

Ninth Circuit Toughens on Class Certifications Post-Dukes

DENTONS

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In the wake of United States Supreme Court decision *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which unquestionably raised the bar for class certification of labor claims, the Ninth Circuit recently partially reversed class certification in *Lynne Wang et al. v. Chinese Daily News, Inc.*, 709 F.3d 829 (9th Cir. 2013). This decision is the first instance of the Ninth Circuit applying *Dukes*' rigorous commonality and common issue predominance analysis and signals that obtaining class certification in the Ninth Circuit will become increasingly difficult.

Foremost, the Ninth Circuit vacated the district court's finding of Rule 23(a) commonality under *Dukes*. The *Wang* Court instructed that Rule 23(a) commonality should focus not on the existence of questions common to the class, but rather on "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes* concluded that individual claim dissimilarities would "impede the generation of common answers." Applying this analysis, the Ninth Circuit signaled that it did not believe that the *Wang* class could ultimately satisfy the rigorous Rule 23(a) requirements. The *Wang* Court instructed the district court to consider whether the claims of the proposed class "depend upon a common contention . . . of such nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

The Court reversed the district court's certification under Rule 23(b)(2), consistent with the Supreme Court's reversal of the Ninth Circuit's *en banc* decision in *Dukes*. While *Dukes* leaves open the possibility for Rule 23(b)(2) class certification despite "incidental" monetary claims, it expressly disallows certifying individualized monetary claims under Rule 23(b)(2), holding that certification of these claims is only potentially appropriate under Rule 23(b)(3). The *Wang* Court thus reversed the district court's certification under 23(b)(2), notwithstanding finding that the claims for monetary relief did not predominate over claims for injunctive relief.

The Court also remanded the district court's alternative certification under Rule 23(b)(3), vacating its predominance finding, which was founded upon a presumption that application of Chinese Daily News policies regarding employment classification damaged the putative class members uniformly. On remand, the Ninth Circuit instructed the district court to abandon its exclusive reliance on this damage presumption and instead consider the existence of individualized claims that may render class treatment impossible. This decision is significant in that it signals that the Ninth Circuit is no longer willing to find a predominance of common issues in a classwide damage context without a thorough analysis of the potential for individualized claims/issues.

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