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SCOTUS grants certiorari to resolve critical class action standing issue

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Takeaway: In a prior article – *Class action standing: Ninth Circuit holds members of a damages class must demonstrate Article III standing* (March 31, 2020) – we discussed the Ninth Circuit's decision in *Ramirez v. TransUnion*, LLC, 951 F.3d 1008 (9th Cir. 2020), where it held "that each class member must have standing to recover damages." But the majority held that this requirement only applies to the final damages determination (and not at the class certification stage), and it upheld the district court's ruling that all of the absent class members suffered Article III injury as well as the jury's substantial verdict in favor of the class, based on Mr. Ramirez's clearly atypical injuries. Judge McKeown, who concurred in part and dissented in part, discussed the issues raised by the majority's decision in detail, setting the stage for the U.S. Supreme Court to again address Fair Credit Reporting Act ("FCRA") standing issues. As expected, TransUnion applied for certiorari, relying in substantial part on Judge McKeown's dissent, and last month the Supreme Court granted TransUnion's application on the following question: "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." This sets up what could be one the most consequential class action decisions by the Supreme Court in quite some time.

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 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 a vacation to Mexico 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 a 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).

Yet, the majority affirmed the district court's ruling that all of the absent class members had standing at the final stage of the case, and the majority affirmed the district court's denial of TransUnion's motion to decertify the class for lack of standing as well as its post-trial motions raising the same issues. *Id*. at 1030.

Judge McKeown, dissenting in part, concluded that "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." 951 F.3d at 1038 (McKeown, J., concurring in part and dissenting in part).

Regarding the reasonable procedures claim under FCRA, Judge McKeown acknowledged that the 1,853 class members whose reports had been sent to a third person had standing. But she found no 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 under FCRA (based on the confusing and conflicting information received by Mr. Ramirez about the terrorist alert), 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)).

If the Supreme Court decides that Rule 23 requires that every class member demonstrate standing in a damages class action, that would provide class defendants with significant ammunition. Class definitions tend to be broad to secure a damages class with the most members (and the greatest monetary recovery). It oftentimes is not difficult for a class defendant to identify categories of class

members or individual class members who suffered no Article III injury. A ruling in favor of TransUnion could make it easier for easier for class defendants to contest damages class actions in federal court.