

MY DOG ATE MY OPT-OUT FORM: EXTENSIONS TO THE OPT-OUT PERIOD IN CLASS ACTION PROCEEDINGS

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The Ontario Court of Appeal decision in *Johnson v. Ontario* (“Johnson”)^[1] provides novel appellate consideration of a court’s discretion to extend the opt-out period for class members in a class action.

In *Johnson*, the Court of Appeal concluded that to obtain an extension, a class member must show that their “neglect in complying with the court-imposed deadline is excusable and that an extension will not result in prejudice to the class, the defendant or the administration of justice”.^[2]

Facts

The class action sought damages for negligence and *Charter* violations arising from the operation and management of an Ontario detention facility. Class members included any person incarcerated at the facility between January 2010 and May 2017. The 2017 certification order approved two forms of notice to the class advising the class of their opt-out rights. A short form notice was published in two local newspapers and a long form notice was posted on class counsel’s website and sent to the last known address of each class member.

The appellant was a class member due to his incarceration from July 2016 to August 2017 at the facility. Direct notice was mailed to his last known address in March 2018. The appellant remained incarcerated at a federal institution until 2019. The appellant’s father still resided at the last known address, but the appellant did not receive the direct notice. The appellant missed the deadline to opt-out of the class proceedings.

The appellant first learned of the class action in June 2020, after commencing his own action for an overlapping proceeding against the facility. The appellant sought an extension of the opt-out deadline in order to continue to pursue his own legal action.

Legal Test

The Court of Appeal found that extensions to an opt-out period should only be granted where:

1. The delay in opting out is a result of excusable neglect, in good faith and on a reasonable basis; and
2. The court has considered if prejudice will result to participating class members, the defendant or the

integrity of class proceedings if the extension is granted.

The excusable neglect/no prejudice test was previously outlined by the Ontario Superior Court in *Young v. London Life Insurance Co.*^[3] and adopted from the federal U.S. decision *Re PaineWebber Limited Partnerships Litigation*.^[4]

The Court recognized the importance of preserving an opt-out right for class members (a fundamental component of the class proceedings scheme) as well as maintaining a deadline (to promote certainty and respect for court orders). The Court reiterated that the judicial power to extend time to opt-out will rarely be exercised.

Application in *Johnson*

In *Johnson*, the Court found that the motion judge had erred in denying an extension of the opt-out period.

The Court of Appeal found that the appellant's neglect to opt-out was excusable, as the appellant did not receive the notices, was incarcerated at the time of the notice publication and mailing, and there was no evidence to suggest that the appellant should have implemented a mail monitoring system. A notice plan can be adequate and notice can be sent in compliance with the notice plan, but that is not dispositive of whether a class member had a reasonable basis in good faith for the opt-out delay. There was no assertion of delay in requesting an extension once the appellant became aware of the class proceeding.

Notably, the Court found that evidence of what the class member would have done had he received the notices was not a relevant consideration. Based on the evidence, it was unlikely that the appellant would have opted out, as he became aware of his cause of action after the opt-out deadline. The Court found that it is not necessary for a class member to prove that they would have opted out by the deadline. The question is whether, given the fact they did not opt-out, there was an excusable neglect.

In considering prejudice, the Court noted that a motion to extend the opt-out deadline after judgment or a settlement will most likely cause prejudice and be denied. The Court saw class counsel's lack of opposition of the appeal as a strong indicator that an extension of time would cause no prejudice to the class. The respondent also did not identify any prejudice which would occur due to the extension. Finally, the appellant's behaviour was determined to be not strategic, or "cavalier" to the initial deadline. As a result, the Court found that granting an extension would not cause prejudice to the administration of justice or integrity of the process.

Key Takeaways

Johnson provides novel appellate consideration of the test to grant an extension of a court ordered opt-out

period in class proceedings.

Parties to class proceedings should be aware that prior to a judgment or settlement of a class action, there is a limited possibility that class members can successfully extend the opt-out deadline. After a judgment or settlement, it will be very unlikely that a class member will be granted an extension, offering certainty and finality to defendants.

The case could open the door to dubious opt-out extension requests – will we see a rise in “my dog ate my opt-out form” excuses? However, the Court was clear in articulating that only in rare circumstances will the test in *Johnson* be met. Further, courts will not be receptive to extension requests where the class member is cavalierly ignoring the deadline, is acting strategically or is implementing a “wait-and-see” approach.

[1] [ps2id id='1' target='']2022 ONCA 725.

[2] [ps2id id='2' target='']*Johnson*, 2022 ONCA 725 at para. 5.

[3] [ps2id id='3' target='']2002 OJ 2971.

[4] [ps2id id='4' target='']147F. (3d) 132 (2d Cir. 1998).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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