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TransUnion Decision Provides New Guidance on Article III Standing

Has a plaintiff suffered a real, concrete, non-abstract harm if there is incorrect and embarrassing information in the plaintiff's credit file, but that information is never disclosed to a third party? Or, as the Supreme Court put it, "if inaccurate information falls into a consumer's credit file, does it make a sound?"[1]

Last Friday, in a 5-4 decision, the Supreme Court answered no. In doing so, the Court reigned in broad views of the Court's language in *Spokeo*,[2] reaffirmed long-standing concepts related to Article III standing, and provided helpful precedent and guidance for defendants defending against future class actions.

TransUnion involved a class of 8,185 individuals who sued TransUnion for various violations under the Fair Credit Reporting Act (FCRA). The issue originated with Transunion's product, OFAC[3] Name Screen Alert, which was offered by Transunion to allow businesses to avoid transacting with individuals designated by the federal government as terrorists, drug traffickers, or other serious criminals. The named plaintiff – Sergio Ramirez – alleged his credit report incorrectly contained an OFAC alert which precluded him from purchasing a new vehicle from a Nissan dealership, and even caused him to cancel a planned trip to Mexico.

Ramirez filed suit on behalf of himself and a class of 8,185 similarly situated consumers, which the district court certified. The class members asserted three claims. The first was a "reasonable procedures" claim, in which plaintiffs alleged Transunion failed to maintain proper procedures to guard against the risk that inaccurate information appeared in a consumer's credit file. The second was a "disclosure" claim, in which the plaintiffs alleged Transunion breached its obligation under the FCRA to provide complete credit files upon request. And the third was a related "summary-of-rights" claim, in which plaintiffs alleged Transunion should have included – but failed to include – a summary of rights with each mailing that included OFAC information. After a trial on the merits, the jury awarded a total award of $60 million (mostly comprised of punitive damages), which the Ninth Circuit upheld but trimmed to approximately $40 million.

The Supreme Court reversed in significant part, holding that nearly 80% of the class had failed to show a concrete injury to support Article III standing on the "reasonable procedures" claim, and none of the 8,185 class members (other than Ramirez) had suffered a concrete harm with respect to either the "disclosure" or "summary-of-rights" claims. At bottom was the Court's view that though Congress has created causes of action and remedies for consumers under the FCRA, that in and of itself is insufficient to confer Article III standing.

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[1] *TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, at 18 (June 25, 2021) (internal citation omitted).
[2] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).
[3] "OFAC" is the U. S. Treasury Department's Office of Foreign Assets Control.

What impact will *TransUnion* have on purported class actions going forward? The Court provided some clues. First, a plaintiff's alleged injury must bear a close relationship to harms "traditionally" recognized as those which provide a basis for a lawsuit. The Court included within that category (1) typical tangible harms (such as physical torts or monetary injury), (2) certain intangible harms (such as reputational or privacy-related injuries), and (3) harms specified within the Constitution itself (*e.g.*, abridgement to free speech). The Court also took the opportunity to reject a broad interpretation of *Spokeo*, holding it was "not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *TransUnion*, slip op. at 9. Lastly, a majority of the Court emphasized the enduring importance of separation of powers, and over 4 dissenting Justices, rejected the notion that although Congress may wish to treat a new, previously unrecognized type of injury as concrete for purposes of Article III, it may not do so, as "an injury in law is not an injury in fact." *Id*. at 11.