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Class action standing: Ninth Circuit holds members of a damages class must demonstrate Article III standing

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Takeaway: The Ninth Circuit recently held "that each class member must have standing to recover damages." *Ramirez v. TransUnion, LLC,* 951 F.3d 1008 (9th Cir. 2020). But the panel held this requirement only applies to the final damages determination, and did not rule class member standing had to be demonstrated at the class certification stage. And the Ninth Circuit's test for standing arguably conflates the standing requirements for injunctive relief and damages claims. Judge McKeown, who concurred in part and dissented in part, addressed these problems in some detail, potentially setting the stage for the en banc court or the U.S. Supreme Court to again address Fair Credit Reporting Act ("FCRA") standing issues.

If bad facts make bad law, then the *Ramirez* case, which dealt with a false terrorist alert on a credit report, seemed destined for problematic legal rulings. The Department of Treasury maintains a list of individuals who are prohibited from transacting business in the United States for national security reasons. Because merchants who do business with people on this "terrorist list" can face big fines, one of the largest credit reporting agencies, TransUnion, developed a product to "match" consumers to the list. But this matching process only involved a rudimentary first-and-last-name search, with the unsurprising result that thousands of consumers had incorrect "terrorist alerts" placed on the front page of their credit reports.

Sergio Ramirez, who was not a terrorist, had a rather unpleasant experience with all of this. In 2011, he went to a Nissan dealership to buy a car with his wife and father-in-law but was told he could not buy a car because he was – according to his TransUnion credit report – on the terrorist list. Although his wife was ultimately able to buy the car in her own name, Mr. Ramirez was "embarrassed, shocked, and scared" and, moreover, later received confusing and conflicting information from TransUnion about the terrorist alert. 951 F.3d at 1018. He even called the Department of Treasury. And he later cancelled an international vacation he had planned with his family.

In 2012, Ramirez filed a putative class action against TransUnion in the Northern District of California, alleging a number of claims under FCRA. One of the claims was that TransUnion had failed to follow "reasonable procedures" to make sure that his credit report was accurate, given that TransUnion used only "rudimentary name-only searches" to generate the terrorist alerts. A class of over 8,000 individuals was certified, but less than 2,000 class members actually had their credit reports requested by a potential credit grantor.

The case must have been a fun case to try to the jury – from class counsel's perspective. In addition to focusing on the egregious and sympathetic facts of Mr. Ramirez's plight, class counsel apparently demonstrated that "TransUnion could not confirm that a single OFAC alert sold to its customers was accurate." *Id*. at 1021 n.4. The jury ultimately found in favor of the class on the FCRA claims, awarding

about $8 million in statutory damages and $52 million in punitive damages.

TransUnion appealed on a number of issues, including the issue of class standing. Addressing an issue of first impression, the Ninth Circuit held that "every member of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages." *Id*. at 1017. The majority emphasized, however, that its holding did not alter the showing required at the "early stages of a case," including the class certification stage, where only the class representative need demonstrate standing. *Id*. at 1017 n.1 & 1023 n.6. Indeed, the majority framed the issue – the "question of first impression" – as "who must show standing in a class action at the final stage of a damages suit." *Id*. at 1017 (emphasis added).

The majority made two observations that should at least give a class defendant the ability to attack class standing at the class certification stage. First, the majority stated that, "although the standing inquiry in the early stages of a case focuses on the representative plaintiffs, district courts and parties should keep in mind that they will need a mechanism for identifying class members who lack standing at the damages phase." *Id*. at 1023 n.6. Second, the majority recognized that "Plaintiffs bore the burden of proving standing through evidence at trial." *Id*. at 1024.

Given the rigorous requirements of Rule 23, however, the question of whether "a mechanism [exists] for identifying class members who lack standing at the damages phase" should be addressed at the class certification stage. At a minimum, a class defendant should be permitted to explore this issue when the defendant addresses issues such as predominance and manageability in opposition to a class certification motion. Moreover, class certification briefing usually and appropriately explores how individual issues will play out at trial. If individual issues would predominate in connection with the evidentiary proof of class standing at trial, that issue could and should be determined at the class certification stage.

Also, in damages class actions, it should be the case that all class members have suffered an injury in fact at the time a district court resolves the class certification issue. In a typical consumer fraud class action, for example, it is alleged that a class of consumers was deceived into buying a product, and the class is oftentimes defined in terms of those who purchased the product through the date of class certification. In that type of case, there is no reason that individualized issues going to standing should not be explored at the class certification stage.

Finally, a district court's class certification decision is typically *not* made in the "early stages of a case." Usually, a class plaintiff has the ability to conduct significant class discovery, and the certification decision is not made until a substantial time after a case has been filed. It is disingenuous to defer the standing analysis on the fiction that class certification occurs at an early stage of the litigation.

The *Ramirez* decision, moreover, appears to conflate standing for injunctive relief and damages claims. On the issue of class standing, and focusing on the FCRA reasonable procedures claim, TransUnion argued that only the class members whose credit reports were requested by a potential credit grantor could show an injury-in-fact. In other words, no injury could result from a false terrorist alert "until someone other than TransUnion and the consumer sees it." *Id*. at 1024.

On this point, the majority employed the two-part inquiry used by the Ninth Circuit in *Spokeo III*, another FCRA case, but a case where false information had actually been published on a website. *See Robins v. Spokeo, Inc*., 867 F.3d 1108 (9th Cir. 2017). Applying this test, the Ramirez majority said that the entire class – including the 6,000-plus class members whose credit reports were not sent anywhere – had

suffered an injury in fact, because all class members "suffered a material risk of harm to their concrete interests." 951 F.3d at 1025. This does not seem to be an appropriate standing inquiry for a damages claim.

If a plaintiff suffers "a material risk of harm," the plaintiff later may be harmed, but it is also possible that the risk will not materialize and the plaintiff will suffer no harm at all. While a plaintiff faced with a material risk of harm might be entitled to injunctive relief – especially if the plaintiff can demonstrate a threat of irreparable harm – it does not make sense that a plaintiff should be permitted to recover damages if the plaintiff ultimately suffers no harm at all.

Judge McKeown agreed with several of these criticisms in her decision dissenting in part. See 951 F.3d at 1038 (McKeown, J., concurring in part and dissenting in part). In her view, "no one but Ramirez and the class members whose information was disclosed to a third party had standing to assert a reasonable procedures claim, and only Ramirez had standing to bring the disclosure and summary of rights claims." *Id*.

Regarding the reasonable procedures claim, Judge McKeown acknowledged that the 1,853 class members whose reports had been sent to a third person had standing. But she found an absence of evidence supporting standing for the other three-quarters of the class, noting that while class counsel "could have offered expert testimony, representative class members, and credit agency protocol to fill this gap," no such evidence "was proffered." *Id*. at 1040. "Because no evidence in the record establishes a serious likelihood of disclosure, we cannot simply presume a material risk of concrete harm, and three-quarters of the class lacks standing for the reasonable procedures claim." *Id*.

As for the disclosure and summary of rights claims, Judge McKeown explained class counsel had presented "no evidence" that "a single other class member so much as opened the dual mailings, or that anyone other than Ramirez was surprised to receive them." *Id*. at 1041. In the absence of such evidence, the disclosure and summary of rights violations as to the other class members constituted "only a bare procedural violation, divorced from any concrete harm,'" and thus failed under the Supreme Court's decision in Spokeo. Id. (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).