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# Supreme Court grants certiorari to address circuit split regarding uninjured class members

by C. Allen Garrett Jr.

**Takeaway:** We have written frequently about the different approaches of the Courts of Appeals when addressing certification of a class that includes uninjured class members. *See, e.g.*, En banc Ninth Circuit reinstates class certification ruling in Bumble Bee price fixing case (Apr. 21, 2022), D.C. Circuit denies class certification where putative antitrust class includes uninjured class members (Aug. 30, 2019), and First Circuit addresses an issue that continues to vex (and split) the circuits: should a class be certified that includes uninjured class members? (Oct. 24, 2018). On January 24, 2025, the Supreme Court finally granted certiorari to address: "Whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury." *Lab. Corp. of Am. v. Davis*, No. 24-304, 2025 WL 288305 (U.S. Jan. 24, 2025). The Supreme Court also expedited merits briefing, with Petitioner's opening brief due March 5, 2025; Respondent's brief due March 31; and Petitioner's reply brief due by 2 p.m. on April 21. This schedule may allow for the case to be argued and decided this term.

The Supreme Court granted review of an unpublished decision of the Ninth Circuit that only briefly addressed the uninjured class member issue in this footnote: "LabCorp's allegation that some potential class members may not have been injured does not defeat commonality at this time." *Davis v. Lab. Corp. of Am. Holdings*, No. 22-55873, 2024 WL 489288, at *2 n.1 (9th Cir. Feb. 8, 2024) (citing *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668-69 (9th Cir. 2022) (en banc)). When the en banc Ninth Circuit announced this rule in *Olean*, Judges Lee and Kleinfeld dissented, expressly noting the majority's ruling created a circuit split. *See Olean*, 31 F.4th at 691-92 (Lee, J., dissenting).

The petition for certiorari in *Davis* cited other decisions and commentators that had recognized the circuit split. *See Lab. Corp. of Am. Holdings v. Davis, Pet. for Writ of Cert.*, No. 24-304, 2024 WL 4241232, at *13 & n.3 (U.S. filed Sept. 13, 2024) (citing *In re Asacol Antitrust Litig.*, 907 F.3d 42, 46 (1st Cir. 2018); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 365-67 (3d Cir. 2015); and *In re Deepwater Horizon*, 739 F.3d 790, 800-01 (5th Cir. 2014)). The petition categorized these decisions as falling into "three camps": (1) cases holding "Article III bars certification where the class includes anyone who lacks standing"; (2) cases allowing certification only where the class contains no more than "just a *de minimis* amount" of uninjured class members; and (3) cases allowing certification as long as "anything less than a really big number" of putative class members lack standing. 2025 WL 4241232, at *13-14.

The courts requiring all class member to have suffered Article III injury include the Second and Eighth Circuits, as well as "certain panels" in the Fifth and Sixth Circuits. *Id.* at *14-16. Courts barring

certification of a class containing more than a *de minimus* number of uninjured class members include the D.C. Circuit and the First Circuit. *Id.* at *16-18. And the courts agreeing the Ninth Circuit in finding that only a "*really* large number of uninjured members" precludes certification include the Seventh, Eleventh, and some courts within the Tenth Circuit, while the Fourth Circuit favorably cited *Olean* and ruled that "only the named plaintiffs must have Article III standing" for class certification to be proper. *Id.* at *18-19 & nn.5-6.

In addition to the three-way circuit split and the unfair settlement leverage created where a class has been certified includes uninjured class members, the Supreme Court previously had granted certiorari to address "whether a class may be certified if it contains members who were not injured and have no legal right to any relief." *Id.* at *26-27 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 461 (2016)). But the *Tyson Foods* court did not address the issue because the merits briefing focused on "whether uninjured members may obtain *relief* post-judgment." *Id.* at *27 (citing 577 U.S. at 460-61).

Thus, it should come as no surprise that the Court has elected to weigh in on this critical issue now, as class actions continue to proliferate. A ruling requiring all class members to have suffered Article III injury for the class to be certified would materially impact the viability of certification in numerous class actions.