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5 Questions on Standing in the Wake of TransUnion

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Following the U.S. Supreme Court's recent decision in *TransUnion LLC v. Ramirez*,[1] many practitioners are asking, "What happens now?" While the decision provided some clarity on the contours of Article III standing, it also opened the door to new questions about the impact on standing.

We discuss five of those questions here.

1. Will consumer litigation decrease or merely shift to state courts?

We expect a shift to an increase in state court cases in the wake of *Ramirez*, specifically with respect to claims that rely on informational injuries.

Justice Clarence Thomas warns in his dissent that *Ramirez* may only be a pyrrhic victory for defendants implying that its primary effect will be to shift venue of consumer litigation rather than limit it.[2]

The court held that federal courts lack jurisdiction to hear some of these cases based on Article III grounds.[3] But the decision in no way affects the jurisdiction of state courts, which are not constrained by Article III like their federal counterparts and are free to craft their own standing rules.[4]

While many states have adopted requirements that mirror Article III standing requirements, others have opted for less stringent standing requirements.

For example, as stated by the Superior Court of Santa Clara County's 1990 decision in *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, California's standing requirements "will vary from statute to statute based

upon the intent of the Legislature and the purpose for which the particular statute was enacted."[5] California recognizes public interest standing and taxpayer standing.[6]

In fact, there are currently 30 states that do not follow Article III standing.[7] While state standing requirements are not uniform and may even vary by cause of action, they are generally less stringent and easier for plaintiffs to satisfy.[8] Indeed, many consumers prefer to file in state courts because state court litigation is generally less expensive and has a consumer-friendly reputation.

With consumers now less likely to prove federal standing, they may become even more inclined to opt for state venues.

A defendant can often remove a consumer action to federal court. However, *Ramirez* may result in an increase in motions to remand from plaintiffs who will challenge Article III standing.[9] If challenged on remand, if the defendant cannot show that the plaintiff has alleged sufficient facts to support Article III standing, the case is remanded to state court — not dismissed with prejudice.

However, plaintiffs will still need to be cognizant of the arguments they may make under this tactic as arguing that there is no standing in federal court may be used against them if the case is remanded to a state court that closely follows Article III standing jurisprudence.

Thus, Justice Thomas may be correct in his prediction that *Ramirez* will ensure that state courts will exercise exclusive jurisdiction over a growing number of consumer class actions.[10] This could result in multiple class cases in separate state courts and encourage classes to be broken up by state.

Maintaining separate class actions in state courts and risking possible inconsistent rulings may prove costly to plaintiffs, however.

While consumers such as the 6,332 dismissed *Ramirez* class members might find a second chance to try to maintain their suit in state court, a change of forum is no guarantee of success and state litigation comes with its own unique costs for both plaintiffs and defendants, especially where it may result in multiple cases filed across multiple states.[11]

2. What role does Article III standing now play in certification under Federal Rule of Civil Procedure 23?

This question of timing remains open in the wake of *Ramirez*, although the fact that every class member must demonstrate Article III standing is resolved.

While the court made it clear that each member of a class must establish Article III standing to recover individual damages, it declined to answer "the distinct question of whether every class member must demonstrate standing before a court certifies a class."[12] That circuit split as to timing remains open and will need to be resolved by lower courts.[13]

However, *Ramirez*'s confirmation that all absent class members must demonstrate their Article III standing to recover should lead courts to assess at the Rule 23 stage whether that required showing will even be factually

possible in a class action posture.

3. How similar does a common law analog need to be?

In the 2016 Supreme Court case of *Spokeo Inc. v. Robins*, the court established that a plaintiff can satisfy Article III standing for an alleged intangible harm — like those affecting one's reputation or privacy — if it has "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[14]

Ramirez clarified that by "close relationship," the court does not require an exact duplicate to a historical or common law analog.[15]

Ramirez still evaluated the plaintiffs' claims by comparing them to their closest common law analog — defamation. Justice Brett Kavanaugh, writing for the majority, reasoned that the harm from a misleading statement like class members "being labeled a 'potential terrorist'" bore a close enough relationship to "the harm from a false and defamatory statement" like "being labeled a 'terrorist.'"[16]

Yet, the 6,332 class members whose credit information was misleading or false but not disseminated to third parties, could not establish standing because publication is an essential element to state a claim for defamation.[17]

Thus, the close relationship test did not require the disseminated information to be literally false — as traditional defamation would — instead, it could be only misleading. But the information did still have to be disseminated. In the court's view, the mere retention of false information in a database is akin to a defamatory letter sitting in a desk drawer; neither amounts to concrete injury.[18]

In short, the decision seems to relax *Spokeo*'s close relationship standard. The court did not differentiate between false and misleading statements, but did insist on publication.

One could argue then that a statutory claim bears a close relationship to a common law analog so long as they require similar or overlapping essential elements to be actionable — regardless of their differences in degree.

For example, under *Ramirez*, a statutory claim requiring financial hardship could arguably have a close relationship to a common law claim requiring financial ruin. Likewise, a statute making invasions of privacy actionable could have a close relationship to historical analogs protecting against highly offensive invasions of privacy or those that shock the conscience.

Future defendants may utilize this line of reasoning to broaden the scope of actionable claims in federal court to prevent their cases from being remanded to state courts.

4. What remains of "risk of harm" standing?

The lead dissent notes that the decision "all but eliminat[es] the risk-of-harm analysis."[19] It is true that *Ramirez* significantly limits the circumstances in which risk of future harm will be sufficient to establish Article III standing.

As the majority put it, “the risk of future harm on its own does not support Article III standing for the plaintiffs’ damages claim.”[20] However, the court does not entirely shut the door on risk of harm plaintiffs.

A sufficiently imminent and substantial risk of future harm still serves as a basis for standing if the plaintiff is pursuing injunctive relief to prevent the harm from occurring.[21] And a plaintiff seeking damages can still base standing on risk of harm if “exposure to the risk … itself causes a separate concrete harm.”[22]

For example, an individual’s knowledge of his or her own exposure to a future risk of physical, monetary or reputational harm may cause the individual to suffer emotional or psychological harm.[23] There, in a case such as a claim for intentional infliction of emotional distress, the risk could suffice for Article III purposes because it has created an independent concrete injury.[24]

Nevertheless, if the only real injury alleged is the future risk that never materializes, that will not be sufficient.[25] In the consumer context, the consumer can take a wait-and-see approach and once the harm materializes, so may the actionable, concrete injury for Article III purposes.

The court also reasoned that the class members claiming risk of harm failed Article III standing because they did not factually establish a sufficient risk of future harm or demonstrate a sufficient likelihood that the defendant would “intentionally or accidentally release their information to third parties.”[26]

The opinion suggests then that plaintiffs can potentially satisfy Article III if there is evidence to establish a serious likelihood of disclosure.[27]

5. What does Ramirez mean for discovery involving absent class members?

A final question arising from *Ramirez* is what impact the decision has on discovery involving absent class members. The answer remains to be seen.

While *Ramirez* did not directly address absent class member discovery, the court did note what it perceived as a failure on the plaintiffs’ part to prove class-member-specific damages, namely that the class members’ reports were actually sent to third-party businesses.[28]

The court noted that “[t]he plaintiffs’ attorneys could have attempted to show that some or all of the 6,332 class members were injured” and that they “presumably could have sought the names and addresses of those individuals, and they could have contacted them” but failed to do so.[29]

Thus, going forward, *Ramirez* may prompt the plaintiffs bar to aggressively seek more thorough absent class member discovery both at the pre-certification and post-certification stages, citing the Supreme Court’s own statement of what is relevant to the Article III standing analysis.

Conclusion

Generally, *Ramirez* was a positive decision for defendants in Fair Credit Reporting Act class cases involving perceived informational injuries. However, it certainly cannot be characterized as complete victory as these claims

may survive outside federal court jurisdiction.

Thus, *Ramirez* leaves open a number of questions regarding where and how both plaintiffs and defendants will litigate consumer class actions. In particular, *Ramirez* seems to have planted a firm obstacle for cases where the alleged injury is only a future risk of harm like data breach cases.

In the wake of *Ramirez*, practitioners will need to closely analyze state court standing requirements in order to know where certain cases may be able to survive.

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[1] *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021)

[2] *Id*. at n.9 (Thomas, J., dissenting).

[3] *Id*. (emphasis added).

[4] *See ASARCO v. Kadish*, 490 U.S. 605, 617 (1989).

[5] *Midpeninsula Citizens for Fair Hous. v. Westwood Invs.*, 271 Cal. Rptr. 99, 104 (Cal. Ct. App. 1990); *see also Surrey v. TrueBeginnings*, 85 Cal. Rptr. 3d 443, 445 (Cal. Ct. App. 2008).

[6] *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011 (Cal. 2011); Cal. Civ. Proc. Code § 526a.

[7] *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 Minn. L. Rev. 1211, 1233 (2021).

[8] *See* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Res. L. 349 (2015).

[9] *See Thornly v. Clearview AI, Inc.*, 984 F.3d 1241, 1244 (7th Cir. 2021) ("[T]he party that wants the federal forum is the one that has the burden of establishing the court's authority to hear the case.").

[10] *Ramirez*, 141 S. Ct. at n. 9 (Thomas, J., dissenting).

[11] *See Bennett*, supra, n. 4 at 1237–1244 (discussing the relative costs for plaintiffs and defendants to litigate in state court)

[12] *Ramirez*, 141 S. Ct. at n. 4.

[13] *See Neale v. Volvo Cars of North America, LLC*, 794 F.3d 353, n. 5 (3rd Cir. 2015) (listing cases from the

First, Fifth, Ninth, and Tenth Circuits to support its conclusion that "unnamed class members need not establish Article III standing").

[14] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

[15] *Ramirez*, 141 S. Ct. at 2190.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*. (Thomas, J., dissenting).

[20] *Id*. at 2190.

[21] *Id*.

[22] *Id*.

[23] *Id*. at n. 7.

[24] *Id*.

[25] *See id*. at 2190.

[26] *Id*.

[27] *Id*. (quoting *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020) (McKeown, J., concurring in part)).

[28] *Id*.

[29] *Id*.

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