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ALERT

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"No Concrete Harm, No Standing": The Long-Reaching Implications of the Supreme Court's Decision in *Ramirez v. TransUnion*

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On June 25, 2021, the U.S. Supreme Court delivered its decision in the closely watched class action case, *Ramirez v. TransUnion LLC*, No. 20-297. The Court's 5 to 4 decision, authored by Justice Kavanaugh, promises to have long-reaching implications for class action practice. Defense counsel undoubtedly will be citing the Court's decision and the phrase Justice Kavanaugh used at the beginning and end of his analysis - "[n]o concrete harm, no standing" - in a wide variety of class certification-related proceedings. Plaintiff's class action lawyers likely will scramble to limit the Court's holding, arguing that it should be confined to class actions based on violations of the Fair Credit Reporting Act ("FCRA"). This article examines the potential, long-term implications of *Ramirez*.

First, a little background on the case. Plaintiff Sergio Ramirez was shocked to learn when he applied for financing to buy a car that his name had been flagged by TransUnion as an individual on the United States government's list of Specially Designated Nationals ("SDN"). The SDN list consists of individuals "who threaten America's national security." The car dealer told Ramirez that he was precluded from extending him credit in light of that information. Worse, the dealer told Ramirez of his SDN designation on his TransUnion credit report in front of his wife and father-in-law, allegedly causing him great embarrassment. After Ramirez complained, TransUnion sent him a copy of his credit report, which did not list him as a SDN but then followed up in a separate letter the next day saying he was a potential match and, in violation of FCRA, not setting forth his rights.

Ramirez sued TransUnion on behalf of himself and approximately 8,200 other consumers who also were wrongly designated as SDNs in their credit files. The trial court certified a damages class despite evidence in the record that only 1,853 of the class members actually had their SDN designations sent to a party outside of TransUnion. The case proceeded to trial and resulted in a verdict of $60 million against TransUnion, which included statutory damages for violations of FCRA and punitive damages.

The Ninth Circuit, in a 2-1, decision, affirmed the trial court's certification of the class under FRCP 23(b) and the award of statutory damages but reduced the punitive damages award. In doing so, the Ninth Circuit held that, in order to obtain damages, the class had to demonstrate that each member of the certified class has Article III standing. The Ninth Circuit found that the class had met this burden at trial through evidence that TransUnion had violated each class member's rights under FCRA by sending out non-compliant notices to each class member about their SDN designations. The Ninth Circuit found these statutory violations were, in and of themselves, sufficient to show "concrete injury" and that the class was not required to prove each of the class member's credit reports were actually sent to third parties in order to satisfy Article III's standing requirement.

The Supreme Court reversed, holding that the class certified above was too broad and that the approximately 6,300 members of the class whose credit reports were never shared with anyone outside of TransUnion lacked Article III standing to participate in the case. Quoting Judge Tatel from the D.C. Circuit, Justice Kavanaugh framed the question this way: "if inaccurate information falls into 'a consumer's credit file, does it make a sound?'" The majority answered the question "no." According the Court, "[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." The Court rejected the plaintiffs' argument that they had standing because they may suffer a "future harm," because the plaintiffs sought to certify a damages action (and not a claim for injunctive relief) and because the plaintiffs failed to present any evidence demonstrating a substantial likelihood of future disclosure to third parties.

The Supreme Court held that every member of the class must have individual standing, which must be maintained through all stages of the litigation.

In dissent, Justice Thomas argued that the majority's decision steps on the toes of the legislature since the Court "has relieved the legislature of its power to create and define rights." The Supreme Court nonetheless vacated the verdict and remanded *Ramirez* with instructions that the trial court revisit its class certification decision in light of its holding.

Ramirez will be viewed as a watershed event for class action defense lawyers. Plaintiff's lawyers will wrestle to limit the impact of the ruling, arguing that the case presents nothing new or novel and that a statutory injury should be enough in most cases to satisfy Article III at the

class certification stage. The question is how far will trial and lower appellate courts take the Supreme Court's holding. The authors[1] believe the decision will have far-reaching implications and not just for FCRA and related privacy case cases. Here are some potential implications:

Many class actions involve evidence of purported violations of federal or state statutes or regulations but are weak on the injury sustained by class members as a result of those violations. Since the merits of those alleged violations are typically adjudicated on summary judgment after the trial court has ruled on a motion to certify a class, class plaintiffs' allegations that the defendant violated the law usually are presumed accurate at class certification. The name plaintiff(s) will therefore hit that issue hard in their motion papers and argue that a statutory violation is the equivalent of evidence of statutory injury and statutory injury is the same as actual injury needed for Article III purposes. Usually, class counsel will select a name plaintiff like Sergio Ramirez who can show some form of concrete injury (even if it is difficult to quantify the damages from a statutory violation like publication of erroneous or private information). The defendant will attack those argument, as TransUnion did in *Ramirez*, by showing that certain members of the class suffered no concrete injury or that the name plaintiff(s) injuries are atypical of the class. In the aftermath of *Ramirez*, we predict that trial courts will be more amenable to putting the class to the task of showing actual injury to all persons within the proposed class definition at the class certification stage instead of just deferring that issue to the damages stage of the case or assuming that evidence of a statutory violation presumptively means all members of the class have been injured.

Ramirez also could give greater momentum to defense arguments that a class should not be certified because the class cannot come up with a common methodology for determining whether each class member suffered a concrete injury from the defendant's purported statutory violations. In many class actions, a defendant's records, or more importantly data, does not track information that would show that members of the class have suffered concrete injury. Class counsel, accordingly, will have to develop a common methodology for determining whether each class member suffered a concrete injury as a result of the defendant's conduct that is dependent on something other than information from the defendant. That could be challenging in many cases and lead trial courts to certify fewer damage class actions in light of the rigorous requirements of FRCP 23(b)(3). Take for example Sergio Ramirez's case. The most concrete injuries he suffered were (1) the denial of credit by his car dealer and (2) the embarrassment he experienced in front of his family when told he is a SDN. That evidence was particular to Ramirez and not in TransUnion's possession. To prove other class member's suffered similar injuries to meet Article III's standing requirement, the class presumably would have to go to each individual class member but, doing so, would only underscore that individual issues of proof predominate over common issues, or that a class action is not a superior or manageable method of resolving disputes compared to individual litigation or alternative dispute resolution.

Finally, we believe *Ramirez* will have implications beyond the FCRA. Defense attorneys will seek to apply *Ramirez* to a wide variety of cases involving statutory penalties, including those filed under the FCRA, TCPA, and other statutes, including possibly the ever-expanding mountain of lawsuits filed under state biometric statutes. For example, if a statute requires a company to utilize a certain methodology or to make certain disclosures to consumers, does it necessarily follow that a company's failure to do that injured each class member? If the defendant's improper methodology did not cause members of the putative class to be paid less than they were owed, for example, it is difficult to see how the class can establish Article III for those class members. The decision will also have implications in common law cases. For example, if the class member never read the defendant's improper or inadequate disclosure of certain mandated information, how was the class member injured by the defendants' conduct? If the class's claim is based on a misrepresentation or fraud theory, the class will be hard pressed to show how class members that never read, and therefore never relied on, the defendant's improper disclosures were harmed at all by them.

Only time will tell the true implications of *Ramirez*. Undoubtedly, the phrase "[n]o concrete harm, no standing" will become a mantra for defense counsel. And the plaintiff's class action bar, with its resources and creativity, will no doubt have an influence on how the requirement of proving Article III standing at the class certification stages of a case is interpreted by the courts. It promises to be a wild ride.

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1. The authors are partners at Saul Ewing Arnstein & Lehr LLP where they focus on class actions affecting clients in a variety of industries, from insurance and financial services to higher education, food and beverage and manufacturing. The views expressed in this article are personal to the authors and do not reflect the views of Saul Ewing Arnstein & Lehr LLP or its clients.

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