Consumer Finance Litigation and Class Action Defense

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How SCOTUS Clarified the *Spokeo* Standard of "Concrete" Harm Necessary to Establish Article III Standing, and What It Means for the Future of Class Actions

On June 25, 2021, the United States Supreme Court issued its decision in *TransUnion LLC v. Ramirez,* No. 20-297, 2021 WL 2599472 (U.S. June 25, 2021) ("TransUnion"), providing much needed clarity regarding the type of "concrete" harm necessary to establish a plaintiff's standing under Article III of the United States Constitution.

In a 5-4 decision authored by Justice Kavanaugh, the Court expounded on its ruling in *Spokeo, Inc. v. Robins,* 578 U.S. 330 (2016), using several examples to illustrate how to measure the harm plaintiffs allege from a statutory violation. As Justice Kavanaugh succinctly stated: "No concrete harm, no standing."

In *TransUnion,* the lower court certified a class of 8,124 absent class members who purportedly suffered injury under the Fair Credit Reporting Act ("FCRA") because TransUnion had placed an alert on their credit report indicating that the consumer's name was a "potential match" to a name on the list maintained by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") of terrorists, drug traffickers, and other serious criminals.

Although lead plaintiff Sergio Ramirez suffered an actual injury, having been denied a car loan when a credit report from TransUnion indicated he was on the OFAC list, 75 percent of the class members had not suffered any recognizable harm or any material risk of harm because their credit reports were never disseminated to any third party. At most, those plaintiffs suffered confusion because they received mailings from TransUnion regarding the erroneous reporting.

In reversing the lower courts, which had certified the class and held that Article III standing had been established for all class members, the Court revisited its prior ruling in *Spokeo* and held 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 any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment… And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court.

The Court also explained that to determine whether a plaintiff has established Article III standing, courts must "[a]ssess…whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm." Importantly, the Court's clarified analysis cuts off the growing line of District and Circuit Courts around the nation that have interpreted *Spokeo* to mean that if the statute in question protects against a

"substantive" harm bearing a "close relationship" to a harm traditionally recognized at common law, the harm alleged due to a violation of that statute constitutes a concrete injury in fact sufficient to establish Article III *without any additional showing.*[1] *TransUnion* reinforces that, regardless of whether the rights at issue are substantive or procedural in nature, courts must analyze whether a plaintiff has sufficiently alleged a concrete harm beyond the mere violation of the statute.

The Court also rejected the plaintiffs' argument that with respect to the class members whose inaccurate OFAC credit information was not disseminated to third parties, the *risk of future harm* was sufficient to establish a concrete injury for Article III purposes. The Court recognized that the mere risk of future harm cannot establish a concrete harm unless it materializes, analogizing the situation to a woman driving behind a reckless driver. If "the risk does not materialize and the woman makes it home safely…, that would ordinarily be cause for celebration, not a lawsuit."

Although the *TransUnion* decision pertains to the FCRA, the decision will have a wide-ranging impact in matters involving the Fair Debt Collection Practices Act ("FDCPA"), the Telephone Consumer Protection Act ("TCPA"), and other consumer protection and privacy statutes.

The *TransUnion* decision may also impact the pending Petition for *Hearing En Banc in Hunstein v. Preferred Collection and Management Services, Inc.,* 994 F.3d 1341 (11th Cir. 2021), *see* The Hunstein Effect—Examining the Eleventh Circuit's Ruling and What's Next for Debt Collectors and Their Third-Party Service Providers. In *TransUnion,* footnote 6, the Court stated: "Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation," and because defamation "generally require[s] evidence that the document was actually read and not merely processed," internal publication "does not bear a sufficiently 'close relationship' to the traditional defamation tort to qualify for Article III standing." This language suggests that the plaintiff in *Hunstein* may lack standing and thus impacts both the pending Petition for Hearing En Banc and the numerous new cases filed under the same theory relied upon in *Hunstein.*

TransUnion will likely lead to many actions alleging mere statutory violations with no additional concrete injury to be dismissed under Fed. R. Civ. 12(b)(1) and may significantly curtail such actions from proceeding past the class certification stage. Indeed, although the Court did not "address the distinct question whether every class member must demonstrate standing before a court certifies a class," the Court did direct the Ninth Circuit on remand to "consider in the first instance whether class certification is appropriate in light of [its] conclusion about standing." To justify class certification in federal court, an action must satisfy certain prerequisites under Fed. R. Civ. P. 23, and the burden is on the party seeking to maintain the lawsuit as a class action to establish each of these prerequisites by a *preponderance of the evidence. Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1022) (9th Cir. 1998). This means that it is a plaintiff's burden to establish standing as to each class member and to meet the elements of each claim in federal court, including, as emphasized by the Court, entitlement to damages and other relief afforded by each of the asserted claims. In *TransUnion* for example, the Court emphasized that "the plaintiffs' attorneys could have attempted to show that some or all of the 6,332 class members were injured in the [concrete and particular] way. They presumably could have sought the names and addresses of those individuals, and they could have contacted them," but instead they relied on inferences, which "are insufficient to support standing." Standing is and will therefore be in the mix for all of the criteria under Rule 23, including commonality, typicality, and superiority. If a defendant can either present evidence showing enough class members lack concrete harm, or sufficiently argue that the plaintiff has not met the burden to show enough class members were harmed in a redressable manner, class certification can be denied. First, it is well-settled that named plaintiffs who lack standing are not "typical." Second, in this instance, courts may find that the individualized issue regarding standing is one where "members of a proposed class will need to present evidence that varies from member to member," *Tyson Foods, Inc. v. Bouaphakeo,* 136 S. Ct. 1036, 1045 (2016), thereby making the class action unmanageable.

1. *See, e.g. Townsend v. Cochran,* No. 20-CV-01210 (ALC), 2021 WL 1165142, at *8 (S.D.N.Y. Mar. 25, 2021); *Katz v. Donna Karan Int'l, Inc.,* No. 14 CIV. 740 (PAC), 2017 WL 2191605, at *4 (S.D.N.Y. May 17, 2017); *Guerrero v. GC Servs. Ltd. P'ship,* No. CV157449DRHAKT, 2017 WL 1133358, at *10 (E.D.N.Y. Mar. 23, 2017); *Bryant v. Compass Grp. USA, Inc.,* 958 F.3d 617, 621 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (June 30, 2020); *Cantrell v. City of Long Beach,* 241 F.3d 674, 684 (9th Cir. 2001).

These Rule 23 considerations would apply in suits seeking damages and injunctive relief. Indeed, the Court emphasized that even for an injunction-only class, "the plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing." The risk of future harm must be material, sufficiently imminent, and substantial. This same principle can apply in cases involving consumer protection statutes and false advertising or labeling claims in which the named plaintiff must show that a sufficient number of class members intend to buy the product at issue again in the future. And the Court's raising of the *Spokeo* standing bar may even have implications as to the requirements for reliance and materiality in consumer lawsuits alleging deceptive business practices under state law pending in federal court. As the Court stated, "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)."

In addition, a motion to strike under Rule 12(f) may be more attractive because of the Court's directive that "under Article III, an injury in law is not an injury in fact." If the complaint does not sufficiently allege that all class members suffered a "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts," the class allegations may be stricken. However, attention and care should be given at the pleading stage about whether the entire class action should be dismissed, lest the action find itself in state court where the standing requirements are much looser. If the suit stays in federal court, either the court or the plaintiff may modify the class to assert a narrower definition that passes muster at least at the pleading stage.

Lastly, offers of judgment may poke out their head again in class actions, given the Court's statement that "Plaintiffs must maintain their personal interest in the dispute at all stages of litigation," citing *Davis v. Federal Election Comm'n,* 554 U.S. 724, 733 (2008).

It is an exciting time in the world of class action litigation.

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