

Court Denies Class Member's Untimely Request to Be Excluded from Class Even Though Class Member Had Previously Filed a Separate Action

July 24, 2019 | Blog | By [Joel D. Rothman](#)

VIEWPOINT TOPICS

- Institutional Investor Class Action Recovery

RELATED PRACTICES

- Institutional Investor Class Action Recovery

RELATED INDUSTRIES

- Financial Services

On July 10, 2019, the judge overseeing the LIBOR-related antitrust lawsuits in the [U.S. District Court for the Southern District of New York](#) denied a class member's motion to be excluded from approved settlement and litigation classes. The story begins on September 23, 2013, when the National Credit Union Administration Board ("NCUA") filed a complaint on behalf of five liquidated credit unions asserting LIBOR-related claims against several banks. At the same time, various plaintiffs were pursuing LIBOR-related class action claims. In 2017, several defendant banks reached preliminary settlement agreements with the class, and the Court granted final judgments approving the settlements in August and October of 2018. Meanwhile, the class continued to pursue litigation against the non-settling banks, and the court certified a litigation class in February of 2018.

The Court set deadlines throughout 2018 for class members to request exclusion from the various classes. With respect to notice of the settlements and litigation class, the court noted:

“

From the earliest filing on the electronic court filing ("ECF") system referencing the first settlement to the entry of the last of the final judgments, 960 days passed. During that span of 960 days, there were over 60 entries on the docket sheet directly related to the settlements and the Litigation Class; multiple notices were filed in the financial press, both online and in print; and direct mail was sent to plaintiffs.

The credit unions represented by NCUA were undisputedly members of the settlement and litigation classes. However, despite the pendency of its individual suit, NCUA did not request exclusion from any class prior to the deadlines set by the court.

Belatedly, on March 26, 2019, NCUA filed a Motion for Exclusion from Class Settlements. In support of this motion, NCUA argued that (a) its failure to opt-out formally was due to "excusable neglect," or (b) formal opt-out was not necessary because NCUA had affirmatively expressed its intent to opt out of the settlements and the litigation class by actively litigating its individual claims against the defendants. The court rejected both of these arguments.

First, in an effort to show "excusable neglect," NCUA argued that it acted in good faith by relying on an established internal process for reviewing and processing mailed notices of class-action settlements, and this internal process did not alert it of the opt-out deadline. The Court rejected this argument, first noting that (1) "due process notice requirements are not dependent on whether all potential class members physically receive mailed notice" and (2) "[t]he burden does not fall on Settling Defendants to ensure that NCUA actually received the mailed notices, and a failure in NCUA's internal system to properly process the notices is entirely NCUA's fault and responsibility." Moreover, the court noted, even if it assumed that NCUA did not receive any mailed notice, "NCUA was on notice of the opt-out deadlines through its counsel, who received no fewer than 61 ECF notices regarding the four settlements and the Litigation Class." Additionally, the court rejected NCUA's argument that no prejudice would befall the defendants by allowing NCUA to pursue claims it was already litigating because, according to the court, the "Settling Defendants would indisputably suffer prejudice from reviving claims that were previously and properly

released in exchange for consideration totaling \$590 million.”

The Court also rejected NCUA's argument that by filing an action in 2013, it affirmatively expressed its intent to opt out of the four settlements and the litigation class. The court distinguished the cases relied on by NCUA because in each of those cases the purported opt-out plaintiff had failed to provide a formal opt-out notice, but had filed an individual action during the opt-out period. The court held:

“

Filing a lawsuit during the opt-out period can be a clear statement of desired exclusion, but litigation activities in a pending case do not necessarily mean that a party does not wish to take advantage of the settlement between the class and a defendant. NCUA cannot expect this Court or Settling Defendants to be mind readers who can decipher NCUA's intent based on its litigation activities unrelated to the proposed settlements, especially when NCUA is still asserting claims against defendants that were not part of the four settlements or the Litigation Class.

Thus, the court denied NCUA's motion to be excluded from the classes, concluding “[t]o find on these facts that NCUA has demonstrated a showing of ‘excusable neglect’ or affirmatively expressed its intent to opt out by ‘actively litigating’ its individual action would effectively write those legal standards out of the law.”

Authors



Joel D. Rothman, Special Counsel

Joel D. Rothman is an attorney who handles commercial, securities, insurance, and employment litigation matters for Mintz clients. Joel advises institutional investors on securities class actions, represents shareholders in merger disputes, and counsels insurers in coverage disputes.