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The Impact of the *TransUnion* Decision on Future Class Actions

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On June 25, 2021, the Supreme Court issued a significant ruling for businesses in *TransUnion LLC v. Ramirez*, validating TransUnion's standing challenge to class claims that it violated the Fair Credit Reporting Act (FCRA). This decision will have far-reaching implications for litigants in cases involving consumer claims, privacy disputes, and data breaches, particularly in the class action context.

The Court held that only those class members, including Sergio Ramirez himself, who demonstrated an injury-in-fact had standing under Article III to seek redress under the FCRA in federal court, summarizing its ruling as "[n]o concrete harm, no standing." The Court held that 6,332 of 8,185 class members lacked standing and thus had no viable claim that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files. The Court further held that all of the class members, save for Ramirez himself, lacked standing on their other claims related to formatting defects in mailings sent to them by TransUnion.

The Court's 5-4 decision, authored by Justice Kavanaugh, upended the Ninth Circuit's judgment in favor of Ramirez and the class, reversing same, and remanding the action for further consideration, including an invitation to revisit class certification altogether based on the Court's conclusion about standing.

Background

The lawsuit was not based upon traditional credit reporting activities. Rather, TransUnion had introduced an add-on product in 2002 called "OFAC Name Screen Alert," which was designed to run consumers' first and last names against the U.S. Treasury Department's Office of Foreign Assets Control's list of "specially designated nationals" who threaten national security. If a company opted into this service, TransUnion would use a third-party vendor to run the consumer's first and last names against the OFAC list, and if a match was found, TransUnion would place an alert on the credit report indicating that the consumer was a "potential match" to a person on the OFAC list. No other data was used to compare the consumer and the OFAC list, and this process generated many false positives.

In February 2012, Sergio Ramirez brought suit on behalf of himself and a proposed class of individuals similarly situated alleging violations of the FCRA. He asserted that in the process of purchasing a new car in February 2011, his credit was run, and the car dealer denied the sale after noting that his TransUnion credit report had been flagged with an OFAC Advisor Alert. Following that experience, Ramirez contacted TransUnion and requested a copy of his credit file. TransUnion sent him two mailings, the first listing everything except the OFAC alert in his file. That mailing included the statutorily required summary of rights prepared by the Consumer Financial Protection Bureau (CFPB). The second mailing was a letter alerting Ramirez that his name was considered a potential match to one on the OFAC list. This second mailing did not include the summary of rights.

Ramirez asserted three violations of the FCRA against TransUnion:

1. through the Name Screen product, TransUnion failed to follow reasonable procedures to ensure the accuracy of information in his credit file;
2. TransUnion failed to provide him with all the information in his credit file upon his request; and

3. TransUnion violated its obligation to provide him with a summary of rights with each written disclosure.

He sought statutory and punitive damages.

The case progressed to a jury trial. Importantly, the parties stipulated that the class included 8,185 members, including Ramirez, and that only 1,853 members of the class (including Ramirez) had their credit reports disseminated by TransUnion to potential creditors during the agreed-upon violation period from January through July 2011. Ramirez testified at trial about his own personal experience as to how he was harmed by the alleged violations of the FCRA committed by TransUnion, but no evidence about the experiences of other class members was presented. The jury returned a verdict for Ramirez and the class – including both statutory and punitive damages of more than $60 million. TransUnion appealed the verdict, challenging the class members' Article III standing.

The Ninth Circuit Decision

The Ninth Circuit affirmed the judgment in relevant part, holding that all members of the class had Article III standing sufficient to recover damages on all three of the claims asserted and that Ramirez's claims satisfied the typicality requirement under Rule 23 of the Federal Rules of Civil Procedure. However, the Ninth Circuit reduced the punitive damages award, which lessened the total judgment amount to about $40 million.

The Supreme Court Decision

The Supreme Court of the U.S. granted TransUnion's petition for a writ of certiorari, confirming that the question presented for the Court's determination was whether all 8,185 class members had Article III standing as to all three of the claims asserted. The Court concluded that they did not.

Judge Kavanagh's majority opinion relied heavily on the Court's prior decision in *Spokeo v. Robins* to conclude that injury-in-fact is required to establish Article III standing, reconfirming that such injury-in-fact requires harm that is concrete, particularized, and actual or imminent. The Court took pains to outline its prior ruling in *Spokeo* in which it rejected the proposition that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and authorizes that person to sue to vindicate that right.

The Court explained that "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." Absent the "concrete harm" requirement, Congress "could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law." Such an expansive view of Article III, wrote the majority, "would flout constitutional text, history, and precedent."

In addressing the standing of the 8,185 class members on their first cause of action – based on the claim that TransUnion failed to use reasonable procedures to ensure accuracy of its credit files, the Court differentiated between the allegations of the 1,853 class members whose reports were disseminated to third-party businesses and the 6,332 other members who claimed a "risk of reputational harm" based on a potential future publication. The Court determined that the mere existence of a misleading OFAC alert in a consumer's internal credit file did not constitute a concrete injury, and thus the 6,332 class members whose reports were not transmitted to third parties did not have Article III standing.[1]

The Court applied a similar analysis to the 8,185-member class as a whole on the other two claims asserted against TransUnion. Ultimately, the Court determined that Ramirez's testimony at trial about his personal experience at the car dealership and his subsequent request and receipt of his credit file from TransUnion in two separate, deficient mailings established his injury-in-fact, and thus conferred Article III standing upon him

to bring the claims asserted and recover damages. However, the Court ruled, the remaining class members did not have standing, as they had not demonstrated that they suffered any concrete harm from the formatting and mailing violations, and thus could not recover any damages.

Justice Thomas authored a scorching dissent, articulating his clear distress at the majority's conclusion that "courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention." In Justice Thomas's words, "[n]ever before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots." Justice Thomas further notes that the majority decision effectively determined that TransUnion's actions were "so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court," despite there being no constitutional support for such a finding.

Justice Thomas pointed out in a footnote that TransUnion's victory here may be "pyrrhic," explaining that the Court's decision may lead plaintiffs to pursue their claims in state court instead of federal court, and state courts may become the "sole forum" for certain types of class actions. Justice Thomas also took TransUnion to task for failing to modify its "Name Screen" process after previously being sued for similar FCRA violations in 2005.

Justices Kagan, Breyer, and Sotomayor joined Justice Thomas's dissenting opinion and also joined in a separate dissent by Justice Kagan, opining that "Congress is better suited than courts to determine when something causes a harm or risk of harm." The three liberal justices urged courts to "give deference to those congressional judgments" and only override them "when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue."

It remains to be seen what will happen as the Ninth Circuit addresses *Ramirez* on remand, including whether that court will accept the Supreme Court's invitation to revisit class certification.

Implications of the Supreme Court Decision

This decision will have far-reaching implications for litigants in cases involving consumer claims, privacy disputes, and data breaches, particularly in the class action context.

Indeed, the biggest impact is likely to be seen in challenges to standing made at every stage in the process for putative class actions filed in federal court for claims of violations of federal statutes, such as the FCRA and the Telephone Consumer Protection Act (TCPA). Defendants will certainly focus on standing as a defense in such cases. Plaintiffs may file class actions in state court instead of federal court, because many states' standing doctrines differ from – and are looser than – the federal standard, rather than risking dismissal for lack of Article III standing. Those states with more lenient views of standing may see an increase in both single plaintiff litigation and class actions, as plaintiffs search for receptive jurisdictions to hear their claims.

If you have any questions about how this decision might impact your business, please contact Eve A. Cann or Kristine L. Roberts for assistance.

[1] In a footnote, the majority outlined an argument that the plaintiffs made for the first time before the Court – that the class members' information was "published" internally to TransUnion's own employees and its vendors who printed and sent the mailings. The Court confirmed that the argument was unavailing (and untimely). This "publication" argument and whether it confers Article III standing to bring claims under federal statutes (like FCRA, FDCPA, and TCPA) and in privacy and data breach cases demonstrates the courts' struggle to interpret *Spokeo*, and has often led to inconsistent results. For example, the defendant in *Hunstein v. Preferred Collection and Management Services, Inc.* has petitioned the Eleventh Circuit for rehearing en banc; that matter involves FDCPA violations based on publication of consumer debt information to a mailing vendor. You can read more about *Hunstein* here and here.