TransUnion Hollows Out Class Members Who Have Not Suffered a Concrete Injury

Article
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"An injury in law is not an injury in fact." Too often since the Supreme Court's seminal decision in *Spokeo*, the nexus between the *intangible* harms often claimed by plaintiffs in ever increasing privacy-based class actions, and Article III's injury in fact requirement, have led courts to find an injury in fact based upon an injury in law. Historically, putative classes have been certified even when class member standing was in question. [1] Now, under *TransUnion*, the standard is clear: every class member must establish standing in order to recover individual damages.

In *TransUnion*, a class of 8,185 individuals sued in federal court under the Fair Credit Reporting Act (FCRA). They claimed that TransUnion failed to use "reasonable" procedures to ensure the accuracy of their credit files. That failure was misleading reports that designated innocent individuals as potential "terrorists, drug traffickers, or other serious criminals" because their first and last names matched those on a list maintained by the Office of Foreign Assets Control (OFAC)—generating false-positives against these individuals who merely shared names. Of the class, 1,853 members had their credit reports provided to third-party businesses. The remaining 6,332 members did not. The Ninth Circuit found that *every* class member had standing "because TransUnion's reckless handling of OFAC information exposed every class member to a real risk of harm to their concrete privacy, reputational, and informational interests protected by the FCRA." *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1037 (9th Cir.), *rev'd and remanded*, No. 20-297, 2021 WL 2599472 (U.S. June 25, 2021). The Supreme Court disagreed.

Writing for the majority in *TransUnion*, Justice Kavanaugh cautioned that "*Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, at *7 (U.S. June 25, 2021). While *Spokeo* made clear that "a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a right and purports to authorize a suit to vindicate it," the Supreme Court issued a

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call to action for federal courts to scrutinize this requirement more closely: "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." *Id*. at *8, *9.[2]

Accordingly, "***only*** those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court," meaning, the harm suffered is a "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 2021 WL 2599472, at *8, *10 (emphasis added). Critically, this includes "***every*** class member [who also] must have Article III standing in order to recover individual damages." *TransUnion*, 2021 WL 2599472, at *10 (emphasis added); *see Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., dissenting) "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not [...] if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand.".

The Court held that only those class members who had their credit report provided to third-party businesses had suffered a concrete injury in fact under Article III. Their injuries bore a "close relationship" to the reputational harm associated with the tort of defamation because "the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement." *TransUnion*, 2021 WL 2599472, at *10, *11. In contrast, the remaining 6,332 class members did not have standing as "the mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm." *Id*. at *12. In light of these findings, the Court remanded the matter to consider whether class certification was even appropriate in the first instance in light of these rulings. *Id*. at *15.

As *TransUnion* makes resounding clear, the onus is on a class representative to establish a concrete harm under Article III that is suffered by *all* members of a class for them to recover individual damages. It also creates a hurdle for plaintiffs to clear at class certification, and will likely preclude plaintiffs from obtaining certification on grounds that the risk of future harm to absent class members satisfies Article III. This means that it will be more difficult for plaintiffs to certify classes, particularly in consumer class actions where there is frequently no common proof to identify which absent class members suffered a concrete injury from those who did not. It will also serve as a basis to support decertification or narrow the class. In closing, the Supreme Court's message to would-be class representatives and class members is straight-forward: "No concrete harm, no standing."

[1] See *Individual standing of class representative as prerequisite; individual standing of absent class members not measured*, 1 Newberg on Class Actions § 2:3 (5th ed.) ("the vast majority of courts continue to heed the basic rule that the standing inquiry focuses on the class representatives, not the absent class members[.]").

[2] *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019) ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions.").