

Summary

Topic

Mechanisms to address class actions can essentially be reduced to two models: an opt in model and an opt out model. Within an opt in procedure, a claimant participates in the class action if he explicitly agreed to join the class. In an opt out procedure, claimants are considered to be a class member, unless they explicitly indicate otherwise. Within an opt out procedure, claimants sometimes have to come forward in order to receive a part of the proceeds of the class action. If this is the case, the percentage of claimants who do so, is represented by the "take up-rate".

In literature two currents can be distinguished concerning the choice for an opt in model or an opt out model. Some (doctrinal) scholars stress the value the litigants' freedom of choice and (individual) access to justice ex art. 6 ECHR which is best reflected in an opt in procedure and therefore should result in a fitting outcome for the individual claimant. Others focus on the initial investment imbalance between the plaintiff and the individual claimants. An opt in procedure maintains this initial imbalance. An opt out model not only combines, but also enlarges the group of claimants, which leads to an increase of the financial interest at stake, which stimulates the investment in and the preparation of the case.

Central question and methods

The arguments for opt in models and opt out models rely heavily on presumptions about considerations of claimants whether to litigate or not, which have not been empirically tested. Therefore, the central question in this study concerns the influence of an opt in regime or an opt out regime in relation to other factors which determine if claimants litigate individually, join the class or do not litigate at all. Only then is it possible to determine the advantages, dangers, gains and costs of opt in and opt out models. We will also examine the implications of our finding for policy, this is, for implementing an opt in model or an opt out model with respect to class actions in The Netherlands.

To answer the central question, it is important to determine which other factors than an opt in or opt out model play part in relation to the choice for an opt in procedure or an opt out procedure. After a literature study, we identified three factors. We subsequently empirically tested the three factors in three separate studies, and focused on the effect of these factors, in relation to the default in opt in and opt out models, on the choice of claimants to litigate individually, join the class, or not to litigate at all. Every study consisted of an experiment. A total of 335 first and second year law students studying at Tilburg University were involved in the three studies.

Finally, we translated the results of the literature study and the experiments to the context of collective procedures for the settling of mass tort. More specifically, we analyzed the implications of the study outcomes for the designing of the applicable law in the field of individual and collective actions.

Relevant factors to choose or leave the default

Although the number of empirical studies on opt in and opt out models is limited, the available studies suggest that opt out models, on average, have a higher participation degree than opt in procedures. However, substantial differences in participation-percentages can be observed, especially within opt in procedures, which indicates that opt in or opt out models, as well as other factors, have an effect on the choice of claimants to litigate individually, collectively, or not to litigate at all.

More general studies on conflict behavior of people with a (potential) legal problem have addressed the choices people make under influence of an impending legal procedure. In addition, these studies have tried to demonstrate which factors are involved in these choices. For example, studies on

the status quo bias suggest that what is designated as the default, influences the choices of an individual significantly, which could explain the higher participation degree within opt out procedures.

The status quo bias is, however, not the only important factor. Studies also indicate that people weigh the benefits and the costs of litigation when choosing whether or not to litigate. Other studies show that information on decisions of others (i.e. peers) may strongly influence the behavior of individuals.

Three factors tested in experiments: the outcomes

The first factor we tested is the availability of information in relation to the effect of the default in opt in and opt out models. We examined whether, if claimants have information of the decisions other claimants made, this would have an effect on the default in opt in models and opt out models. The study showed that claimants who knew that most of the other claimants were going to litigate individually, tend to chose to litigate individually as well, implying that this information reduced the effect of the default in opt in and opt out models.

The second factor which was tested, was size of the claim. The results showed that claimants with a substantial claim considered to claim individually compared to claimants with a modest claim. Although the individuals with a substantial claim more often considered to claim individually, the results showed that they did not actually filed an individual claim more often than claimants with a 'low' claim.

The third factor we tested, is knowledge (or: certainty) about the outcome of the procedure. A certain outcome would make the weighing of costs and benefits more adequate. The study showed that with a certain outcome of the collective procedure, more claimants in both an opt in regime as in an opt out regime chose to litigate individually.

The three studies showed that claimants in an opt out regime participated in a collective procedure more often than claimants in an opt in regime. However, the results did not show that claimants in an opt in model did not start a procedure more often than claimants in an opt out procedure. Other factors appeared to be more important.

It should be noted that the damage in our study was relatively small, but on the other hand, so was the effort needed to achieve a better result. Further research should determine the effect of the three factors when the damage is more substantial. Another limitation of the research design is that the take-up-rate was not included.

Implications of the outcomes for the practice and policy concerning mass tort

The study shows that claimants within an opt out model more often participate in a collective procedure than within an opt in model, so to involve as many claimants as possible in the settlement an opt out model seems preferable. Information that many other claimants litigate individually has the effect in both opt in as opt out procedures that claimants choose to litigate individually too. This can be of importance given the communication coming from interest groups in the field of mass tort. It is recommended that these interest groups are subjected to a test of integrity.