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Supreme Court to Decide Key Question of Whether Rule 23(b)(3) Class May Be Certified if Some Proposed Class Members Lack any Article III Injury

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On Friday, the U.S. Supreme Court granted certiorari in *Laboratory Corporation of America Holdings v. Davis*, No. 24-304, to decide "[w]hether 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." This has the potential to be one of the most significant developments in class action law in several years.

The plaintiffs, who are blind, sued Labcorp under the Americans With Disabilities Act and California Unrah Civil Rights Act (Act) because its self-service kiosks were not accessible to the blind without assistance. They seek minimum statutory damages of $4,000 per violation under the Act—potentially $500 million per year. The proposed class was defined to include any legally blind person who walked into a facility that had a kiosk and was unable to use it, regardless of whether they were aware of it or desired to use it. The district court certified the class and the Ninth Circuit affirmed in an unpublished opinion with little analysis because prior Ninth Circuit decisions had held that only the named plaintiff must establish Article III standing. Here, a named plaintiff walked into the facility, inquired about a kiosk and then was assisted by an employee at the front desk. According to the petition for certiorari, many putative class members were not aware of the kiosks and used the front desk, and the plaintiffs did not identify anyone who was unable to receive services due to the kiosks.

Circuits are split on whether or what extent class members must have standing (i.e., a "concrete and particularized" "invasion of a legally protected interest" that is "actual or imminent, not conjectural or hypothetical") at the class certification stage, or at some other stage in the case. Under Ninth Circuit precedent, it was sufficient for the named plaintiff to have sustained an injury, even if many other putative class members did not. The Second and Eighth Circuits have articulated a relatively strict approach that all class members must have standing. The First and D.C. Circuits appear to have required that a class contain no more than a "de minimus" number of proposed class members who lack standing. The Seventh Circuit has found that a class may be certified unless a "great many" class members lack standing. Finally, the Eleventh Circuit appears to have agreed with the Ninth Circuit that only a named plaintiff must have standing. I say "appears to have" because there is some debate about how to properly interpret some of these circuits' case law, and in some circuits the cases are not entirely consistent.

This is an issue the Supreme Court was expected to decide in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), but did not reach in that case.

Defendants will be hoping that the Court's conservative majority will rein in this type of class action and require that all proposed class members have standing for a class to be certified, while the plaintiffs' bar will be hoping the Court, if it does not affirm the Ninth Circuit, adopts more of a "middle ground" approach. Briefing is scheduled for March and April, to put the case in line for decision by the end of June. Stay tuned.

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