C L I F F O R D

C H A N C E

TRANSUNION V. RAMIREZ: SUPREME COURT REINS IN CLASS CLAIMS FOR STATUTORY DAMAGES

Class claims involving little more than statutory damages suffered another setback on June 25, 2021, as the Supreme Court held in *TransUnion v. Ramirez* that a statutory cause of action cannot by itself create standing. Building upon the Court's 2016 decision in *Spokeo v. Robins*, the 5-4 opinion authored by Justice Kavanaugh will place important restrictions on the ever-increasing incidence of class action claims—particularly those premised on statutory violations. The Court also found that a risk of future harm is not by itself sufficient injury to create standing in a damages claim, a finding that will make it significantly more difficult to prevail on claims arising from data breaches.

Key issues

- The Supreme Court held in *TransUnion v. Ramirez* that a statutory cause of action cannot by itself create standing.
- The Court also found that a risk of future harm by itself is not sufficient injury for standing in a damages claim.
- The 5-4 decision will likely reign in class claims for statutory damages, as well as damages claims based on increased risk of future harm (including many data breach class actions).

SPOKEO V. ROBINS: ARTICLE III STANDING AND THE FCRA

Article III of the U.S. Constitution limits federal judicial power to decisions involving a case or controversy. Over time, federal courts have interpreted this "standing" requirement to mean that a plaintiff must show that they have suffered an injury in fact that is redressable by the courts.

The "injury in fact" requirement was one of the main points of focus in the 2016 landmark decision in *Spokeo v. Robins*, which involved a class action filed against Spokeo, a company that provides consumer reports, for certain violations of the Fair Credit Reporting Act (FCRA).[1] Robins alleged that Spokeo violated the FCRA and published inaccurate information about him.

The district court dismissed Robins' complaint for lack of standing, but the Ninth Circuit reversed, finding that Robins' allegation that Spokeo had violated his statutory rights was sufficient for standing.

The Supreme Court reversed, explaining that Article III standing requires an injury that is both "concrete" and "particularized." A "particularized" injury is one that

[1] The FCRA imposes certain restrictions and requirements on the creation and use of consumer reports compiled by U.S. credit reporting agencies. Businesses, landlords, employers, and others use these reports to evaluate the creditworthiness of consumers.

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affects the plaintiff in a personal and individual way—which the Ninth Circuit properly found when it determined that Robins had alleged violation of his own statutory rights. A "concrete" injury, on the other hand, is one that actually exists—*i.e.* it is real and not abstract. The Court found that the Ninth Circuit had not considered whether Robins' injury was "concrete," and thus the Court remanded the case for that determination.

In the 6-2 opinion written by Justice Alito, the Court provided guidance on what injuries are "concrete" for Article III standing. Concrete injuries include tangible harms—monetary and physical injury—as well as intangible harms such as improper restrictions on constitutional rights or common law harms such as slander. The Court explained that Congress could define certain injuries through statute, but such injuries must still cause harm—"bare" procedural violations of a statute were not sufficient for standing. Thus, a failure to follow procedural requirements by itself may not create a concrete injury, but a failure that results in increased risk of harm may be sufficient.

On remand, the Ninth Circuit again reversed, finding that the injury was both concrete and particularized. After the Supreme Court refused to consider Spokeo's second appeal, the parties settled.

TRANSUNION V. RAMIREZ: LOWER COURT RULINGS

Like in *Spokeo*, the *TransUnion* dispute also centers on whether an FCRA violation creates a "concrete" injury sufficient for Article III standing.

TransUnion is one of the three major credit reporting agencies in the United States that compiles consumer credit reports. TransUnion also offers add-ons to its credit reports, including the OFAC Name Screen Alert, which alerts customers seeking a credit check that an individual is a "potential match"[2] to a name on the list of specially designated nationals maintained by the Office of Foreign Assets Control (OFAC).[3]

The *Ramirez* class action arose after TransUnion placed an OFAC Name Screen Alert on the credit report of the named plaintiff, Sergio Ramirez. A car dealer in California refused to sell a car to Ramirez after obtaining his credit report from TransUnion with the OFAC alert. As a result, Ramirez's wife had to buy the car solely in her own name.

After the incident, Ramirez contacted TransUnion to obtain a copy of his credit report. TransUnion sent Ramirez two mailings. The first mailing included his credit file and a summary of his rights, with no mention of the OFAC alert. The second mailing consisted of a letter explaining that Ramirez's name was a potential match to one or more names on the OFAC list, but this mailing did not include any summary of Ramirez's rights.

As a result of these mailings and the OFAC alert, Ramirez contacted a lawyer and canceled a planned trip to Mexico.

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[2] At the time of the events giving rise to the claim, TransUnion's OFAC Name Screen Alert service simply compared a consumer's first and last name against OFAC's list, without conducting any further verification procedures.

[3] Federal law generally prohibits any business transactions with individuals on OFAC's list of specially designated nationals. The members of the list are terrorists, drug traffickers, and other serious criminals who threaten America's national security.

In February 2012 Ramirez commenced a class action against TransUnion alleging three violations of the FCRA:

- Failure to follow reasonable procedures to ensure the accuracy of information in his credit file—specifically, the OFAC alert;[4]
- Failure to provide complete credit file information upon request (the first TransUnion mailing did not include the OFAC alert);[5] and
- Failure to provide required documentation with each mailing (the second mailing did not include any summary of consumer rights).[6]

Ramirez's proposed class contained 8,185 members who had been incorrectly identified as a potential OFAC match as part of TransUnion's OFAC Name Screen Alert service and who had sought and received documentation from TransUnion in the same allegedly improper manner as Ramirez. Of these, only 1,853 members of the class had their credit reports actually shared with a potential creditor. TransUnion opposed the class, arguing among other things that each member must have suffered a concrete injury to have standing.

The district court certified the class, finding that TransUnion's procedural violation in creating the inaccurate OFAC designations created a risk of injury sufficient to meet the concreteness requirement under *Spokeo*, regardless of whether the inaccurate reports were actually shared with potential creditors. After trial, a jury awarded statutory and punitive damages of over $60 million.

On appeal, the Ninth Circuit affirmed the district court's standing determination but reduced the award to approximately $40 million.

TRANSUNION V. RAMIREZ: KAVANAUGH'S OPINION

The Supreme Court reversed. In a 5-4 opinion authored by Justice Kavanaugh, the Court re-emphasized the importance that an injury be "concrete" in order to be sufficient for Article III standing. Building on constitutional principles of separation of powers and limits placed on the judiciary and legislature, the Court re-iterated its observation in Spokeo that, while Congress could establish an injury in law, such an injury was not automatically an injury in fact. The Court then elaborated on what injuries are "concrete," providing examples and instructing courts to consider whether an alleged intangible harm has a "close relationship" to a harm "traditionally" recognized by U.S. courts as being sufficient for Article III standing.

Applying these principles to the proposed class in Ramirez, the Court found that the members of the class whose credit reports had actually been shared with potential creditors had alleged concrete injuries from TransUnion's failure to ensure the accuracy of their credit reports, but the remaining class members had not. Specifically, the Court found that the mere presence of inaccuracies in a credit file does not by itself cause concrete harm.

The Court also rejected the plaintiffs' alternative argument that inaccuracies in a credit file created a risk of future harm sufficient for standing in a damages claim.

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4. *See* 15 U.S.C. § 1681e(b), which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports.
5. *See* 15 U.S.C. § 1681g(a)(1), which requires consumer reporting agencies to, upon request, disclose "[a]ll information in the consumer's file."
6. *See* 15 U.S.C. § 1681g(c)(2), which requires consumer reporting agencies to provide a summary of rights prepared by the Consumer Financial Protection Bureau with "each written disclosure by the agency to the consumer."

The Court pointed out that, while such a risk may be sufficient for Article III standing in a suit for injunctive relief,[7] it was not sufficient for a damages claim. The plaintiffs had not shown that any harm had actually materialized from the inaccuracies; nor had they presented any evidence of any other type of injury, such as emotional harm.

The Court used similar reasoning to reject the second and third allegations (arising from what the Court called "formatting defects" in the TransUnion mailings) for the entire class. The Court pointed out that, formatting defects aside, each class member had received the requested and required information. None of the plaintiffs had demonstrated any harm arising from the formatting defects, so none of the plaintiffs could establish standing.

CONCLUSION & TAKEAWAYS

The *Ramirez* opinion makes clear that Congress cannot legislate around Article III's injury-in-fact standing requirement—that inquiry is solely under the purview of the judiciary. This holding may influence future legislation, as lawmakers grapple with the implications of the Court's holding. State legislatures may be emboldened to continue to lead the way in developing data protection laws if federally-created private rights of action cannot be vindicated in federal court.

Perhaps more importantly from a practical perspective, the opinion places significant limits on consumer class actions. *Ramirez* raises the bar for plaintiffs, requiring them to plead concrete injuries arising from any statutory violations, regardless of whether Congress authorized suit or not. Plaintiffs claiming to have suffered an increased risk of future harm may also face more difficulty overcoming a standing challenge. The Court's skepticism that such risk can create standing for damages will have important implications in particular for data breach class actions, which often are often based in large part on the increased risk victims face of identity theft and fraud.

Ramirez's requirement of a concrete injury beyond risk of harm may also have a cascading effect of making class certification more difficult to obtain. The Court explicitly left open the question of whether each class member must demonstrate standing before a court certifies the class.[8] Such class-wide showing could potentially be even more difficult after *Ramirez*.

Whether these limits actually reduce the incidence of large consumer class actions depends on how lower courts interpret and apply *Ramirez*. Indeed, lower court application of *Spokeo* was mixed, with some courts considering the decision to have not actually changed the law of standing—something that may have prompted the Court to take up and decide *Ramirez* as it did. Class counsel may also increasingly turn to state court to avoid the tricky questions of standing made more difficult by the *Ramirez* holding.

In the meantime, companies defending against class actions should carefully scrutinize whether *Ramirez* could reinvigorate a standing challenge to any claims they face.

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[7] *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013).
[8] *See* note 4 of the majority opinion.

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