complexity of class allegations, and indicators of greater ability of the defendant to pay a settlement or judgment. These associations are more pronounced for class settlements where an institutional investor opts out. These data suggest that if the potential damages are large, allegations are complex, and the issuer is financially healthy, it is more likely that at least one putative class member may opt out of a class settlement.

Endnotes

- ¹ Securities class action settlements are identified based on the research sample used in the Cornerstone Research Securities Class Action Settlements report. This settlement database is limited to cases alleging Rule 10b-5, Section 11, and/or Section 12(a)(2) claims brought by purchasers of a corporation’s securities. For further details on this database, see *Securities Class Action Filings—2022 Year in Review*, Cornerstone Research, 2023; *Securities Class Action Settlements—2022 Review and Analysis*, Cornerstone Research, 2023.
- ² References herein to “opt-outs” or “an opt-out” indicate this research has found—via publicly available information—that at least one putative class member had excluded itself from a given class settlement. However, an opt-out may decide not to bring a separate direct action lawsuit. Parties that opt out but do not file a direct action may opt out to pursue separate negotiations, to preserve rights to participate in litigations in other countries, or for other idiosyncratic reasons. Also note that all direct action lawsuits are not readily identifiable based on publicly available information (e.g., if the lawsuit is brought in a jurisdiction located outside the United States or in certain state courts). Hence, this research has not identified the filing of a separate direct action lawsuit against the defendant for *all* opt-outs, and the terms “opt-out” and “direct action” are not interchangeable. Note also that, unless otherwise stated, the opt-out and direct action counts presented herein generally tally the number of securities class actions for which at least one opt-out or direct action lawsuit was identified. In other words, there are often several opt-outs and direct action lawsuits that relate to a single class action but, unless otherwise stated, the counts herein do not reflect the number of distinct *individual* opt-outs or direct action lawsuits.
- ³ For purposes of this report, the settlement date corresponds to the date on which the hearing to approve the settlement was held (for class action cases involving multiple settlements, the most recent partial settlement is used). Note also, this publication only assesses securities class action settlements through H1 2022 because this research has found that publicly available information regarding opt-outs generally emerges in the year after class settlements are finalized. For example, public disclosures often happen with a significant lag (e.g., in a company’s subsequent quarterly filing with the U.S. Securities and Exchange Commission (SEC)). Accordingly, the research methodology used in this report for identifying opt-outs entails reviewing disclosures in SEC filings and public press for mentions of opt-outs for approximately one year or more after the settlement hearing date (see next endnote for further details). Since opt-out information for settlements finalized after H1 2022 is likely to be incomplete at the time of this publication, these settlements are not included in the analysis contained in this report.
- ⁴ Consistent with the methodology followed in prior releases of this report, the research presented herein is based on a detailed review of publicly available information (primarily from public press articles, SEC filings, and court documents) for 287 securities class action settlements where the hearing approving the settlement occurred between 2019 and H1 2022. Potential opt-outs and direct action lawsuits were identified by reviewing public press articles released up to one year from the class action settlement hearing date, and company SEC Form 10-K and Form 10-Q filings (for U.S. issuers) and SEC Form 20-F, 40-F, and 6-K filings (for non-U.S. issuers) up to one year before or after the class action settlement hearing date. For public press and SEC filings identified using these selection criteria, an initial keyword search was then performed to identify potential evidence of an opt-out or a direct action lawsuit (including but not limited to variations on terms such as “opt-out,” “direct action,” and “exclude” in close proximity to terms such as “settlement,” “class,” and “litigation”). Public press and SEC filings identified using these keyword searches were then reviewed in detail. Evidence of opt-outs or direct action lawsuits obtained from these keyword searches was then further supplemented with additional review of class action settlement websites, legal publications, and internet searches. For the current publication, the methodology was further supplemented by performing a comprehensive review of publicly available filings to identify any lists of opt-outs associated with the class settlements for 35 class settlements where the largest calculated disclosure dollar loss, or DDL, exceeded \$1 billion. See endnote 11 below for further details on DDL.
- ⁵ PSLRA stands for the “Private Securities Litigation Reform Act of 1995.” There were 267 “core” securities class action filings in 2019, 234 in 2020, 218 in 2021, and 208 in 2022. Between 1997 and 2021, there were an average of 192 “core” securities class action filings per year. For further details, see *Securities Class Action Filings—2020 Year in Review*, Cornerstone Research, 2021; *Securities Class Action Filings—2021 Year in Review*, Cornerstone Research, 2022; and *Securities Class Action Filings—2022 Year in Review*, Cornerstone Research, 2023.

- ⁶ Settlement or judgment amounts for direct action lawsuits are not frequently disclosed publicly. Furthermore, this research has identified fewer public disclosures of resolution amounts in direct action lawsuits in recent years. Thus, there is insufficient information for a systematic comparison of the recovery that plaintiffs in direct actions achieved relative to what those plaintiffs would have achieved had they remained in the class.
- ⁷ Because the methodology in this report entails reviewing publicly available information, and (as noted above) because opt-out information is not necessarily available until after a class settlement, and with a lag, additional opt-outs in the first half of 2022 might exist but may not yet be publicly reported.
- ⁸ Parties that opt out but do not file a direct action may opt out to pursue separate negotiations, preserve rights to participate in litigations in other countries, or for other idiosyncratic reasons.
- ⁹ For class settlements over \$20 million, additional searches for individual direct action lawsuits were performed using Lex Machina. Specifically, searches were performed to identify any securities lawsuits filed in federal courts separate from the class action where the issuer was named as the defendant. The complaints in these resulting matters were then reviewed in order to determine whether each was, in fact, a direct action lawsuit with allegations similar to the associated class action.
- ¹⁰ The case characteristics analyzed in this report are consistently available for class settlements from 2006 forward. For example, the “simplified tiered damages” metric (see next endnote for further details) is only available for class actions that settled in 2006 or later.
- ¹¹ DDL is the dollar-value change in the defendant firm’s market capitalization between the trading day immediately preceding the end of the class period and the trading day immediately following the end of the class period. MDL is the dollar-value change in the defendant firm’s market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period. “Simplified tiered damages” uses simplifying assumptions to estimate per-share damages and trading behavior for cases involving Rule 10b-5 claims. It provides a measure of potential shareholder losses that allows for consistency across a large volume of cases, thus enabling the identification and analysis of potential trends. For more information, see Cornerstone Research’s reports on *Securities Class Action Filings* and *Securities Class Action Settlements*.
- ¹² Note that for the purposes of this analysis, class actions on behalf of purchasers of American Depositary Receipts (ADRs) are treated the same as class actions on behalf of common stock purchasers. The variable for presence of non-common-stock purchasers captures whether class plaintiffs brought claims on behalf of investors in non-equity securities, such as debt or options.
- ¹³ Issuers that filed for bankruptcy or were distressed correspond to class actions where the defendant issuer declared bankruptcy or was delisted from a major exchange during or after the putative class period.
- ¹⁴ Alison Frankel, “Securities Fraud Defendant Agrees to Pay \$217.5 Million to Opt-Outs. A Portent?,” *Reuters*, October 29, 2018, <https://www.reuters.com/article/legal-us-otc-securities/securities-fraud-defendant-agrees-to-pay-217-5-million-to-opt-outs-a-portent-idUSKCN1N32JI>. Details of the opt-out settlements are confidential. While *Reuters* reported that opt-outs represented nearly a third of ARCP’s investor base, it is unclear (absent data from the claims process) whether the opt-outs actually represented a third of the eligible class members who purchased shares during the class period.
- ¹⁵ First Solar Inc. Form 10-K filing for 2020, pp. 125–126.
- ¹⁶ In re AOL Time Warner Inc. Securities Litigation. Complaint filed August 23, 2004. Settlement hearing date April 6, 2006.
- ¹⁷ In re New England Health Care Employees Pension Fund v. Qwest Communications International Inc. Complaint filed February 6, 2004. Settlement hearing date September 29, 2006. See also “Opt-Out Cases in Securities Class Action Settlements,” Cornerstone Research, 2013; “Company and Case Information: Qwest Communications International Inc.,” Stanford Law School Securities Class Action Clearinghouse, <http://securities.stanford.edu/1019/Q01/>; “Colorado PERA Reaches \$15.5 Million Settlement with Qwest,” Colorado Public Employees’ Retirement Association Press Release, November 21, 2007, <http://www.copera.org/pdf/NewsReleases/2007/Qwest.pdf>.

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