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GIBSON DUNN

Class Actions Update April 28, 2025

Class Actions 2025 First Quarter Update

This update provides an overview of key class action-related developments from the first quarter of 2025 (January through March).

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1. The Fourth and Eighth Circuits Reinforce the Predominance Requirement

In two decisions from the past quarter, federal appellate courts rejected class certification under Rule 23(b)(3)'s demanding predominance requirement.

In *Vogt v. Progressive Casualty Insurance Co.*, 129 F.4th 1071 (8th Cir. 2025), the Eighth Circuit reiterated that claims requiring an individualized look at consumers' purchasing decisions make "poor candidates for class litigation." *Id.* at 1074. The plaintiff bought a van and later learned that the insurance company that sold the van to the dealer had classified it as totaled but had sold it with a clean (rather than a salvage) title. *Id.* at 1072. The plaintiff brought a putative class action against the insurance company on behalf of purchasers of similarly mistitled vehicles. *Id.* The

Eighth Circuit affirmed the denial of class certification because individual issues of reliance and causation would predominate. *Id.* The court explained that although "some putative class members bought their vehicles because they understood . . . that the vehicles were free of salvage title restrictions," others "may have been satisfied with their purchase even if those restrictions applied" because salvage title cars still "have value." *Id.* at 1073-74. *Vogt* illustrates that "common" issues often will not predominate even in cases involving uniform policies and measurable consumer spending.

In *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925 (4th Cir. 2025), the plaintiff companies bought coupon-processing services on behalf of retailers and later filed a putative class action claiming that the defendant had engaged in horizontal price-fixing resulting in higher fees. *Id.* at 927-28. In affirming the denial of certification for lack of predominance, the Fourth Circuit emphasized that the plaintiffs' model did not show any impact of higher fees for 32% of the proposed class. "Whatever the resolution of the question posed in" *Labcorp*, the court concluded, "the presence of 32% of uninjured members in a proposed class [is] much too high" and would inevitably lead to many individualized proceedings. *Id.* at 933-34.

Mr. Dee's and *Vogt* show different sides of the predominance coin—*Vogt*, for cases where the number of class members that would be subject to individualized proceedings is difficult to estimate, and *Mr. Dee's*, where expert modeling provides some estimate of the number of uninjured class members.

2. The Fourth Circuit Discusses Article III Standing of Class Members Ahead of the Supreme Court's Decision in *Labcorp*

In two recent cases, the Fourth Circuit held that putative class representatives and absent class members lacked Article III standing, illustrating the ongoing importance of justiciability issues—especially given that the U.S. Supreme Court is poised to address whether a Rule 23(b)(3) class can be certified when some members of the proposed class lack any Article III injury.

In one case, the Fourth Circuit emphasized that a mere "risk" of economic harm is insufficient to satisfy Article III. In *Alig v. Rocket Mortgage, LLC*, 126 F.4th 965 (4th Cir. 2025), the plaintiffs sought to represent a class of homeowners who sued a mortgage lender, claiming that the lender shared their estimates of their homes' market values with appraisers and so made the appraisals they bought "unreliable and worthless." *Id.* at 970. The district court certified the class, but the Fourth Circuit reversed, holding that there was no evidence that class members actually did not receive fair or independent appraisals. *Id.* at 974-75. At best, exposing the appraisers to the homeowners' estimates created "a *risk* of influence," but that risk was not enough to create a concrete injury for standing. *Id.* at 975 (emphasis added).

Another case from the Fourth Circuit, *Opiotennione v. Bozzuto Management Co.*, 130 F.4th 149 (4th Cir. 2025), reiterated Article III's requirement that the party seeking relief suffer genuine, concrete harm. The plaintiff, who is over 50, claimed that property management companies discriminated by targeting Facebook ads for housing to users under 50. *Id.* at 151-52. But the district court dismissed the complaint for lack of standing, reasoning that the plaintiff did not allege that she requested housing information or was personally denied any housing opportunity based on her age. *Id.* at 154-55. In affirming the dismissal, the Fourth Circuit explained that the

plaintiff had alleged that she was a member of a disfavored age group but not that she had suffered any concrete, personal injury due to her age. *Id.* at 153-56.

These decisions spotlight Article III standing ahead of the Supreme Court's consideration of the interplay between that fundamental requirement and class actions in *Laboratory Corp. of America v. Davis*, No. 24-304. In late January 2025, the Court granted certiorari 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." *Labcorp* provides the Court with an opportunity to resolve a long-standing circuit split over how courts should approach the issue of uninjured class members at class certification—as we have discussed here. The Second and Eighth Circuits have applied a bright-line rule prohibiting certification if any members lack standing. The First, Seventh, and D.C. Circuits take a middle-ground approach, permitting certification if the number of uninjured members is "de minimis." And the Ninth Circuit permits certification even when more than a de minimis number of class members lack standing. The decision in *Labcorp* is expected by late June.

3. The Fourth and Ninth Circuits Address Arbitrability and Assent

In a pair of recent cases, the Fourth Circuit took different approaches to clauses in arbitration agreements that allow the defendant to unilaterally change the agreement. In *Johnson v. Continental Finance Co.*, 131 F.4th 169 (4th Cir. 2025), the court, applying Maryland law, held that a change-in-terms clause rendered an agreement illusory because such clauses are "so one-sided and vague that [they] allow[ ] a party to escape all of its contractual obligations at will." *Id.* at 179. But a few days later, in *Meadows v. Cebridge Acquisition, LLC*, 132 F.4th 716 (4th Cir. 2025), the court held that a similar change-in-terms clause was *not* illusory, provided "the modifying party must give reasonable notice of modification." *Id.* at 728.

Although there is apparent tension between the two cases, Judge Wynn, who concurred in both, attributed the different outcomes to differences in state law. *Meadows*, 132 F.4th at 735 (concurrence). Whether a change-in-terms clause is dispositive, in his view, depends on whether the state law views an arbitration provision as a "separate agreement that requires separate consideration in order to be legally formed." *Johnson*, 131 F.4th at 182 (concurrence).

The Ninth Circuit also took on a pair of cases involving modern arbitration agreements. In *Chabolla v. ClassPass Inc.*, 129 F.4th 1147 (9th Cir. 2025), the court considered the enforceability of an arbitration agreement formed through a sign-up website. *Id.* at 1151. The agreement was listed on the Terms of Use page, but this page was provided only as a link on login screens, and the website did not require users to read the terms before subscribing. *Id.* at 1154. The Ninth Circuit held that the agreement was unenforceable because it lacked reasonably conspicuous notice of and an unambiguous manifestation of assent to the terms. The court emphasized that one sign-up screen was insufficiently conspicuous because the notice was on the "periphery" of the page and that additional screens were ambiguous as to manifestation of assent because they prompted users only to "continue" or "redeem." *Id.* at 1157–58.

In another case, *Jones v. Starz Entertainment, LLC*, 129 F.4th 1176 (9th Cir. 2025), the Ninth Circuit upheld an arbitration provider's consolidation of thousands of mass individual arbitration demands. *Id.* at 1178. One plaintiff petitioned to compel individual arbitration in federal court, but

the district court denied the petition and the court of appeals affirmed. The Ninth Circuit explained that federal courts had no authority to second-guess an arbitration provider's interpretation of its rules, including to permit consolidation, and that consolidation did not present the same due process risks as in "class or representative arbitration." *Id.* at 1182. The court also called out the obvious strategy behind plaintiffs' counsel's attempting to leverage individual arbitration fees to extract a large settlement. Specifically, the panel questioned "the true motivation underlying the mass-arbitration tactic deployed [in the case], which appear[ed] to be geared more toward racking up procedural costs to the point of forcing [the defendant] to capitulate to a settlement than proving the allegations . . . to seek appropriate redress on the merits." *Id.*

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