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Supreme Court Considers Standing and Typicality for No-Injury Class Actions in TransUnion v. Ramirez Oral Argument

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The U.S. Supreme Court heard oral argument yesterday in *TransUnion LLC v. Ramirez*, a case in which the Supreme Court is once again grappling with the requirements of Article III standing — this time in the context of class actions. The argument confirmed this case is one to watch, as the eventual decision may clarify the standing requirements for class-action plaintiffs in cases where no actual injury can be proven. The decision will likely address whether a "material risk of harm" is sufficient to confer standing in and of itself, or whether Article III requires something more.

Background

The case arose from a product offered by TransUnion, which attached a "potential match" alert to the credit files of individuals with names matching a name designated by the Department of the Treasury's Office of Assets Control (OFAC) as individuals restricted from certain transactions for national security reasons (*e.g.*, terrorists, drug traffickers, etc.). The named plaintiff, Sergio Ramirez, alleged he suffered actual injury in the form of denied credit, embarrassment in front of his family, and having to cancel a vacation because a car dealer from whom he sought to buy a car received a consumer report from TransUnion indicating his name matched a name on the OFAC list.

After his experience, Ramirez contacted TransUnion and requested a copy of his consumer file. In response, TransUnion mailed him a copy of his credit file that did not contain the OFAC alert, but contemporaneously mailed Ramirez a separate letter referencing the file disclosure letter and explaining that his name was a "potential match" to a name on the OFAC list. Ramirez received the file disclosure first, a few days before receiving the "OFAC-alert" letter.

Ramirez filed a class-action suit in California under the FCRA. The suit alleged two types of FCRA claims. First, it alleged TransUnion failed to maintain reasonable procedures to assure the maximum possible accuracy of the information in its consumer reports (the "reasonable procedures" claim). Second, it alleged TransUnion violated the FCRA's requirement to provide consumers, upon request, with all information in their files by providing the OFAC "potential match" information in a separate mailing, and TransUnion violated the FCRA's requirement to provide consumers with a summary of their rights with each file disclosure by not including a summary of rights in the OFAC-alert mailing (the "disclosure" claims). The suit also asserted similar claims under the California Consumer Credit Reporting Agencies Act (CCRAA), for which Ramirez sought injunctive relief.

Ramirez filed the suit on behalf of a class of over 8,000 persons to whom TransUnion sent a similar OFAC-alert letter. Unlike Ramirez, however, a majority of the putative class members (over 75%) did not allege that TransUnion sent any inaccurate information to any creditor. Although the "potential match" alert was attached to the credit files of all class members and stored in TransUnion's database, only the files of roughly 25% of the class members were disseminated to third parties. Further, even among those class members for whom an OFAC alert was disseminated, only Ramirez alleged he was denied credit based on the OFAC alert. The suit also alleged each class member was injured by receiving nonconforming file disclosures, but only Ramirez alleged he even read the letters, let alone was confused by them.

The district court certified a national class for the FCRA claims and a California subclass for the CCRAA injunctive relief claim. At trial, a jury awarded Ramirez and the class members $8 million in statutory damages and $52 million in punitive damages. On appeal, the Ninth Circuit affirmed certification and the statutory damages award, but reduced the punitive damages award to $32 million. Regarding the reasonable procedures claim, even though most of the class members could not allege their credit file with an OFAC alert was ever transmitted to a third party, a divided Ninth Circuit panel held a "material risk of harm" existed sufficient to establish Article III standing simply because TransUnion had compiled the allegedly false information in its database and could have disseminated it upon request. The Ninth Circuit further held every class member suffered an injury by receiving the nonconforming disclosures since the separate credit file and OFAC-alert mailings were "inherently shocking and confusing." The Ninth Circuit also held Ramirez satisfied the typicality requirement of Federal Rule of Civil Procedure 23, despite the differences in the nature and degree of injury he suffered when compared to the members of the classes.

Petition for Certiorari

TransUnion petitioned the U.S. Supreme Court to review the case, and the Court agreed to do so. The question presented to the Court relating to Article III standing was: "Whether either Article III or Rule 23 permits a damages class action, where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."

Oral Argument

At oral argument, the Supreme Court heard three different perspectives. TransUnion argued the class should be decertified for both lack of standing and lack of typicality; Ramirez argued standing and typicality were both met; and the U.S. solicitor general's office argued the requirements of standing were met, but the Court should remand the case to the trial court to properly assess typicality. The Court's remote-argument procedures significantly changed the pace of the argument from the traditional approach. Instead of each advocate arguing his or her case with interjections from the justices, the advocates were each given an opportunity for a short introduction, after which each justice was allotted a few minutes for questioning. These time constraints were strictly observed, with a justice often interrupting an advocate's answer to announce that the justice's time had expired. Thus, the arguments proceeded in a regimented fashion, with every justice asking questions of each advocate sequentially, in order of the justices' seniority.

The justices shifted their questioning repeatedly between the issues of standing and typicality, but most of the questions targeted standing. In many ways, this case was framed as a sequel to the Supreme Court's 2016

decision in *Spokeo v. Robins* — also an FCRA case — where the Court held a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" and, instead, must demonstrate a "concrete" and "particularized" harm. 136 S. Ct. 1540, 1550 (2016). The justices and the advocates referenced *Spokeo* repeatedly, though differing views of what *Spokeo* requires emerged. TransUnion emphasized that the core message of *Spokeo* was that a plaintiff must have an injury in fact; an injury at law is not sufficient. Ramirez, on the other hand, insisted *Spokeo* contemplated injury in the form of a material risk of harm, and not in terms of the plaintiff's subjective knowledge of the risk.

On standing, TransUnion argued a distinction must be made between a material risk of harm that exists currently and a material risk of harm that exists only in retrospect. TransUnion argued this case falls into the latter category. TransUnion has already discontinued the practices at issue, so there is no longer a risk that any of the non-disseminated credit files would ever be disseminated. Further, since many class members may not have even read the disclosure letters, they would not have even known they were subject to a risk until after it could no longer materialize. The justices pressed TransUnion on this point, asking whether timing should have such a drastic effect on standing. If the class members suffered an injury from the material risk of harm that their credit file might be disseminated *before* TransUnion remedied the issue, Justice Kagan asked, then why would they not continue to have standing to recover for that injury even after it has been remedied? TransUnion responded that no injury could be suffered if the individual never had knowledge of the risk in the first instance.

The justices seemed eager to draw a line as to what constitutes a "concrete" injury, invoking a litany of hypothetical circumstances in their questioning. For instance, the chief justice questioned whether standing would exist under a hypothetical statute that creates a claim for anyone who drives within a quarter mile of a drunk driver, even if they never knew they were at risk at the time. Ramirez insisted standing would exist there, though there might be a merits question as to the harm suffered. Justice Kagan, on the other hand, suggested a more deadly hypothetical involving a carcinogen with a 50% chance of causing cancer, but stipulated that persons exposed either would or would not get cancer within five years. If Congress created a claim for persons exposed, would a class have standing to sue in the fifth year? And if so, would they still have standing to sue in the sixth year? TransUnion responded (1) if the risk never materialized, and the class members never had knowledge that they were at risk, then they were not injured, and (2) a 50% chance of getting cancer is much more severe than a 25% risk of having a credit file disseminated, especially since no one other than Ramirez has alleged they were actually harmed by dissemination. Justice Barrett piggy-backed on this hypothetical: Suppose the class sued in the second year, but the case dragged on and did not reach the damages phase until the sixth? TransUnion suggested that case might be better framed as a mootness issue, but it stressed Supreme Court precedent requires standing to be maintained at every stage of the case.

Multiple justices also questioned whether a "material risk of harm" is, in and of itself, an injury sufficient to confer standing. Some viewed Ramirez's argument as requiring this conclusion: For a class to have standing based on a risk that never materialized and of which many class members did not become aware while it existed, the risk must be considered an independent injury. Justices Gorsuch, Kavanaugh, and Barrett each expressed concern that Ramirez's position pushed beyond the holding of *Spokeo*, where the information had been published on the internet. According to Justice Kavanaugh, *Spokeo* addressed a material risk of harm *beyond* publication, in contrast to a case, such as this one, where no publication occurred.

Parts of the discussion also centered on the distinction between the alleged injury for the reasonable procedures

claim and the alleged injury for the disclosure claims. Justice Kagan, who stated she "got the harm on the procedures claims," asked pointedly why the disclosures claim amounted to anything more than a "no harm, no foul" situation. Justice Barrett also addressed this issue, pressing Ramirez's counsel with the question: If this is not a "bare procedural violation" under the FCRA, then what is?

Most of the standing discussion centered on whether the 75% of class members whose files were not disseminated to third parties suffered any injury, as opposed to the 25% whose files were disseminated. Several justices, including conservative ones, such as Alito, Kavanaugh, and Gorsuch, signaled a belief that the 25% whose files were disseminated *did* suffer an injury sufficient to confer standing. There was also discussion on whether the allegedly false information was indeed "false" at all. Chief Justice Roberts pointed out during the solicitor general's argument that all the names identified as "potential" matches to the OFAC list were, in fact, matched names between the consumer and the individual on the list. TransUnion picked up on this in rebuttal, noting that a search of the class members' names on the OFAC's website will flag a match on the list as well.

Justices Breyer and Sotomayor kept their cards close to the vest on the standing issue, spending their allotted time asking only about typicality. Their eagerness to discuss typicality instead of the jurisdictional issue of Article III standing, however, may suggest that these justices believe standing exists for the class members. Regarding typicality, they suggested numerous times that the difference between the damages sustained by Ramirez and the other class members was an issue that should be addressed at trial, by objecting to the relevance of Ramirez's damages evidence, and that typicality only requires typical *claims*, not typical damages. Justice Kagan appeared to agree on this point.

Finally, although the Ninth Circuit expressly held all members of the class must have standing at the damages phase to recover, the Court did not comment on this question hardly at all. The sole exception was one question from Justice Thomas to Ramirez's counsel, asking simply: "Do you agree that all members of the class must have standing?" Ramirez's counsel agreed, conceding the point. The Court's lack of robust questioning on this point may signal at least an implicit acceptance of the Ninth Circuit's conclusion that all class members must have standing to recover damages.

Take Away

As is often the case with a Supreme Court oral argument, it is difficult to make any precise predictions about how the Court will ultimately decide the case. Yet, a few points seem clear.

First, there was substantial concern among the justices with the Article III standing issue, with five of the nine justices focusing almost exclusively on this issue. A key theme in this discussion was the distinction between how the 25% whose files were disseminated and the 75% whose files were not would be treated for Article III standing purposes.

Second, the decision will likely address whether a material risk of harm is an injury sufficient to confer standing on class members in and of itself, or whether Article III requires something more.

A written decision is expected in June.

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