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YEAR-END AND FOURTH QUARTER 2021 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview and summary of key class action developments during the fourth quarter of 2021 (October through December).

> **Part I** addresses recent arbitration-related developments relevant to class action practitioners, including cases addressing the Federal Arbitration Act's ("FAA") Section 1 exemption for interstate transportation workers, and the Supreme Court's grants of certiorari in two arbitration-related appeals.
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> **Part II** covers decisions from the Second and Seventh Circuits applying the Supreme Court's holding in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), that requires plaintiffs to establish that they have suffered "concrete" harm in order to have Article III standing.
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> **Part III** summarizes two decisions from the First and Seventh Circuits emphasizing the rigorous analysis that district courts must conduct under Rule 23 before certifying a class.
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> And **Part IV** analyzes a Fifth Circuit order granting a stay of discovery pending appeal of a class-certification order under Rule 23(f).

I. Important Arbitration Issues Continue to Percolate at the Supreme Court and Circuit Court-Levels

As reported in last quarter's update, the FAA's Section 1 residual clause exemption continues to generate litigation across the country. Under this clause, "workers engaged in foreign or interstate commerce" are exempt from having to arbitrate their claims under the FAA. 9 U.S.C. § 1. The courts of appeals have continued interpreting the scope of this exemption in various contexts.

In *Cunningham v. Lyft, Inc.*, 17 F.4th 244 (1st Cir. 2021), a group of Massachusetts Lyft drivers alleged they had been misclassified as independent contractors. The district court denied Lyft's motion to compel arbitration based on the Section 1 exemption, but the First Circuit reversed. *Id*. at 246–47. The First Circuit noted that even though many drivers transport passengers to and from the airport as part of the passenger's interstate trip, they do not fall within the exemption because the "driver contracts with the passenger as part of the driver's normal local service to take the passenger to the start (or from the finish) of the passenger's interstate journey." *Id*. at 250. Moreover, that some drivers may occasionally transport passengers across state lines did not mean that drivers generally are "primarily in local intrastate transportation." *Id.* at 253.

In a different context, the Ninth Circuit in *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627 (9th Cir. 2021), held that certain pizza delivery drivers are engaged in interstate commerce, and are thus covered by the Section 1 exemption. This case involved Domino's drivers who delivered pizza ingredients from a Domino's "Supply Center" in California to various Domino's franchisees in California; the drivers sued Domino's for alleged violations of various California labor laws. *Id.* at 628. The Ninth Circuit affirmed the denial of Domino's motion to compel arbitration, holding that the drivers were not covered by the Section 1 exemption. *Id*. at 629–30. The court observed that "[t]he critical factor in determining whether the residual clause exemption applies is not the nature of the item transported in interstate commerce (person or good) or whether the plaintiffs themselves crossed state lines, but rather the nature of the business for which a class of workers performed their activities." *Id*. at 629 (citation omitted). The court reasoned that the plaintiffs were "engaged in a single, unbroken stream of interstate commerce that renders interstate commerce a central part of their job description," because they were responsible for delivering products from suppliers located outside of California to franchises within the state. *Id*. (citation omitted).

Additional guidance from the Supreme Court regarding the residual clause's scope may be on its way. In December 2021, the Supreme Court granted certiorari in *Saxon v. Southwest Airlines Co.*, 993 F.3d 492 (7th Cir. 2021), to resolve whether an airline cargo ramp supervisor qualifies as exempt from arbitration under the residual clause. In that case, the Seventh Circuit held that such workers are exempt under Section 1, reasoning that "transportation workers" are those who "perform[] work analogous to that of seamen and railroad employees, whose occupations are centered on the transport of goods in interstate and foreign commerce." *Id*. at 496 (citation omitted). The court noted that the proper focus of the analysis is whether the worker is "actually engaged in the movement of goods in interstate commerce," and added that "actual transportation is not limited to the precise moment either goods or the people accompanying them cross state lines." *Id*. at 498. We will continue monitoring this appeal and other cases addressing the Section 1 exemption.

In another notable grant of certiorari concerning arbitration, the Supreme Court agreed to hear *Morgan v. Sundance, Inc.*, 992 F.3d 711 (8th Cir. 2021), which presents the issue of whether a party resisting arbitration on the grounds of waiver must show prejudice. In this case, the Eighth Circuit had held that even a defendant's participation in litigation for eight months did not amount to waiver, given that the litigation remained at a preliminary phase and the plaintiff had not demonstrated any prejudice by the defendant's alleged delay in asserting its right to arbitrate. *See id.* at 714–15. The case is now being briefed and we'll provide a further update when the Supreme Court issues its decision.

II. Standing and Article III Injury After *TransUnion LLC v. Ramirez*

As reported in our prior update, in an important decision with significant ramifications for standing in class actions, in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Supreme Court held that each class member must have suffered a "concrete" harm bearing a "close relationship" to traditional harms—like physical injury, monetary injury, or intangible injuries like damage to reputation—to have Article III standing. *Id.* at 2200. And importantly, after *TransUnion*, "an injury in law is not an injury in fact." *Id.* at 2206. In the months since it was issued, the courts of appeals have adopted different

approaches to applying *TransUnion* to determine when class action plaintiffs alleging statutory violations have alleged a "concrete" harm satisfying Article III.

In *Maddox v. Bank of New York Mellon Trust Co.*, 19 F.4th 58 (2d Cir. 2021), the Second Circuit ruled that the plaintiffs' allegations that the defendant bank violated New York's mortgage-satisfaction-recording statutes did not support Article III standing because the allegations showed only a *risk* that plaintiffs would be injured—but not that plaintiffs suffered any actual harm. While *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), allows a "real risk of harm" to "satisfy the requirement of concreteness" in some cases for injunctive relief, the Second Circuit explained that "*TransUnion* established that in suits for damages[,] plaintiffs cannot establish Article III standing by relying entirely on a statutory violation or risk of future harm." 19 F.4th at 63–64. Thus, even though the plaintiffs alleged the bank failed to timely record satisfaction, they did not allege that anyone saw the misleading records, that they suffered reputational harm, or other injury. *Id.* at 65. As a result, the plaintiffs lacked standing to seek damages in federal court. *Id.* at 66.

The Seventh Circuit adopted a slightly different view in *Persinger v. Southwest Credit Systems, L.P.*, 20 F.4th 1184 (7th Cir. 2021). In *Persinger*, the Seventh Circuit held that the defendant's use of the plaintiff's "propensity-to-pay score" without a permissible purpose, in violation of the Fair Credit Reporting Act ("FCRA"), was sufficient to confer Article III standing. *Id.* at 1193. Specifically, the court reasoned that "the FCRA's protection of consumer credit information is akin to the common law's protection of private information through the tort of invasion of privacy," and that in making it "unlawful to furnish, obtain, or use a consumer's credit information without a permissible purpose," "Congress created a federal cause of action for a common-law-like harm." *Id.* at 1192. Thus, because the plaintiff's alleged harm resembled a harm traditionally protected by common law, it was a "concrete injury" for purposes of Article III. *Id.*

III. The Seventh and First Circuits Address the Requirements for Class Certification

This past quarter, the Seventh and First Circuits published noteworthy decisions analyzing the Rule 23 certification requirements.

In *Santiago v. City of Chicago*, 19 F.4th 1010 (7th Cir. 2021), the Seventh Circuit emphasized the "rigorous analysis" that district courts must conduct before certifying a class. *Id.* at 1019. When the plaintiff's van was towed and disposed of pursuant to Chicago's Municipal Code, she moved for class certification under Rule 23(b)(3) for ten claims. *Id.* at 1014–15. The district court certified two classes (a tow class and a vehicle-disposal class) without specifying which claims survived. *Id*. at 1015–16. On appeal, the Seventh Circuit found two "fatal flaw[s]" in the district court's certification analysis, and concluded the district court failed to "properly engage in the rigorous analysis that a class certification order requires." *Id.* at 1017, 1019.

- First, the district court's certification analysis was "organized … around potential common questions rather than the claims at issue." at 1017. As the Supreme Court has explained, any analysis of whether commonality or predominance are satisfied "'begins, of course, with the elements of the underlying cause of action.'" *Id.* (quoting *Erica P. John Fund, Inc. v. Halliburton*

Co., 563 U.S. 804, 809 (2011)). Although the district court reasoned that there were some common questions that predominated, it did "not discuss any of the elements of the underlying causes of action, nor in clear terms explain what the causes of action are." *Id.* By failing to conduct the requisite "detailed analysis" of the elements of the underlying claims, the district court abused its discretion. *Id.* at 1018.

- Second, the district court also erred by conducting a "less-than-rigorous analysis" of the adequacy of the named plaintiff. *Id*. at 1019. Although the defendant had argued the plaintiff was susceptible to a unique defense of actual notice (which may have precluded the plaintiff from challenging the notice's procedural sufficiency), the district court did not identify why this unique defense was irrelevant to the claims for each class. *Id*.

The First Circuit also addressed the certification requirements in *Aronstein v. Massachusetts Mutual Life Insurance Co.*, 15 F.4th 527 (1st Cir. 2021), where the court affirmed a denial of certification because the plaintiff had not established that he was similarly situated to proposed class members. In this case, the plaintiff alleged he purchased an annuity that he believed had a guaranteed annual interest rate of 3%, when in actuality, the defendant attached a rider that reduced the guaranteed interest rate to 1.5%. *Id.* at 530. The district court denied certification because under New York contract-interpretation law, extrinsic evidence was needed to determine which interest rate each putative class member believed prevailed when they purchased the annuity, which destroyed predominance. *Id.* at 531.

The First Circuit affirmed, reasoning that, "although [the plaintiff] was never told that MassMutual reduced the interest rate to 1.5%, MassMutual produced evidence that it engaged in an extensive marketing campaign to inform sales agents of the minimum guaranteed interest rate change, its marketing materials were modified to reflect this change, and sales agents generally explained this key interest rate to potential purchasers orally." *Id*. at 535. Thus, the court held that because the plaintiff only produced evidence that *he* had not been informed of the rate change, there was nothing to show that other potential class members had not been so informed. *Id*.

IV. The Fifth Circuit Stays Discovery During Pendency of Important Rule 23(f) Appeal

In a relatively rare decision, a split panel of the Fifth Circuit granted a motion to stay discovery during the pendency of the defendants' Rule 23(f) appeal even after the district court had denied the defendants' request to stay such discovery. *Earl v. Boeing Co.*, No. 21-40720, — F.4th —, 2021 WL 6061767 (5th Cir. Dec. 22, 2021). Acknowledging the uncertainty regarding the amount of deference owed to the district court's ruling on the request for a discovery stay, the Fifth Circuit held that even under a deferential standard of review, all the factors in *Nken v. Holder*, 556 U.S. 418 (2009), favored granting the stay. 2021 WL 6061767, at *1.

In particular, the Fifth Circuit concluded the defendants had a "significant likelihood of success" in reversing the certification decision, and emphasized the "very costly and time consuming" discovery that would be needed in a class action suit of this magnitude. *Id.* at *2. Moreover, allowing discovery as to liability while staying discovery as to class membership (as the district court ordered) was not a reasonable solution because proportionality concerns "would impose far different constraints on

discovery by eleven named plaintiffs" (if the appeal were successful) "than it would for classes of millions of air travelers" (if the appeal were unsuccessful). *Id.* Finally, the plaintiffs did not plausibly allege that they would be injured by a stay in the absence of "any specific prospective threat of spoliation," and the public interest supported a stay to avoid potentially wasteful and unnecessary litigation. *Id.* at *3.

The *Earl* decision should be helpful for defendants challenging class certification orders via Rule 23(f) and simultaneously seeking a discovery stay.

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