

**Mach 2010**

## Does an individual already have the pre-existing right to opt out of a class action lawsuit?

**Answer** - Under the Federal Rules of Civil Procedure (FRCP) it depends upon which type of class action is filed.

**Detail** - Rule 23 of the FRCP creates 3 types of class actions. The first, a (b) (1) class, is for when there exists a large number of separate lawsuits that would create the risk of inconsistent and varying outcomes or deciding one case would for all practical purposes dispose of the claims of other individuals not part of the suit. Class actions filed under (b) (1) are not common.

The second, a (b) (2) class action, as described under FRCP 23 (b) (2), is tailored to cases where ***injunctive relief is sought***. The rule references circumstances where the opposing party has acted "on grounds generally applicable to the class, thereby making appropriate ***final injunctive relief or corresponding declaratory relief with respect to the class as a whole***."

When the Protection and Advocacy (P&A) system files a class action to, for example, address abuse and neglect at a facility, unhealthy living conditions, insufficient staffing, inadequate health services, or a failure to promote community integration, it is almost always going to be filed under (b) (2).

The last type of class action, under FRCP 23(b) (3), is largely for damages. It is ***only*** the (b) (3) class action which contains a right of the class member to be excluded from the class. Compare FRCP 23 (c) (2) (A) with FRCP 23 (c) (2) (B) (v). The reason for this is to preserve that individual's damage claim, if s/he wishes for this to be so.

**In sum, class members of class actions seeking injunctive relief do not already have an existing right to opt out.**

That is not to say that those class members do not have other procedural protections. There are at least four types of protections already in existence to those class members:

(1) In class actions filed under (b) (1) or (b) (2) for injunctive relief, the court "may direct appropriate notice to the class." See FRCP 23(c) (2) (A). This is not the same as a right to opt out, but it does provide notice to all class members of the filing of the class action.

(2) Class members may intervene as parties in the class under FRCP 24.

- (3) The judge may make additional orders during the pendency of the litigation, including providing additional notice to class members or otherwise allowing them to signify if representation is fair and adequate. See FRCP 23 (d) (1) (B).
- (4) The court cannot allow a settlement, dismissal or compromise of the class action without a fairness hearing, with notice to all class members, and allowing class members to express their views on the proposed outcome.

**Conclusion** - H.R. 1255 breaks new and dangerous ground by allowing class representatives to opt out of cases seeking injunctive relief based on allegations of abuse and neglect and related claims filed by P&As. Judges should be permitted to look at the entire picture and craft injunctive relief that may be necessary to protect all people with disabilities in institutions.

No guardian, whether institutionally appointed or a family member, should have the individual right to prevent a federal judge from awarding complete relief, if this is necessary to address abuse and neglect at a facility, including unhealthy living conditions, insufficient staffing, inadequate health services or a failure to promote community integration.