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Should Defendants Seek Stays of Class Actions Pending the Supreme Court's Upcoming Decision on Article III Standing for Absent Class Members?

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On December 16, 2020, the Supreme Court granted certiorari in *TransUnion LLC v. Ramirez* to review the Ninth Circuit's decision in *Ramirez v. TransUnion LLC*. Specifically, the Supreme Court granted certiorari for the following question:

> Whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.

The oral argument in *TransUnion* is scheduled for March 30, 2021.

One strategy that merits substantial consideration is **moving to stay** any class action pending the outcome in *TransUnion* where there are Article III standing questions because the named class representative or some unnamed members of the class have not suffered any harm.

Last week, our Carlton Fields class action attorneys obtained an order granting such a stay in a data breach class action pending in the Middle District of Florida. *Stoll v. Musculoskeletal Inst., Chartered*, No. 8:20-cv-01798, 2021 WL 632622 (M.D. Fla. Feb. 18, 2021). The decision was entered over the plaintiff's objection and, as far as we can tell, is the first federal district court decision issued on this topic. The five-month stay will save the defendant from undertaking substantial work - and equally important, will allow for potentially favorable developments from the Supreme Court.

If we've piqued your interest, here is a little bit of background on why this issue is at the heart of scores of federal class actions and how the circuits are deeply split. At bottom, the question of Article III standing for absent class members is a knot that courts have been trying to sort out over the last several years.

- On one end, the Second Circuit has held that "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006). Likewise, in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), the First Circuit reversed an order granting class certification, holding that "this is a case in which any class member may be uninjured, and there are apparently thousands who in fact suffered no injury." And in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), the D.C. Circuit vacated certification of a class because the plaintiffs had failed to "show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy."
- Somewhere in the middle is the Eleventh Circuit, which has held that "at some point before it can award any relief, the district court will have to determine whether each member of the class has standing." *Cordoba v. Direct TV, LLC*, 942 F.3d 1259 (11th Cir. 2019).
- Other circuits have held that absent class members are not required to have Article III standing. *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353 (3d Cir. 2015) (concluding that "requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23"); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010) (holding that "Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm"); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009) ("[A] class will often include persons who have not been injured by the defendant's conduct. … Such a possibility or indeed inevitability does not preclude class certification.").

One way or the other, the Supreme Court's upcoming decision in *TransUnion* should shed light as to whether the Second Circuit's categorical approach will control or if the rule will call for some less rigid standard, at least at the class certification stage. We would be glad to discuss these issues with you and how they can be best addressed in any pending federal class actions.

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