August 29, 2024

Fourth Circuit affirms denial of class certification for golf course investors allegedly swindled by Ponzi scheme

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In July 2024, the Fourth Circuit affirmed the denial of class certification for a group of Chinese investors who were allegedly duped into entering a Ponzi-like investment scheme to purchase two dozen golf courses and other real estate in South Carolina. *Cheng v. Liu*, No. 23-1806, 2024 WL 3579606 (4th Cir. July 29, 2024). In an unpublished opinion, the Fourth Circuit held that the class plaintiffs failed to meet the requirements of Rule 23(b) because a single injunction could not provide relief to the class, which primarily sought money damages, and because a class action was not the superior method of litigation. 2024 WL 3579606, at *5.

The named plaintiffs, representing a putative class of over 95,000 Chinese investors, asserted ten causes of action against one of the co-conspirators and his affiliated companies, including claims for violations of federal and state securities laws as well as state common-law claims. *Id.* at *2. Seven of the ten claims sought money damages. *Id.* at *3.

The plaintiffs sought certification of a "constructive trust" class and two sub-classes, each of which sought to recover money lost in the Ponzi scheme that had not been recovered or repaid. *Id.* at *2. The district court denied class certification on several grounds, including that (1) the plaintiffs had not met the commonality and typicality requirements of Rule 23(a); (2) certification was improper under Rule 23(b)(2) because the plaintiffs primarily sought monetary relief; and (3) certification was improper under Rule 23(b)(3) because a class action in South Carolina was not a superior method of litigation. *Id.*

The Fourth Circuit affirmed the denial of class certification under Rule 23(b)(2) and 23(b)(3) and remanded for further proceedings on class members' individual claims. *Id.* at *1. Because each element of Rule 23 must be satisfied and the plaintiffs failed to satisfy Rule 23(b), the Fourth Circuit did not resolve whether the district court also properly denied class certification under Rule 23(a). *Id.* n.1.

Rule 23(b)(2). Applying the U.S. Supreme Court's reasoning in *Wal-Mart Stores, Inc. v Dukes*, 564 U.S. 338 (2011), the Fourth Circuit first affirmed that certification was not appropriate because Rule 23(b)(2) is limited to claims seeking injunctive and declaratory relief and does not authorize certification "where each class member would be entitled to an individualized award of monetary damages." *Id.* at *3 (citing *Dukes*, 564 U.S. at 360-61). Because most of plaintiffs' claims sought money damages and the damages calculation for each class member would not be identical, the Fourth Circuit "easily" concluded that "an award of individual money damages—not injunctive relief—is the primary relief sought and that monetary relief predominates." *Id.* at *4.

Rule 23(b)(3). Rule 23(b)(3) permits certification if (1) questions of law or fact predominate over questions affecting individual class members; and (2) a class action is a superior method of adjudicating the controversy. The Fourth Circuit adopted the district court's reasoning that a class action in South Carolina would not be manageable or superior to other litigation methods because China was the "locus" of the entire lawsuit: nearly all the plaintiff investors were Chinese citizens; they invested in Chinese companies using Chinese money; the material evidence was located in China; and China was unlikely cooperate in discovery in the U.S. *Id.*

Takeaways: The U.S. Supreme Court's holding in *Wal-Mart Stores, Inc. v Dukes* provides important guidance for class actions where plaintiffs seek both damages as well as injunctive and declaratory relief. If monetary relief predominates, certification should not be appropriate under Rule 23(b)(2). The *Dukes* rule prevents class plaintiffs from using Rule 23(b)(2) to certify claims primarily seeking money damages without satisfying the rigorous criteria for certification of damages claims under Rule 23(b)(3).