"NO CONCRETE HARM, NO STANDING:" U.S. SUPREME COURT'S DECISION SOLIDIFIES STANDING REQUIREMENTS FOR FAIR CREDIT REPORTING ACT CLAIMS

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On 25 June 2021, the U.S. Supreme Court issued its decision in *TransUnion LLC v. Ramirez*, clarifying the nature of the harm sufficient to establish Article III standing to maintain a Fair Credit Reporting Act (FCRA) claim.[1] After *Ramirez*, plaintiffs seeking to pursue FCRA class litigation must establish concrete harm that is more than just speculative, and they must do so for all class members with the requisite type of evidence called for at each particular stage of litigation. The impact of the holding in *Ramirez* will likely extend to class standing issues beyond the FCRA context.

In *Ramirez*, a California dealership ran a credit check on the plaintiff when he and his wife sought to purchase a car.[2] The credit check, provided by TransUnion, indicated a potential match between the plaintiff's name and a name appearing on a list of terrorists maintained by the U.S. Treasury's Office of Foreign Assets Control (OFAC).[3] As a result, the plaintiff's wife purchased the car in her name rather than jointly with the plaintiff.[4] The plaintiff brought suit, asserting that TransUnion had violated FCRA when it allegedly failed to (1) follow reasonable procedures to ensure the accuracy of information in his credit file, (2) provide all information in his credit file upon request, and (3) provide a summary of his rights "with each written disclosure[.]"[5]

The plaintiff sought to represent a nationwide class of supposedly similarly situated individuals, and the Northern District of California certified a class of individuals who received a letter similar to one that TransUnion had sent to the plaintiff indicating the recipient's name potentially matched a name on the OFAC list.[6] Of the 8,185 individuals in the class, only 1,853 individuals had had this information disseminated to a third party.[7] Nevertheless, the trial court held that all class members had Article III standing, and it proceeded to rule for the class on the merits of the FCRA claims.[8] On appeal, the 9th Circuit (1) affirmed that all class members had Article III standing, (2) found that Ramirez's claims satisfied the Fed. R. Civ. P. 23 typicality requirement for class certification, and (3) reduced the trial court's punitive damages award.[9]

The U.S. Supreme Court granted certiorari to review the question of whether all 8,185 class members had suffered an injury-in-fact sufficient to establish Article III standing to pursue the three FCRA claims.[10] The Court began with examining its 2016 FCRA decision in *Spokeo, Inc. v. Robins*.[11] In doing so, the Court (1) reiterated that in analyzing standing, a federal court "should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts[,]"[12] and (2) rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[13] In light of *Spokeo*, the Court reemphasized the need for a showing of "concrete harm" to justify Article III

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standing.[14] Additionally, the Court provided a reminder that a plaintiff must establish standing "with the manner and degree of evidence required at the successive stages of the litigation."[15]

The Court then focused its analysis on whether each of the members of the *Ramirez* class could establish concrete harm based on the inclusion of erroneous OFAC information in their credit files.[16] The Court found that the 1,853 class members whose credit files were provided to third parties had suffered a concrete harm.[17] The Court reasoned that the transmission of the erroneous derogatory information to third parties bore a close relationship to a harm traditionally recognized as a basis for relief, namely, defamation.[18]

But the Court found that the remaining 6,332 class members had not suffered a concrete harm.[19] Comparing the *Ramirez* fact pattern to that of a defamation claim, the Court emphasized that for these individuals, there was no "publication" of the allegedly erroneous facts because TransUnion had not provided the reports to any third parties.[20] The Court stated that "[t]he mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."[21] It also rejected the plaintiffs' argument that the risk of future harm from the erroneous information in the credit files could constitute concrete harm for Article III purposes.[22] Further, the Court ruled that, other than the named plaintiff, none of the class members had established concrete harm from the alleged failure to provide all information in the credit files upon their request and to include summaries of plaintiffs' rights with each disclosure.[23] Accordingly, the Court reversed and remanded the case to the 9th Circuit.[24] In doing so, the Court did not address the lower court's Rule 23 typicality analysis, concluding that "[o]n remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing."[25]

Ramirez will curtail the ability of plaintiffs to maintain FCRA class litigation and other class litigation in federal court. In *Ramirez*, the Court provided clarity as to what constitutes concrete harm for purposes of Article III standing to maintain a FCRA claim and likely other similar causes of action. Plaintiffs can no longer establish Article III standing by merely alleging the possible risk that supposedly false or misleading information may be disclosed to third parties. Thus, the decision will serve to pare back frivolous class claims that merely speculate about the possibility of future harm. The decision also indicates that a court should consider the viability of individual class members' Article III standing as part of the analysis of whether to certify a putative class. Additionally, the holding will circumscribe claims based on technical violations of FCRA where a plaintiff cannot establish a concrete harm resulting from the supposed violation. At the same time, while curbing private class litigation in federal court, *Ramirez* is unlikely to curtail government enforcement actions seeking to address legal injuries.

FOOTNOTES

[1] No. 20-297, 2021 WL 2599472 (U.S. June 25, 2021).

[2] *Ramirez*, 2021 WL 2599472, at *4.

[3] *Id*.

[4] *Id*.

[5] *Id*. at *5 (citing 15 U.S.C. §§ 1681e(b), g(a)(1), g(c)(2)).

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[6] *Id*. (citing *Ramirez v. TransUnion LLC*, 301 F.R.D. 408 (N.D. Cal. 2014)).

[7] *Id*.

[8] *Id*. (citing *Ramirez v. TransUnion LLC*, 2016 WL 6070490, at *5 (N.D. Cal. Oct. 17, 2016)).

[9] *Id*. (citing *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020)).

[10] *See id*. at *6.

[11] 578 U.S. 330 (2016).

[12] *Ramirez*, 2021 WL 2599472, at *6 (quoting *Spokeo*, 578 U.S. at 341).

[13] *Id*. at *8 (quoting *Spokeo*, 578 U.S. at 341).

[14] *See, e.g., id.*

[15] *Id*. at *10 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

[16] *See id*. at *10–14.

[17] *Id*. at *11.

[18] *See id*. at *10–11.

[19] *Id*. at *14.

[20] *See id*. at *11–12.

[21] *Id*. at *12.

[22] *Id*. at *13–14.

[23] *Id*. at *15.

[24] S*ee id*. at *16.

[25] *Id*. The Court refused to credit the plaintiff's theory that “internal publication” of the erroneous information “to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received” could constitute concrete harm. *Id*. at *12 n.6. The Court's statement may indicate that recent lower court decisions, such as the 11th Circuit's decision in *Hunstein v. Preferred Collection & Management Services, Inc*., 994 F.3d 1341 (11th Cir. 2021) (finding standing where defendant transmitted information to vendor), are no longer viable.

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