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Insights

TRANSUNION V. RAMIREZ: THE SUPREME COURT FURTHER NARROWS ARTICLE III STANDING AND REJECTS "NO INJURY" CLASS ACTIONS

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On June 25, 2021, the Supreme Court revisited the issue of Article III standing for the first time since *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). In *TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, – S. Ct. – (2021) (link), the Court clarified that if a plaintiff does not suffer a real harm and the risk of future harm never materializes, there is no concrete harm and no standing to assert a damages claim. The Court further held that "every class member" is required to meet this heightened standard for a concrete harm, which precludes "no injury" class actions in federal courts moving forward. The Court, therefore, reversed judgment on the claims of more than 6,000 putative class members whose *internal* credit reports contained an inaccuracy but were never published to any third party.

The *Ramirez* majority confirmed *Spokeo's* general rule of "no concrete harm, no standing" and then expanded on *Spokeo* by instructing that "an injury in law is not an injury in fact." In other words, even if a defendant's conduct violates a statute, the statutory violation alone does not rise to the level of a "concrete injury" for purposes of a plaintiff's Article III standing unless the violation caused the plaintiff to suffer a real world injury. Nor does the "risk" that a plaintiff may suffer a real world injury from the statutory violation in the "future" constitute a "concrete injury" sufficient to confer Article III standing. This Article III standing analysis is particularly significant in class actions because, although the Supreme Court declined to address the class certification standard in its opinion, *Ramirez* makes clear that "*every class member* must have Article III standing in order to recover individual damages." In short, federal courts now lack jurisdiction to hear "no injury" class actions.

The Court thus held that, although TransUnion technically violated the Fair Credit Reporting Act ("FCRA") by reporting inaccurate information on credit reports of 8,185 class members, over 75% of those class members did not suffer a "concrete injury" from, and therefore lacked Article III standing to seek damages from, TransUnion's inaccurate reporting because TransUnion did not disseminate the inaccurate information to a third party. Specifically, the Court found: "Here, the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized—that is, that the inaccurate . . . alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of

credit. Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses. Therefore, the 6,332 plaintiffs' argument for standing for their damages claims based on an asserted risk of future harm is unavailing." The Court thus reversed the nearly $40 million verdict that was awarded to the class, which improperly included the 75% of class members who lacked Article III standing. The Court then remanded the case to the Ninth Circuit to address class certification "in the first instance."

The Supreme Court's holding is a significant blow to consumer plaintiffs attempting to plead their way into federal court with claims based on alleged statutory violations that did not cause any real world injury. The manner in which the Court raised the bar for establishing concrete injuries is also likely to have a significant impact on class action practice, especially for "no injury" classes premised on statutory claims without an accompanying real world injury at all. Federal courts now lack jurisdiction to hear these "no injury" class actions. Nonetheless, both the majority opinion and dissent offer glimpses in to how other relief might be sought, such as potential claims for injunctive relief based on the risk of future harm and potential claims for general damages, including emotional distress or the like. Additionally, as the dissent suggests, *Ramirez* may also lead to a trend of "no injury" class actions premised on federal causes of action now being filed in state courts with more lenient standing requirements.

Takeaways

Ramirez will have wide reaching consequences for consumer plaintiffs, as well as for class action practice generally:

- **Consumer plaintiffs.** *Ramirez* unquestionably raises the bar for consumer plaintiffs seeking to pursue their claims in federal court. The Supreme Court started this process nearly five years ago in *Spokeo*, when it first made clear that a concrete injury is required for Article III standing and that a statutory violation, without more, often will not be sufficient to establish the required concrete injury. To the extent any question still remained after *Spokeo*, the *Ramirez* majority shut the door on those plaintiffs who have not suffered a real life injury. Following *Ramirez*, the alleged statutory violation at issue in the lawsuit must have actually injured the plaintiff. This explicit requirement is likely to keep many plaintiffs out of federal court because many plaintiffs bringing claims for procedural violations of federal statutes do not suffer an injury. Using *Ramirez* as an example, a violation of the FCRA does not always injure the plaintiff. The same will also be true of plaintiffs bringing claims for procedural violations of the FDCPA and TCPA.

- **"No injury" class actions.** The *Ramirez* majority confirmed that *"[e]very class member must have Article III standing in order to recover individual damages,"* even absent class members. As a result, federal courts no longer have jurisdiction to hear "no injury" class actions premised

on federal statutory violations with a class that suffered no real life injury from the violation. This significantly ups the ante for class counsel and class representatives who now will be tasked with proving a concrete injury for each member of the class. While *Ramirez* held that about 25% of the total class members could reach this threshold in the context of the FCRA when the defendant disseminated inaccurate information, it may not be so easy for consumer class actions involving different statutes without such clear potential injuries for particular class members. In the alternative, defendants may be able to parse putative classes into smaller segments if treatment and the potential for actual harm is disparate, making the putative class members not similarly situated.

- **Standing and class certification.** While rebuking "no injury" class actions, the *Ramirez* majority did not address *when* standing challenges should be made. Instead, in a footnote, it declined to address "the distinct question whether every class member must demonstrate standing *before* a court certifies a class." *See* 2021 WL 2599472, at *10 n.4 (emphasis in original). However, in that same footnote, the majority strongly suggested that standing challenges are appropriate before class certification when it cited *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019). which is an Eleventh Circuit decision requiring district courts to review and consider whether standing predominates over common issues in the case under Rule 23(b)(3) *before class certification*. Additionally, the majority noted at the end of its opinion that it "need not" address typicality "[i]n light of our conclusion about Article III standing," thus also inferring that standing challenges are appropriate before class certification. *See* 2021 WL 2599472, at *23. Defendants can use this guidance to assert standing challenges as early as possible. Since the majority remanded the case to the Ninth Circuit to address class certification "in the first instance," the Ninth Circuit will likely very soon have the opportunity to revisit the timing of such standing challenges vis-à-vis class certification, which could lead to even further litigation and *Ramirez* being right back before the Supreme Court on class certification issues.

- **Typicality.** In what may have been a missed opportunity, *Ramirez* declined to address the issue of typicality under Rule 23(a)(2). *Id.* at *16. While typicality challenges usually occur when the named plaintiff has an *atypically weak* claim compared to the rest of the class (thus putting the class at a disadvantage), *Ramirez* would have presented a unique opportunity to review a case where the named plaintiff's claim was *atypically strong*– indeed, the majority found that the named plaintiff was the only member of the entire class that had standing as to all three FCRA claims asserted. As a result, the Supreme Court could have addressed the challenge faced by a defendant when a named plaintiff has the strongest claim of the class and whether Rule 23(a)(3)'s typicality requirement is met in that situation. Instead, that issue will have to wait until (or if) it is presented in another case.

- **Inaccurate credit reporting.** With regard to FCRA claims arising from inaccurate credit reporting, *Ramirez* answers the question: If a tree falls and no one is there to hear it, does it make a

sound? In the context of inaccurate credit reporting and claims under the FCRA, *Ramirez* answered this question in the negative. In short, after *Ramirez*, inaccurate credit reporting alone does not confer standing. The reporting must have damaged the plaintiff. Most often, the injury may occur – as *Ramirez* contemplated – if and when the reporting is disseminated to a third party. If no such dissemination occurs, there is unlikely to be an injury to the plaintiff. For instance, the majority gave the example of "someone [who] wrote a defamatory letter and then stored it in her desk drawer," concluding that "[a] letter that is not sent does not harm anyone, no matter how insulting the letter is." *Id.* at *12. The same rationale now applies to credit reporting giving rise to claims under the FCRA.

- **More than a "risk of future injury."** The majority also dealt a significant blow to plaintiffs using a "risk of future injury" as a ground to establish Article III standing. In the context of the FCRA, this most commonly arises in privacy and data breach cases. Following *Spokeo*, a circuit split had arisen regarding whether a risk of future injury was sufficient to constitute a concrete injury for FCRA claims premised on privacy violations. *Ramirez's* majority, however, created a significant hurdle for plaintiffs arguing for Article III standing based on the risk of future injury alone. In an action for damages (as distinguished from an action for injunctive relief), the "asserted risk of future harm" does not constitute a concrete injury unless the plaintiff can "demonstrate that the risk of future harm materialized." Extending this rationale to privacy and data breach cases, plaintiffs will be hard pressed to establish a concrete injury unless they have suffered a real injury from the privacy violation or data breach; the "risk" of such harm in the future will no longer suffice.

- **State court.** One possible consequence of *Ramirez* is a flood of "no injury" class actions in state courts. In the dissent, Justice Thomas warned that *Ramirez* "might actually be a pyrrhic victory for TransUnion." *Id.* at *23 n.9. He reasoned that plaintiffs without injuries are more likely to simply file their claims in state court moving forward – and defendants will be unable to remove – because *Ramirez* "does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases." Many states, including Illinois and New York, have more lenient standing requirements than federal courts, and also have judges that are more likely to have liberal interpretations of the federal statutes upon which most "no injury" class actions are based. In other words, while TransUnion may have won the battle, the war is far from over.

- **Closing circuit splits.** Time will tell if *Ramirez* results in closing the circuit splits that emerged following *Spokeo*. It is reasonable to expect that the *Ramirez* majority's instruction as to what is required to establish concrete injuries, especially in the context of a "risk of future injury," will eliminate some of the open circuit splits. The ruling tends to adopt logic traditionally advanced by the Sixth, Seventh and Eleventh Circuits, requiring more than a bare violation to establish a concrete injury. However, it is also worth noting that the majority did not expressly address any

of these circuit splits. As a result, it will be up to the individual circuits to interpret *Ramirez*, which, as we learned following *Spokeo*, may yield continuing differences.

For questions or further information, please reach out to your regular Bryan Cave Leighton Paisner LLP contact, a member of BCLP's Business and Commercial Disputes, Class Actions, or Consumer Finance Disputes practices, or the authors of this Client Alert.

Please see below for additional background information regarding Article III Standing & *Spokeo*, including additional detail on the Supreme Court's *Ramirez* ruling:

Article III Standing

Article III standing requires: (1) an injury-in-fact; (2) fairly traceable to the challenged conduct; and (3) that is likely to be redressed by a favorable judgment. *Spokeo*, 136 S. Ct. at 1547. To establish an injury-in-fact, a plaintiff must establish that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 1548. Until *Ramirez*, *Spokeo* had been the seminal case addressing when a plaintiff suffers a "concrete harm" for an injury-in-fact.

Spokeo And Its Aftermath

In *Spokeo*, the Supreme Court instructed that the concrete and particularized requirements for an injury-in-fact are to be evaluated separately. The Court further clarified that concrete injuries can be tangible or intangible, but when the injury is intangible, the mere fact that Congress codified a cause of action does not confer standing. In other words, "Article III standing requires a concrete injury *even in the context of a statutory violation*." (Emphasis added.) To be concrete, the intangible injury must be real and have a close relationship to traditional, common law harms.

The Supreme Court then remanded the case back to the Ninth Circuit to consider whether the plaintiff's allegations of inaccurate credit reporting and the impact on his employment prospects were sufficiently concrete. In *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017) (see Client Alert here), the Ninth Circuit answered that question in the affirmative, holding that the plaintiff had established a concrete injury for purposes of Article III standing because the alleged inaccurate credit reporting created "real harm" to the plaintiff's employment prospects at a time when he was unemployed.

The defendant appealed the Ninth Circuit's *Spokeo* ruling back to the Supreme Court, which denied the petition for writ of certiorari (see Client Alert here). The Supreme Court's refusal to provide additional instruction led to numerous circuit splits due to diverging ways in which federal district and appellate courts interpreted and applied *Spokeo*. While many of the circuit splits arose regarding claims under the FCRA, the circuit splits also extended to other federal statutes as well, including the FDCPA, TCPA, and VPPA.

Ramirez – The District Court And Ninth Circuit Cases

The *Ramirez* plaintiff filed his FCRA complaint against TransUnion on behalf of himself and a putative class in 2012. He alleged three different FCRA violations against TransUnion – (1) failure to use reasonable procedures to ensure the accuracy of the plaintiff's credit files, (2) failure to use the proper format for its disclosure statement, and (3) failure to use the proper format for the summary-of-rights. Specifically, Ramirez alleged that TransUnion inaccurately reported that he and other class members were on a list of "specially designated nationals" by the Office of Foreign Assets Control ("OFAC"), indicating they were subject to sanctions and with whom business entities were forbidden to transact business.

Ultimately, Ramirez and TransUnion stipulated that TransUnion inaccurately reported the OFAC designation for 8,185 individuals but only disseminated reports for 1,853 of those 8,185 individuals. Stated differently, TransUnion did not disseminate the inaccurate information for 6,332 of the individuals. As the Supreme Court majority would later explain, these 6,332 individuals likely would "first learn that they were 'injured' [by TransUnion] when they received a check compensating them for the supposed injury."

The district court certified a class encompassing all 8,185 class members who were allegedly subjected to inaccurate credit reporting by TransUnion – both the 1,853 individuals for whom TransUnion did disseminate the inaccurate information to third parties and the 6,332 individuals for whom it did not. After *Spokeo*, TransUnion moved to decertify the class, but the district court denied that motion. The jury eventually entered a judgment in favor of the class of almost $60 million, including punitive damages for willful violations of the FCRA. In February 2020, the Ninth Circuit affirmed the district court's certification of the class but reduced the jury's verdict from $60 million to $40 million. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020).

Ramirez – The Supreme Court's Decision

By a 5-4 vote, the Supreme Court reversed the Ninth Circuit on the ground that the 6,332 individuals for whom TransUnion did not transmit the inaccurate credit reporting to any third parties did not suffer a concrete injury and lacked Article III standing to pursue claims against TransUnion. In reaching that conclusion, Justice Kavanaugh writing for the majority (which included Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett):

- Confirmed, reiterating *Spokeo*, that "concrete harms" for purposes of Article III standing must be "real, and not abstract." *See* 2021 WL 2599472, at *7. "Real" injuries can be both tangible and intangible. *Id.* Tangible injuries, such as "physical harms and monetary harms," are the "most obvious." *Id.* "If a defendant has cause a physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III. *Id.* Additionally, "various intangible injuries can also be concrete," and "[c]hief among them are injuries with a close

relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.*

- Held that not every violation of a statute will constitute a concrete harm for purposes of establishing standing. "For standing purposes, … an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiffs suffering concrete harm because of the defendant's violation of federal law." *Id.* at *8. In other words, "Congress's creating of a statutory prohibition 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." *Id.* Courts "cannot treat an injury as 'concrete' for Article III purposes based solely on Congress's say-so." *Id.*

- *Held that "[e]very class member must have Article III standing in order to recover individual damages."* at *10. The *Ramirez* majority then went on to analyze whether the class standing with respect to the three FCRA claims asserted.

- Had "no trouble" concluding that the 1,853 class members for whom TransUnion disseminated credit reports with the inaccurate information to third parties suffered a concrete injury. *Id.* at *10-11. The majority concluded that the injury caused by the dissemination of the inaccurate information about each of the 1,853 being a "terrorist" bears a "close relationship" to "the reputational harm associated with the tort of defamation." *Id.* Although the two injures were not identical, the majority noted that "we do not require a exact duplicate" and the harm from being labeled a terrorist by TransUnion's report was "sufficiently close" to the injury from defamation. *Id.*

- Nonetheless held that the 6,332 class members for whom TransUnion did not share the inaccurate reports to any third party lacked standing because they did not suffer a concrete injury. "The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm." *Id.* at *12. The majority further held that the "asserted risk of future harm" from the inaccurate information did not constitute a concrete injury because the plaintiffs "did not demonstrate that the risk of future harm materialized" or that "the class members were independently harmed by their exposure to the risk itself." To make its point, the majority commented that these class members may not even have known that their TransUnion report was inaccurate, and concluded that "[i]t is difficult to see how a risk of future harm could supply the basis for a plaintiff's standing when the plaintiff did not even know that there was a risk of future harm."

- Additionally held, regarding the plaintiffs' formatting claims based on mailings sent by TransUnion to all 8,185 class members, the majority found that even though all 8,185 class members complained about formatting defects in certain only lead plaintiff Sergio Ramirez had demonstrated that the alleged formatting errors caused him concrete harm, meaning that only he could move forward with those claims. *Id.* at *15-16. The rest of the class lack

standing regarding those claims because "the plaintiffs have identified no 'downstream consequences' from failing to receive the required information [in the required format]." *Id.*

Based on the above, the majority reversed the Ninth Circuit's judgment and remanded the case back to the Ninth Circuit to "consider in the first instance whether class certification is appropriate in light of our conclusion about standing." As a result, on remand, the Ninth Circuit will be tasked with re-evaluating the district court's decision to certify the class of 8,185 class members in light of the Supreme Court's ruling that 6,332 of those members lack standing.

Justices Thomas, Breyer, Sotomayor, and Kagan dissented, arguing, in part, that "each class member established a violation of his or her private rights" and that "[t]he plaintiffs thus have a sufficient injury to sue in federal court." *Id.* at *20-21. Responding to the majority's holding that a concrete injury is required in addition to a defendant's statutory violation the dissent found it "remarkable" that the majority "relieved the legislature of its power to create and define rights." *Id.* Finally, the dissent warned that *Ramirez* will result in more "no injury" class actions being filed in state courts, rather than federal courts. *Id.* at *23 n.9.

RELATED PRACTICE AREAS

- Class Actions

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