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Son of *Spokeo*: The Supreme Court addresses Article III standing in class actions in *TransUnion v. Ramirez*

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This past Friday, the United States Supreme Court, in an unusual alignment of Justices, decided in *TransUnion v. Ramirez* that plaintiffs in a class action must demonstrate that all class members seeking damages have suffered a "concrete harm" to satisfy the "injury in fact" requirement for Article III standing in federal court. *See TransUnion v. Ramirez*, No. 20–297, 2021 U.S. LEXIS 3401 (June 25, 2021). The majority opinion was authored by Justice Kavanaugh, joined by the Chief Justice and Justices Alito, Gorsuch, and Barrett. Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, dissented. Justice Kagan, joined by Justices Breyer and Sotomayor, filed a further opinion clarifying the joinder in Justice Thomas' position.

Background

TransUnion is one of the "Big Three" credit reporting agencies (popularly known as "credit bureaus"), along with Experian and Equifax. It sells "credit reports" to entities interested in obtaining information that may relate to the creditworthiness of individual consumers.

Shortly after the September 11, 2001, terrorist attacks in the United States, TransUnion began offering a product it called an "OFAC Name Screen Alert", or "Name Screen" for short, in connection with its consumer reports. "OFAC" refers to the Office of Foreign Assets Control in the United States Department of the Treasury. OFAC maintains a list (the "OFAC List") of people, such as alleged terrorists, drug traffickers, and other serious criminals, designated by the government as threats to national security.

Purchasers of TransUnion's Name Screen product would receive, as part of a credit report on a specified consumer, an alert if the name of the individual in question was a potential match to a name on the OFAC List. For some period of time, TransUnion simply relied on third-party software to compare a consumer's first and last names—and nothing else, such as birth dates, social security numbers, or even middle initials—to the names on the OFAC List.

Not surprisingly, this very limited comparison resulted in TransUnion issuing Name Screen alerts that flagged a number of law-abiding citizens as potential terrorists, drug traffickers, or other

national security threats just because they had the same first and last name as an individual on the OFAC List. One such law-abiding citizen was Sergio L. Ramirez.

In 2011, Mr. Ramirez visited a Nissan dealership in California seeking to buy a car. When he found one he liked, the dealership ran a credit check on him. The credit report—produced by TransUnion—contained an alert that Mr. Ramirez's name matched a name on the OFAC List. A salesperson then informed Mr. Ramirez that the dealership would not sell him a car because his name was on a terrorist list.

The following day, Mr. Ramirez contacted TransUnion. He asked for a copy of his credit file, which TransUnion mailed to him that same day. This mailing was accompanied by a statutorily required summary of Mr. Ramirez's rights in connection with such file, but failed to mention that Mr. Ramirez's credit file had contained a Name Screen alert. TransUnion sent a second mailing one day later, this time informing Mr. Ramirez his name was considered a potential match with a name on the OFAC List. This second mailing, however, failed to include the statutorily-required summary of Mr. Ramirez's rights.

Procedural history

In February 2012, Mr. Ramirez sued TransUnion, alleging three violations of the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C.A. § 1681 *et seq.* (West 2021). *See also id.* § 1681n(a) (private right of action). His first claim centered on the FCRA provision that requires credit reporting agencies to follow reasonable procedures to assure the "maximum possible accuracy" for consumer information in a credit report. *Id.* § 1681e(b). Mr. Ramirez argued that a procedure using only the first and last names for OFAC List verification would certainly not result in the maximum possible accuracy for his credit report. *See TransUnion,* 2021 U.S. LEXIS 3401, at *13.

Mr. Ramirez's second and third claims centered on the FCRA provisions that require credit reporting agencies to provide consumers with *complete* credit files upon request and to include a summary of consumer rights with *each and every* written disclosure to those consumers. *See* 15 U.S.C.A. §§ 1681g(a)(1), 1681g(c)(2). Mr. Ramirez argued that TransUnion violated these provisions when it failed in its first mailing to note that his name had been flagged as a potential OFAC match and when it failed in its second mailing to include the required summary of consumer rights. *See TransUnion,* 2021 U.S. LEXIS 3401, at *13.

In addition to his own claim, Mr. Ramirez sought to represent a class of all individuals in the United States to whom TransUnion had sent similar mailings during a specified period. *See id.* at *13-14. The District Court for the Northern District of California certified that class, which turned out to have 8,153 members. *Id.* at *14. In doing so, the District Court held that all 8,185 class members had standing under Article III of the United States Constitution to pursue their claims in federal court, even though the parties agreed that credit reports for only 1,853 of those class members had been sent to third parties during the class period. *Id.* In other words, no one outside TransUnion had seen the credit files of 6,332 of the class members.

The plaintiffs prevailed at trial. The jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages. *Id.* In total, the judgment against TransUnion exceeded $60 million.

Naturally, TransUnion appealed. A split panel of the United States Court of Appeals for the Ninth Circuit, affirmed the District Court's conclusion that each class member had standing to sue for

damages with respect to all three claims asserted by Mr. Rodriguez. *Id.* at *14-15. The panel did, however, reduce the punitive damages to $3,936,88 per class member, thus lowering the overall award against TransUnion to more than $40 million. *See id.* at *15.

The majority opinion

The Supreme Court granted *certiorari* from the Ninth Circuit's decision to consider the issue of Article III standing as to the class members below. *Id.* at *15. Building on the Court's 2016 decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (which also involved the FCRA), Justice Kavanaugh both began and ended his opinion with the simple conclusion of "[n]o concrete harm, no standing." *TransUnion,* 2021 U.S. LEXIS 3401, at *7, 40. More specifically, drawing on Justice Alito's majority opinion in *Spokeo*, Justice Kavanaugh reaffirmed that, to show a concrete harm (a required element of Article III standing), plaintiffs must "have identified a close historical or common-law analogue for their asserted injury." *Id.* at *18. Often this is easy, as with "traditional tangible harms, such as physical and monetary harms . . . ." *Id.* "Various intangible harms," such as "reputational harms, disclosure of private information, and intrusion upon seclusion," can also qualify as "concrete". *Id.* at *19. And Congress can even "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* at *19-20 (quoting *Spokeo,* 136 S. Ct. at 1549).

But this does not mean that a plaintiff will "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at *20 (citing *Spokeo,* 136 S. Ct. at 1549). Instead, federal courts must still "independently decide whether a plaintiff has suffered a concrete harm under Article III." *Id.* As Justice Kavanaugh put it, in a phrase likely to be quoted in many future briefs, "under Article III, an injury in law is not [itself] an injury in fact." *Id.* at *21.

Because "[e]very class member must have Article III standing in order to recover individual damages", *id.* at *25, Justice Kavanaugh then applied this test to each of the claims and class members at issue. First, he assumed that all class members experienced an injury in law based on TransUnion's alleged statutory violations. *See id.* at *26. This was a reasonable assumption, because the FCRA does require credit reporting agencies to take steps to maintain accurate information, *see, e.g.,* 15 U.S.C.A. § 1681e(b), and all the class members instead had inaccurate information placed in their files by TransUnion based upon its rudimentary matching process. *See TransUnion*, 2021 U.S. LEXIS 3401, at *28.

But only the 1,853 class members whose inaccurate information was disseminated to third parties experienced a further *concrete* harm. *Id.* at *27. Their injury was analogous to the injury recognized in the common law tort of defamation. *See id.* The 6,332 other class members whose incorrect credit reports were never given to any third party did not suffer such a similar harm and thus lacked any "injury in fact" sufficient for Article III standing. *Id.* at *37.

As to the allegations that TransUnion had violated the disclosure and summary-of-rights requirements of the FCRA, the Court found that no evidence had been presented to support a finding of such violations for any class member except Mr. Ramirez himself. *See id.* at *41. The rest of the class had no entitlement to a judgment on those issues, having lacked standing even to sue for them. *Id.*

The dissents

Justice Thomas had concurred in *Spokeo,* and his dissent in *TransUnion* seems to be an extension of that concurrence. In his view, the test for Article III standing differs depending on whether a plaintiff is asserting an individual private right or a "public right", that is, "a duty owed broadly to the community." *Id.* at *47. For Justice Thomas, if a plaintiff is claiming "a violation of an individual right", whether one at common law or one defined by Congress, that alone "gives rise to an actionable harm" for purposes of standing. *Id.* at 49. But if a plaintiff is claiming a violation of a "public right", then the plaintiff must also prove that he or she has suffered a "concrete harm." *Id.* at *55-56.

In the circumstances of *TransUnion*, Justice Thomas believed that each class member had established a violation of his or her private legal rights under the FCRA. *Id.* at *52. Therefore, in his view, each class member had Article III standing, even if not all of them had suffered a "concrete harm." *Id.*

While each of Justices Breyer, Sotomayor, and Kagan agreed with this ultimate conclusion, they "differ[ed] with Justice Thomas on one matter", as explained by Justice Kagan in an additional dissenting opinion. *Id.* at 68. Rather than saying that any violation of any individual right created by Congress would provide Article III standing, *id.*, she and her two colleagues would not recognize standing if "Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue." *Id.* at 69. But, echoing words from the *Goldman Sachs* decision a day before, *see Goldman Sachs Group, Inc. v. Arkansas Retirement Sys.*, No, 20-222, 2021 U.S. LEXIS 3391, at *20 (June 21, 2021) (the allocation of a particular burden of persuasion on a defendant, while novel, "is unlikely to make much difference on the ground"), Justice Kagan also asserted that her caveat in *TransUnion* would be "unlikely to make much difference in practice". *TransUnion,* 2021 U.S. LEXIS 3401, at *68.

The majority's reply

Justice Kavanaugh did not ignore the dissents. His response was firm: according to him, Justice Thomas's "theory would largely outsource Article III to Congress" because "so long as Congress frames a defendant's obligation to comply with regulatory law as an obligation owed to individuals, any suit to vindicate that obligation suddenly suffices for Article III." *Id.* at *24, n.3. This would be inconsistent with the allocation of authority in the Constitution itself. Simply stated, "Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law." *Id.*

Conclusion

The *TransUnion* decision is a good one for defendants in federal class actions generally, and in statutory privacy class actions in particular. But, as Justice Thomas observed in a footnote, the decision "might actually be a pyrrhic victory for TransUnion" and similar defendants in FCRA cases, because plaintiffs can also pursue such claims in state courts, where Article III limits do not automatically apply. *Id.* at *65 n.9. Thus, much as with the Class Action Fairness Act of 2005, *see, e.g.*, 28 U.S.C.A. § 1332(d) (West 2021), which was widely ballyhooed by the defense bar at the time of its passage, but then led to increases in state court filings, there may not be as much reduction in class action litigation from the *TransUnion* decision as some commentators expect. (And because *TransUnion* involves a *constitutional* standing issue, it may well reduce the strategic options for litigation across multiple venues even more.)

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