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# SCOTUS standing ruling – "No concrete harm, no standing" – sidesteps class action issues and could limit federal subject matter jurisdiction over class actions

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**Takeaway**: In *TransUnion LLC v. Ramirez,* --- S. Ct. ----, No. 20-297, 2021 WL 2599472 (June 25, 2021), the Supreme Court granted certiorari to resolve the question of "[w]hether 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." Given this question, and as we explained in a prior article – *SCOTUS grants certiorari to resolve critical class action standing issue* (January 26, 2021) – we fully expected the TransUnion decision to be an important class action ruling. But the *TransUnion* majority opinion constitutes another claim-by-claim, remedy-by-remedy concrete harm explication that we have seen many courts perform since *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). The TransUnion majority focused exclusively on the standing issues raised by the three claims and corresponding remedies asserted by the plaintiff and certified class under the Fair Credit Reporting Act (FCRA), holding that (1) only those class members whose misleading credit reports actually had been distributed to third parties had standing to sue, and (2) only the class representative (Mr. Ramirez) had standing to bring his disclosure and summary of rights claims under FCRA, given that the trial evidence focused exclusively on his plight and did not address the circumstances of the absent class members. The majority's mantra – "No concrete harm, no standing" – undoubtedly will be repeated many times. 2021 WL 2599472, at *3, 15. But the court largely sidestepped the key class action issues embedded in the certified question, meaning the most significant aspects of the ruling likely will be the majority's elimination of "the risk-of-harm" analysis for damages claims and the diminishment of federal jurisdiction over claims alleging intangible harms and "procedural" statutory violations.

The *TransUnion* case dealt with the list maintained by the U.S. Department of Treasury of individuals prohibited from transacting business in the United States for national security reasons. Because merchants who do business with people on this "terrorist list" can face big fines, one of the largest credit reporting agencies, TransUnion, developed a product to "match" consumers to the list. But this matching process only involved a rudimentary first-and-last-name search, with the unsurprising result that thousands of consumers had incorrect "terrorist alerts" placed on the front page of their credit reports.

Non-terrorist Sergio Ramirez had a rather unpleasant experience with this process. In 2011, he went to a Nissan dealership to buy a car with his wife and father-in-law, only to be told he could not buy a car because his credit

report identified him as being on the terrorist list. Although his wife ended up buying the car in her own name, Mr. Ramirez understandably felt "embarrassed, shocked, and scared," a reaction compounded by the fact he later received confusing and conflicting information from TransUnion about the terrorist alert. He even called the Department of Treasury. And he later cancelled a vacation to Mexico he had planned with his family.

In 2012, Ramirez filed a putative class action against TransUnion in the Northern District of California, alleging three claims under FCRA: (1) TransUnion willfully failed to follow "reasonable procedures" to make sure that his credit report was accurate, given that TransUnion used only "rudimentary name-only searches" to generate the terrorist alerts (the reasonable procedures claim); (2) TransUnion willfully failed to disclose to him an accurate version of his credit report that showed the terrorist alert on the report (the disclosure claim); and (3) TransUnion willfully failed to provide the required "summary of rights" when it sent him a separate "courtesy letter" notifying him about the terrorist alert (the summary of rights claim). He sought to represent a class of persons who (1) had been falsely labeled a potential terrorist; (2) requested a copy of his or her credit report; and (3) received a separate courtesy letter that contained no summary of rights.

The district court certified a class of 8,185 individuals, even though only 1,853 class members actually had their credit reports disseminated to potential creditors. At trial, counsel for Ramirez introduced evidence focusing on the egregious and sympathetic facts of Mr. Ramirez's plight but did not introduce evidence pertaining to the circumstances of the absent class members (among other things failing to offer evidence that any of the absent class members reviewed their credit reports or otherwise opened the courtesy letters). The jury ultimately found in favor of the class on the FCRA claims, awarding each class member $984.22 in statutory damages and $6,353.08 in punitive damages, for a total award in excess of $60 million.

TransUnion appealed on a number of issues, including class standing. Addressing an issue of first impression, the Ninth Circuit held that "every member of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages." *Ramirez v. TransUnion, LLC*, 951 F.3d 1008, 1017 (9th Cir. 2020). The Ninth Circuit majority emphasized, however, that its holding did not alter the showing required at the "early stages of a case," including the class certification stage, where only the class representative need demonstrate standing. *Id*. at 1017 n.1 & 1023 n.6. Indeed, the majority framed the issue – a "question of first impression" – as "who must show standing in a class action at the *final* stage of a damages suit." *Id*. at 1017 (emphasis added).

The majority affirmed the district court's ruling that all of the absent class members had standing at the final stage of the case, and the majority affirmed the district court's denial of TransUnion's motion to decertify the class for lack of standing as well as its post-trial motions raising the same issues. *Id*. at 1030. But the majority reduced the punitive damages award to $3,936.88 per class member, reducing the total award to roughly $40 million.

Judge McKeown, dissenting in part, concluded that "no one but Ramirez and the class members whose

information was disclosed to a third party had standing to assert a reasonable procedures claim, and only Ramirez had standing to bring the disclosure and summary of rights claims." *Id*. at 1038 (McKeown, J., concurring in part and dissenting in part).

Regarding the reasonable procedures claim, Judge McKeown acknowledged that the 1,853 class members whose reports had been sent to a third person had standing. But she found no evidence supporting standing for the other three-quarters of the class, noting that while class counsel "could have offered expert testimony, representative class members, and credit agency protocol to fill this gap," no such evidence "was proffered." *Id*. at 1040. "Because no evidence in the record establishes a serious likelihood of disclosure, we cannot simply presume a material risk of concrete harm, and three-quarters of the class lacks standing for the reasonable procedures claim." *Id*.

As for the disclosure and summary of rights claims (based on the confusing and conflicting information received by Mr. Ramirez about the terrorist alert), Judge McKeown explained class counsel had presented "no evidence" that "a single other class member so much as opened the dual mailings, or that anyone other than Ramirez was surprised to receive them." *Id*. at 1041. In the absence of such evidence, the disclosure and summary of rights violations as to the other class members constituted "only 'a bare procedural violation, divorced from any concrete harm,'" and thus failed under *Spokeo*. Id. (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).

As expected, *TransUnion* applied for certiorari, relying in substantial part on Judge McKeown's dissent, which the Supreme Court granted on 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." Given the question the court accepted, we expected the Supreme Court's decision in TransUnion to be an important class action decision. But the Supreme Court's ruling went in an entirely different direction.

In a 5-4 decision authored by Justice Kavanaugh, the court essentially adopted the reasoning set out in Judge McKeown's opinion, ruling that only the 1,853 class members (including Ramirez) whose reports had been sent to third parties had standing to assert a reasonable procedures claim, and only Ramirez had standing to assert the disclosure and summary of rights claims. Among other startling conclusions, the majority essentially closed all federal courthouse doors to numerous congressionally-authorized statutory damages claims, if the claimants could not meet the Court's heightened "concrete harm" test: "if the law of Article III did not require plaintiffs to demonstrate a 'concrete harm,' Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law." 2021 WL 2599472, at *9.

In his dissent, Justice Thomas (joined by Justices Breyer, Sotomayor and Kagan) took issue with this sweeping conclusion: "Never 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. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights." *Id*. at *21 (Thomas, J., dissenting) (emphasis in original, footnote omitted).

As Justice Thomas's dissent also noted, the most significant aspect of the *TransUnion* majority opinion may be the elimination of "the risk-of-harm" analysis for damages claims. *See id*. at *15 ("the risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim."); *see also id*. at *22 ("According to the majority, an elevated risk of harm simply shows that a concrete harm is *imminent* and thus may support only a claim for injunctive relief.") (Thomas, J., dissenting) (emphasis in original). In Justice Thomas's view, the majority's confinement of the risk-of-harm analysis to injunctive relief claims directly conflicts with the Court's ruling in *Spokeo*. *Id*. at *22 ("The theory that risk of harm matters only for injunctive relief is thus squarely foreclosed by *Spokeo* itself.").

The majority largely sidestepped the class action issues embedded in the question accepted, ruling: "In light of our conclusion about Article III standing, we need not decide whether Ramirez's claims were typical of the claims of the class under Rule 23. On remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing." *Id*. at *16. But the court did rule that the 1,853 class members whose reports had been sent to third parties had standing and could have ruled on the question of whether Ramirez's reasonable procedures claim was typical of the claims of those 1,853 class members (which included Ramirez). Justice Kavanaugh's standing analysis would seem to demonstrate the typicality requirement had been satisfied as to those 1,853 class members. *See id*. at *10-11.

While the majority held that "[e]very class member must have Article III standing in order to recover individual damages" (*id*. at *10), it declined to "address the distinct question whether every class member must demonstrate standing *before* a court certifies a class." *Id*. at *10 n.4 (emphasis in original). Regarding this timing issue – at what stage of the case must class member standing be evaluated – courts at the class certification stage oftentimes look ahead as to how claims would be proved at trial in assessing whether Rule 23's requirements have been satisfied. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 & n.6 (2011) (recognizing courts must sometimes "probe behind the pleadings before coming to rest on the certification question") (citation omitted). This would support a district court assessing class member standing at the class certification stage, with a view towards examining how class member standing would be proved at trial. *See TransUnion,* 2021 WL 2599472, at *10 ("the specific facts set forth by the plaintiff to support standing 'must be supported adequately by the evidence adduced at trial'" (citation omitted)).

Finally, as Justice Thomas also noted in his dissent, the majority's standing ruling could have the effect of

foreclosing federal subject-matter jurisdiction over many class actions. Because the majority found no standing – and therefore no federal subject-matter jurisdiction – with respect to the class's disclosure and summary of rights claims, the dismissal of such claims must be without prejudice. In the absence of a disposition on the merits, the claims can be re-filed in state court, where (under the majority's reasoning) they would not be subject to removal to federal court. As Justice Thomas aptly observed: "Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which 'are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law'—as the sole forum for such cases, with defendants unable to seek removal to federal court. By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions." *Id*. at *23 n.9 (citations omitted).