The Road To Class Action May Be Harder After TransUnion

By Greg Marshall and Andrew Jacobs (June 29, 2021)

Greg Marshall

Andrew Jacobs

The U.S. Supreme Court's 5-4 decision in TransUnion LLC v. Ramirez portends a significant change in the law of standing under Article III of the U.S. Constitution.

While the Ramirez opinion presents itself as another step toward Chief Justice John Roberts' particular view of judicial modesty, the sharp dissent authored by Justice Clarence Thomas correctly suggests that Ramirez is far more consequential than modest.

Ramirez promises to intensify the already-pitched battles over Article III standing invited by the court's 2016 decision in Spokeo Inc. v. Robins, and may limit the size of class actions while narrowing the damage theories class action plaintiffs can advance.

TransUnion kept a list of potential matches for a government terrorist and criminal watch list.

The Ramirez suit was a class action arising under the Fair Credit Reporting Act. At stake was whether consumers in various postures of having false or misleading information about them transmitted by TransUnion and misused by third parties had Article III standing to sue TransUnion.

The particular type of transmission and misuse centered around TransUnion identifying certain consumers as potential matches for names on the Office of Foreign Assets Control list of specially designated nationals — a list of persons determined to be dangerous, including terrorists and drug traffickers.

As the dissent explained, in creating its list of potential matches for names on the OFAC list, TransUnion could have in many cases — but did not — use birthdates, Social Security numbers or middle initials to differentiate potential matches from the OFAC-listed wrongdoers with whom TransUnion associated them.

Three kinds of injury led district court to approve $60 million in damages, which was reduced by the Ninth Circuit to $40 million.

Before the case reached the Supreme Court, the U.S. District Court for the Northern District of California certified a class of 8,185 persons who had been designated in TransUnion's credit files as potential matches with the OFAC list, and thus potentially designated as terrorists or drug traffickers.

The class members complained that TransUnion failed to use "reasonable procedures" to maintain accurate files about them, and separately complained of defects in the credit reports TransUnion eventually sent the class members themselves.

There were three categories of potential damage to be found within the 8,185-member class:

1. There was their very concrete and particular injury to class representative Sergio Ramirez. TransUnion provided Ramirez's credit file to a car dealership, which refused to sell him a car because it took his status as a potential match with the identity of someone on the OFAC list to mean that his name was on a terrorist list, leading him to cancel a planned trip to Mexico over concern about that identification.

2. There were the other 1,852 class members whose credit files, like Ramirez, TransUnion transmitted to third-party businesses.

3. There were 6,332 class members whose credit files TransUnion maintained, but did not transmit to third party businesses.

The district court ruled that all 8,185 class members were injured in a justiciable fashion by TransUnion's actions, and the jury awarded the class over $60 million in damages.

In a split panel ruling, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling as to standing but reduced the award to $40 million, finding it unconstitutionally excessive.

In a partial dissent, U.S. Circuit Judge Margaret McKeown wrote separately to argue that while Ramirez and the other 1,852 plaintiffs whose files TransUnion sent to third parties had standing because of the reputational harm it would cause, the other 6,332 class members lacked standing for the absence of that harm.

The majority opinion, authored by U.S. Circuit Judge Mary Murguia, held that the entire class had standing because of the risk of harm to their privacy, reputational, and informational interests protected by the FCRA.

The Supreme Court reversed the Ninth Circuit, limiting standing to cases involving concrete harm, irrespective of whether defendants violated a statute.

Justice Brett Kavanaugh wrote the court's 5-4 majority opinion reversing the Ninth Circuit and holding that no class member had standing unless TransUnion actually sent their credit report with the false or misleading information to a third party. His majority opinion rests on a pithy rule: "No concrete harm, no standing."

Reversing the Ninth Circuit, the court's majority explained that even assuming TransUnion violated FCRA's obligation to use reasonable procedures to maintain credit files on all 8,185 class members, only the 1,853 class members whose reports TransUnion actually disseminated had a sufficiently concrete injury to confer standing upon them to sue under Article III to the Constitution.

The court held that being termed a "potential match" with a list of actual terrorists, drug traffickers and other serious criminals was a harm much like that of a false and defamatory statement, and was thus a sufficiently concrete injury to confer Article III standing on the class members.

The other 6,332 class members, whose files were not disseminated by TransUnion, were the nub of the dispute between Justice Kavanaugh's five-justice majority — composed also of Justice Roberts and Justices Samuel Alito, Neil Gorsuch and Amy Coney Barrett — and Justice Thomas' four-justice dissent — joined by Justices Stephen Breyer, Sonia Sotomayor

and Elena Kagan.

To the court's majority, the mere maintenance of potentially defamatory materials on TransUnion's database in assumed violation of the FCRA was not a concrete injury that could establish Article III standing. The majority reasoned that these plaintiffs could not establish a harm closely related to those serving as a basis for civil liability in American law, a test grounded in Spokeo v. Robins.

To the dissent, Congress' creation of a private right of action in FCRA to vindicate the rights of consumers against reporting agencies who "willfully fail to comply" with certain FCRA requirements was sufficient to create standing.

The dissent drew a line through Spokeo to American law around the time of the founding to argue that violations of individual rights have been consistently understood as giving rise to actionable harm for more than two centuries. The dissent thus objected to the concrete injury requirement, to the extent the majority deployed it as displacing and rendering irrelevant the statutory creation of rights.

The majority, in turn, deplored the dissent's view that a conceded FCRA violation and a legislatively created cause of action in favor of a consumer conferred standing as "largely outsourc[ing] Article III to Congress."

Ramirez limits the risk-of-future-harm theory of damages.

Clarifying Spokeo's oft-quoted passage that a material risk of harm can "satisfy the requirement of concreteness," the court meaningfully limited the future breadth of that theory. Ramirez argued that even if misleading information appearing in credit files is not itself concrete enough for an Article III injury, the risk that misleading information would in the future be transmitted to third parties was sufficiently concrete.

But the court shrugged off that argument, noting that its 2013 decision in Clapper v. Amnesty International USA — the source of the relevant language in Spokeo — involved injunctive relief, which is inherently forward-looking, that a plaintiff must "demonstrate standing separately for each form of relief sought," and that standing to seek injunctive relief does not necessary endow plaintiffs with standing to seek retrospective damages.

The court reiterated that any risk of future harm must cross the line from speculative to imminent and substantial, and suggested that when plaintiffs are not even aware of the risk, as was apparently the case for much of the Ramirez class, it is insufficiently concrete. Because risks are often inherently of unrealized conditions, this may be a significant limitation on the potential that a risk may itself be sufficiently concrete to support standing.

With consumer data breach class actions so often premised on the risk of future harm, it is hard to see how Ramirez will not have a profound dampening effect on their viability going forward.

Take for example the Ninth Circuit's 2018 decision in In re: Zappos.com Inc. Consumer Data Security Breach Litigation, in which hackers breached the servers of online retailer Zappos.com and allegedly stole millions of customers' personal identifying information. The supposed damage upon which that suit was based was the risk of a future fraud or identify theft, not a presently existing injury, and on that basis was permitted to proceed.

Ramirez necessarily throws the viability of Zappos.com into sharp question, for in addition

to the fact that the risk of future damages in data breach cases will often be more speculative than certainly impending, the only reasons putative class members would even know of any risk of future harm is through legally required notices by the very businesses victimized by the cyber-attacks, which notices should not themselves be the proximate source of the supposed class injury.

Ramirez portends a significant alteration in standing that may meaningfully restrict Congress' power and disfavor plaintiffs under federal statutes.

The dissent has it right: Ramirez is a significant alteration in the law of standing.

In Spokeo, the Supreme Court's most recent word in this area until Ramirez, the court held that violating statutory rights did not automatically create injury sufficient to confer standing, while stating in tension with that holding that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements."

Thus, the majority would view Ramirez as a mere example of the general rule of Spokeo. But there is little doubt that Ramirez represents either new law, or a meaningful extension of Spokeo, for it is, as Justice Kagan points out, the first time "a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III."

Thus, even if Ramirez merely realizes the promise of the rule of Spokeo, it now provides an example for lower courts to follow of when injury is insufficiently concrete to justify Article III standing.

This will necessarily usher in a wave of new motions to dismiss claims for lack of standing, particularly in litigation in which federal statutory rights are at issue. It was Congress' very choice to create consumer causes of action in the FCRA that Ramirez appears to invalidate, on the basis that the mere informational harms and recklessness with consumer data Congress proscribed are not sufficiently concrete to merit attention by Article III courts.

Ramirez is far from modest, and is likely to endure.

On a deeper level, Ramirez represents a constitutionalism that features a paradoxically muscular judicial role presented to the reader as a paradigmatically modest one.

Justice Roberts has long been well known as an exponent of judicial modesty, from advocating at his confirmation hearing an objectivist view that federal judges are like umpires who call balls and strikes, to authoring Rucho v. Common Cause in 2019, in which the Supreme Court held 5-4 that claims of partisan gerrymandering were not justiciable under Article III of the Constitution, because they presented a fundamentally political question commended by the Constitution to legislatures.

Ramirez's holding is couched as one presenting limits to the judicial power, warning that "Spokeo is not an open-ended invitation for federal courts to loosen Article III."

Yet while avoiding any pernicious loosening, the court for the first time decided that Congress cannot open the federal courts to an identified set of plaintiffs by identifying a discrete legal harm from which they must be protected, and establishing a cause of action in their favor. It thus makes more modest not the judicial power, but Congress' power to create claims and remedies.

Though crafted in a 5-4 decision, Ramirez appears likely to endure. The court's longest-serving members who have been the subject of reports concerning their potential retirements in recent years, Justices Thomas and Breyer, are found in dissent. And the U.S. Court of Appeals for the Seventh Circuit writings of the newest member of the Supreme Court, Justice Barrett, are cited approvingly and relied on materially by Justice Kavanaugh's majority opinion.

Justice Roberts has a majority centered in the real estate of the court that is least likely to turn over for extending Spokeo and limiting standing, in a manner consistent with his own stated philosophy of limitations on judicial power.

Greg Marshall is a partner and co-chair of the financial services and commercial litigation groups at Snell & Wilmer LLP.

Andrew Jacobs is a partner and the chair of the appellate practice at the firm.