

Jeff Wilkerson Discussed Circuit Split on “Fail Safe” Class Actions with *The National Law Journal*

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Winston & Strawn Partner Jeff Wilkerson spoke with *The National Law Journal*, discussing Hilton Hotels Retirement Plan’s petition for the U.S. Supreme Court to decide whether class certification is barred when the proposed class definition is “fail safe.” The Supreme Court has been asked to review a decision from the U.S. Court of Appeals for the D.C. Circuit, which reversed a district court’s denial of class certification due to a proposed fail safe class and deepened a circuit split over the issue.

Jeff said the D.C. Circuit’s holding that district court judges should consider redefining proposed classes to remove fail-safe issues seems to wrongly pit the trial court against the defendant. He also noted that the D.C. Circuit’s decision would make early motions to strike or defeat class allegations more difficult even when plaintiffs propose a clearly unfair fail-safe class, since the Rule 23 analysis that judges will follow is heavily factual.

Jeff explained that this case “cleanly presents a circuit split on whether there is a per se rule against fail-safe classes inherent in Rule 23.”

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