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Locke Lord QuickStudy: *TransUnion v. Ramirez*: Supreme Court Further Separates Concrete Harm Inquiry from Statutory Violations

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In its 2016 decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the U.S. Supreme Court held that alleging a "bare procedural violation [of a statute], divorced from any concrete harm" was insufficient to satisfy the injury requirement for Article III standing.

On Friday, the high Court elaborated on that decision in *TransUnion LLC v. Ramirez*, 2021 WL 2599472 (June 25, 2021). It held that only plaintiffs concretely harmed by a defendant's statutory violation have Article III standing to sue in federal court, and that an injury is "concrete" only if it is closely related to a harm "historically or traditionally recognized as providing a basis for a lawsuit in American courts." The Court clarified that the "concrete harm" requirement applies not only to individually named plaintiffs but also to the absent members of a putative class.

At first glance, *Ramirez* appears to be a boon for class action defendants because it will make it much more difficult for plaintiffs to sue for technical violations of federal statutes, which often do not cause the plaintiff any tangible, "real world" harm. At the same time, the decision may simply force statutory class actions into state courts, which are not similarly bound by Article III of the federal constitution.

Facts

In 2011, Sergio Ramirez applied for a car loan with a dealership in California. As part of the process, the dealership ran a credit check on Ramirez, which included obtaining a credit report for Ramirez from TransUnion.

The credit report contained an alert indicating that Ramirez's name matched that of someone on the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) list of "specially designated nationals," sometimes known as a "terrorist watch list." As a result, the dealership refused to give Ramirez a loan, and Ramirez felt shock, embarrassment, and fear in having to experience this in front of both his wife and her father, who accompanied him to the dealership.

Ramirez later requested his credit information from TransUnion, which mailed him his credit file with all required disclosures and a separate letter notifying him he was a potential match on the OFAC list without the required

disclosures. After receiving this second letter, Ramirez cancelled an upcoming vacation to Mexico out of concern that he was included on this list.

Ramirez sued TransUnion in the U.S. District Court for the Northern District of California. He alleged that TransUnion violated the FCRA by: (1) failing to follow reasonable procedures to ensure it distributed accurate credit reports; and (2) sending him all of his credit file information in one mailing, as the FCRA requires. He sought to certify a nationwide class of 8,185 persons who, like him, received their credit file and OFAC list information in separate mailings.

The parties stipulated prior to trial that only 1,853 members of the class actually had their misleading credit reports provided to third parties. Nonetheless, the trial court certified a class of all 8,185 people who received a letter from TransUnion indicating that their credit reports contained an OFAC warning. At trial, the jury found in favor of the class, awarding each class member nearly $1,000 in statutory damages and $6,000 in punitive damages—for a total verdict of $60 million. The Ninth Circuit affirmed.

The Supreme Court's Decision

The Supreme Court granted certiorari to determine whether the 6,332 class members whose credit reports were not disseminated to third parties had suffered an injury sufficient to confer Article III standing.

In a 5-4 decision, the Court answered that question in the negative. Writing for the majority, Justice Kavanaugh reiterated *Spokeo*'s reasoning that a statutory cause of action and the harm the plaintiff suffered are separate and distinct inquiries, and that standing requires a concrete injury. One way to determine whether the alleged harm suffered is concrete, he wrote, is to look for harms that are historically and typically held to be cognizable.

Applying these principles, the Court had "no trouble" concluding that the 1,853 class members whose credit reports *were* published to third parties suffered a concrete injury sufficient to confer standing. The Court likened their harm to a reputational injury traditionally recognized in defamation claims.

On the other hand, the Court held that the other 6,332 class members whose credit reports were *not* disseminated to third parties did not suffer a concrete injury sufficient to confer Article III standing. The Court concluded that the mere existence of the information on their credit reports was insufficient to establish an injury, as mere existence of erroneous information was not traditionally or historically recognized as a concrete harm in defamation cases. The Court also rejected Ramirez's argument that the prior risk of publication of negative information about the class was sufficient to confer standing. Although prior cases stated that a "material risk of harm" is sometimes sufficient to satisfy concreteness, the Court explained that those cases involved requests for injunctive relief, not money damages.

As for the remaining claims based upon the format of the mailings from TransUnion, the Court held that—although the format of the mailings technically violated the statute—Ramirez failed to demonstrate "that the format of TransUnion's mailings caused [the class members] a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts," or any harm at all. In fact, there was no evidence that the other class members even opened the mailings, that they were "confused, distressed, or relied on the information in any way," or that these class members would have tried to correct the inaccurate information

if they were sent information in a proper format. The lack of harm from the formatting meant this was the "bare procedural violation, divorced from any concrete harm" that *Spokeo* rejected.

Justice Thomas—joined by Justices Breyer, Sotomayor, and Kagan—dissented. Both he and Justice Kagan (who wrote her own dissent) would have concluded that Congress's decision to create a statutory right in the FCRA was sufficient to confer standing.

Key Takeaways

At first glance, the Court's decision appears to be positive for class action defendants—particularly those targeted with lawsuits alleging "technical" violations of state and federal statutes. The Court's decision effectively forces a would-be class representative to show some sort of previously recognized harm, such as physical, monetary, or reputational injury that applies equally across the entire class—*in addition* to a technical statutory violation. A technical violation of a statute, without more, is not enough.

The decision will reverberate most in cases alleging violations of the FCRA, TCPA, FACTA, RESPA, FDCPA, and TILA, where technical statutory violations do not always lead to concrete, "real world" harm. FACTA, for example, requires merchants to truncate all but the last five digits of a consumer's credit card number on a digital or paper receipt. Under the statute, plaintiffs who can show that a merchant willfully failed to comply with the truncation requirement are entitled to statutory damages. *Ramirez*, however, will now require FACTA plaintiffs to show that they also suffered some sort of recognized harm as a result of a merchant's failure to truncate—such as a demonstration that their identity was stolen as a result.

On the other side, *Ramirez* is likely to strengthen plaintiffs' standing for TCPA claims. Circuit courts have lately been split over whether the receipt of unwanted automated text messages is a sufficiently concrete injury to confer standing. Although some courts have held that it is not, others, such as the Seventh Circuit (in an opinion by then-Judge Amy Coney Barrett), have held that it is, recognizing that receiving unwanted texts is "closely related" to common-law invasions of privacy claims. *Ramirez* appears to incorporate the same reasoning and will likely result in fewer challenges to a TCPA plaintiff's standing.

At the same time, *Ramirez* is somewhat of a double-edged sword for defendants, as it may have the undesired consequence of forcing more class actions into state courts. As Justice Thomas noted in his dissent, the *Ramirez* decision "does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of those cases." Unlike federal courts, state courts are not bound by Article III of the federal constitution, and many state courts have interpreted the concept of standing under their state constitutions to be broader than Article III standing. Defendants who are successful in dismissing a putative class action from federal court may therefore find themselves back in state courts defending the same lawsuit.

One question the *Ramirez* decision expressly left open is whether an absent class member's standing must be proven before or after certification. Our view is that challenges to class member standing should be resolved on the pleadings in cases where the class definition in the complaint makes it reasonably foreseeable that an individualized inquiry will be required to determine whether each class member sustained concrete harm. We anticipate that this question will be among the many post-*Ramirez* disputes that will be sorted out in the courts in coming years. In the meantime, please connect with any of the authors to discuss *Ramirez*, Article III standing, or

class action litigation.

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