"NO CONCRETE HARM, NO STANDING": SUPREME COURT HOLDS THAT EACH CLASS MEMBER MUST INDEPENDENTLY ESTABLISH ARTICLE III STANDING TO RECOVER INDIVIDUAL DAMAGES

Timothy E. Congrove – Shook, Hardy & Bacon L.L.P.

Daniel E. Cummings – Shook, Hardy & Bacon, L.L.P

Sarah T. Eibling – Nelson Mullins Riley & Scarborough LLP

Jeffrey A. Holmstrand – Grove, Holmstrand & Delk, PLLC

Heather M. Howard – King & Spalding LLP

In *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), the Supreme Court reiterated that standing under Article III required a plaintiff in federal court to show, among other things, an "injury-in-fact" – an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id*. at 338-40. The Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 594 U.S. ___, 141 S. Ct. 2190 (2021), provides some much-needed answers to Article III's standing requirements with respect to class actions, but as is often the case, leaves just as many questions unanswered.

The 5-4 decision, authored by Justice Kavanaugh, squarely held that each class member must have independent Article III standing in order to recover individual damages, *TransUnion*, 141 S. Ct. at 2208, but left open the "distinct question whether every class member must demonstrate standing *before* a court certifies a class." *Id.* at n. 4. It further stated that "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim they press and for each form of relief they seek (for example, injunctive relief and damages)." *Id*. The majority concluded that while some of the class members had Article III standing for one of their claims brought under one section of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*. ("FCRA"), none of the putative class members – other than the named plaintiff himself – had suffered a concrete harm for the alleged violation of two other sections. Justice Thomas, writing for the four dissenters, would have found that standing existed for all class members for all claims and further noted that class members who could not pursue those FCRA claims in federal court (because of lack of Article III standing) might nonetheless be able to proceed in a more favorable state court forum. *TransUnion*, 141 S. Ct. at 2224 n. 9 (Thomas, J. dissenting).

This article will discuss the *TransUnion* decision, its impact on defendants facing class actions where the named plaintiff and the absent class members may lack Article III standing, and other potential implications such as personal jurisdiction challenges to claims of absent class members.

BACKGROUND

Standing in federal court is constrained by Article III, which limits federal jurisdiction to "Cases" or "Controversies." Broadly speaking, that means plaintiffs in federal court must show:

1. That they are under threat of suffering an "injury in fact" that is "concrete and particularized;"

2. The threat must be actual and imminent, not conjectural or hypothetical;

3. It must be fairly traceable to the challenged action of the defendant; and

4. It must be likely that a favorable judicial decision will prevent or redress the injury.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). Even where a defendant engages in conduct that violates a statutory provision providing for a penalty, a plaintiff seeking monetary relief for that violation must meet the "injury-in-fact" requirement. *Spokeo*, 578 U.S. at 338-40. A plaintiff must "demonstrate standing separately for each form of relief sought." *Friends of the Earth*, 528 U.S. at 185.

As a credit reporting agency, TransUnion is subject to various provisions of FCRA, which "imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo,* 578 U.S. at 335. Among those is a requirement that it "follow reasonable procedures to assure maximum possible accuracy" in its reports. 15 U.S.C. §1681e(b) (the "reasonable procedures" requirement). It must also disclose to consumers, upon request, "all information in the consumer's file at the time of the request." *Id.* § 1681g(a)(1) (the "disclosure requirement"). Finally, it must provide a consumer with a "summary of rights" prepared by the Consumer Financial Protection Bureau whenever it makes a written disclosure to a consumer. *Id.* § 1681g(c)(2) (the "summary of rights" requirement). These three requirements were at the heart of the parties' dispute. Congress further created a private right to sue for violations of FCRA's requirements which provides for the award of "actual damages or for statutory damages not less than $100 and not more than $1,000," as well as punitive damages and attorney's fees. *Id.* § 1681n(a). Thus, the statutory language arguably permits an award of statutory damages even in the absence of any actual harm to the consumer as a result of a technical violation of the statute.

The Treasury Department's Office of Foreign Assets Control, OFAC, maintains a list of "specially designated individuals" who are "terrorists, drug traffickers, or other serious criminals" and it is generally unlawful to transact business with a person on the OFAC list. *TransUnion*, 141 S. Ct. at 2201. TransUnion offered businesses an OFAC name screen service, which provided a notation that the person's name matched a name on the OFAC list. Its basis for so doing was limited to a simple comparison of first and last names without making use of any other potentially identifying data. TransUnion had continued this practice with only "surprisingly few changes," despite a prior jury verdict from another consumer based on a similar complaint. Because the names on the OFAC list are not unique, TransUnion's procedures resulted in many false positives and its files contained thousands of false notations of a match to the OFAC list. Thus, when a third party requested a report for one of those people, the resulting report included an alert of a potential OFAC match.

Plaintiff Ramirez was one such person. When he applied for an auto loan, a report containing the false information was provided to the dealership, which then refused to lend to him because his name was on a "terrorist list." When he asked TransUnion for a copy of his credit report the next day, the copy he was provided did not contain the OFAC alert but was accompanied by a summary of his rights. TransUnion sent a second letter the next day which, as a "courtesy," disclosed to him that his name was considered a match to the OFAC database and that it would include that information in future reports. That disclosure did not include a summary of rights. Concerned about the mailings, Ramirez consulted a lawyer and ultimately succeeding in getting TransUnion to exclude the alert from future reports. In the meantime, he cancelled a planned vacation out of the country over concerns about potential implications from the alert.

Ramirez subsequently brought three claims in federal court. First, he asserted that TransUnion's procedures resulting in the inclusion of the OFAC alert in his credit report violated the reasonable procedures requirement. Second, sending him a copy of the credit report without the OFAC alert violated the disclosure requirement. Finally, he contended that TransUnion's "courtesy" letter disclosing to him that his name was a potential match to the OFAC list violated the summary of rights requirement because one was not included with that disclosure. He also sought certification of a class of all people in the United States to whom TransUnion sent a mailing similar in form to the second mailing Ramirez received (*i.e.*, disclosing a potential match to the

OFAC list without including a summary of rights letter and after TransUnion previously provided the consumer with a copy of their report that did not include the false OFAC alert).

The district court certified a class of 8,185 such persons. Of those, only 1,853 members had their reports disseminated to third parties during the class period. The false OFAC information was also included in the credit files of the other 6,322 class members but not disseminated during the class period. At trial, Ramirez introduced evidence as to his personal experiences but not those of any other class member and made no effort at trial to show that TransUnion disseminated false reports for any of the class members outside the class period. There was likewise no evidence at trial that other class members had done anything after TransUnion sent them a copy of their report and the separate "courtesy" letter. The jury found for the class on all three claims, awarding each member $984.22 in statutory damages (just under the $1,000 statutory maximum) and $6,353.08 in punitive damages (approximately 6.45 times the statutory damages award), resulting in a judgment in excess of $60 million.

On appeal, the Ninth Circuit held that all class members had Article III standing for all three claims but reduced the punitive award to $3,936.88 per class member, concluding a ratio of 4 to 1 was the constitutional maximum, and thus reducing the total award to roughly $40 million. TransUnion sought review both as to the Article III standing holding as well as to the constitutionality of the punitive damage award. The Supreme Court granted certiorari limited to the standing 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.

592 U. S. ___, 141 S. Ct. 972, 208 L. Ed. 2d 504 (2020).

THE SUPREME COURT'S DECISION

All class members must have Article III standing for each claim and form of relief sought.

"No concrete harm, no standing." *TransUnion*, 141 S. Ct. at 2214. When a lawsuit involves a Congressionally created right to recover statutory damages, the closer that damage claim relates to a harm "traditionally providing a basis for a lawsuit in American courts," the more likely the Court will find Article III standing. Finding that the dissemination of the false OFAC alert to third parties closely relates to the tort of defamation, the majority held those 1,853 class members established Article III standing because the violation of the "reasonable procedures" requirement led to a concrete injury. On the other hand, even though TransUnion had also violated that requirement for the other 6,332 class members by placing false OFAC information in their credit files, the fact that there was no evidence at trial it had disseminated that information to third parties during the class period precluded a similar result. The Court rejected the argument that the risk that TransUnion might have done so in the past or would do so in the future sufficed to create a concrete harm.

With respect to the disclosure and statement of rights claims, which the Court said were "intertwined," the Court stated:

> But the plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. In fact, they do not demonstrate that they suffered any harm ***at all*** from the formatting violations. The plaintiffs presented no evidence that, other than Ramirez, "a single other class member so much as ***opened*** the dual mailings," "nor that they were confused, distressed, or relied on the information in any way." The plaintiffs put forth no evidence, moreover, that the plaintiffs would have tried to correct their credit files—and thereby prevented dissemination of a misleading report—had they been sent the information in the proper format. Without any evidence of harm caused by the format of the mailings, these are "bare procedural violation[s], divorced from any concrete harm." That does not suffice for Article III standing.

Id. at 2213 (internal citations omitted). Accordingly, none of the absent class members had standing to recover damages related to those claims. On the other hand, the named plaintiff testified about the concerns he had over the mailings (including consulting a lawyer and cancelling a planned trip) after opening them, so the Court apparently concluded that he alone had suffered a concrete harm allowing him to recover under the disclosure and statement of rights claims. *Id*. at 2214.

The question of when standing must be established for absent class members remains unresolved.

As noted above, the *TransUnion* majority expressly left open the "distinct question whether every class member must demonstrate standing *before* a court certifies a class." 141 S. Ct. at 2208 n. 4 (emphasis in original). It further held that a "plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages." *Id*. at 2210. As a result, it stated: "On remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing." *Id*. at 2214.

By declining to address the question of when standing must be established, the Supreme Court continued the uncertainty among the circuits whether a class may be certified when the class definition includes members who suffered no injury and thus lack Article III standing. Although the majority of circuits follow the rule that the standing inquiry focuses on the class representatives, not absent class members, this is nonetheless an issue that has been cited as creating "deep confusion" among the circuits on the "essential, constitutional" issue of class standing. 1 William B. Rubenstein, Newberg on Class Actions § 2:3 (5th ed. 2016, Dec. 2021 Update) (quoting *In re Deepwater Horizon*, 753 F.3d 516, 521 (5th Cir. 2014) (Clement, J., dissenting)). Whether classified as a question of Article III standing or class definition under Rule 23, courts must grapple with the existence of uninjured, absent class members when they undertake a class certification inquiry. *Id.*

Justice Thomas drops a concerning footnote.

In a footnote in his dissent that has garnered significant attention, Justice Thomas noted that the majority's decision "might actually be a pyrrhic victory for TransUnion." Article III creates a limitation only on the power of federal courts, but not on state courts, which are free to

determine their own standing requirements. *Id.* at 2224 n.9 (Thomas, J. dissenting) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)). This, he said, means that actions seeking monetary relief for class members who lack Article III standing may be able to proceed in the courts of some states, even when the underlying rights at issue are based on federal law. Justice Thomas cited to Thomas Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 Minn. L. Rev. 1211 (2021), and he added that "the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions." *Id.*

Commentators have already echoed Justice Thomas's concern that "*TransUnion* may move class actions from federal courts back into state courts." *Article III Standing – Separation of Powers – Class Actions* – TransUnion v. Ramirez, 135 Harv. L. Rev. 333, 342 (2021). "The Court's holding in *TransUnion* thus means that federal courts lack the ability to vindicate the rights of those 6,332 class members, not that those class members lack the ability to obtain relief in state courts." *Id.* By making it "more difficult for class action plaintiffs to bring their claims in federal court," the Court in *TransUnion* has been criticized for "undermining congressional efforts to keep class actions in federal court" and instead having the effect of "push[ing] these kinds of class actions into state court." *Id.* As discussed below, however, *TransUnion* also calls into question another constitutional limitation on the power of courts to hear cases – personal jurisdiction – and the Supreme Court has squarely held that the state courts are constrained by the Due Process Clause from hearing claims which have no connection to the forum.

Moreover, even if Justice Thomas were correct that existing Supreme Court precedent arguably permits recovery in no-injury cases on federal claims (such as the FCRA claims at issue in *TransUnion*) in state courts with less rigorous standing requirements, s*ee ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), the reasoning of the Court's opinion in *TransUnion* may have laid the groundwork for addressing that precedent. The Court did not just ground its holding in Article III, but in Article II and separation of powers more broadly. As Justice Kavanaugh wrote for the Court: "A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion*, 141 S. Ct. at 2207. In other words, Article II places decisions as when and how to enforce society's interest in enforcing statutory violations within the discretion of the Executive Branch, not "within the purview of private plaintiffs (and their attorneys)." *Id.*

Logically, if an Article III court cannot infringe on the power of the federal executive, a state court should not be permitted to do so either. Thus, even if state courts could hear some no-injury federal law claims that federal courts cannot under *Spokeo* and *TransUnion* (though defendants can and should make any colorable arguments to the contrary), *TransUnion* lays the doctrinal groundwork for a future holding that the concrete harm requirement is a substantive component of all federal law claims and that it applies in state courts the same as in federal courts.

WHAT ABOUT PERSONAL JURISDICTION OVER ABSENT CLASS MEMBER CLAIMS?

Broadly speaking, personal jurisdiction deals with a court's power to compel a party to come into court and defend itself. The Due Process Clause limits the ability of state courts to exercise personal jurisdiction over claims against companies to suits (1) brought in their state of

incorporation or where they maintain their principal place of business (general personal jurisdiction) and (2) those states where they have sufficient contacts both to the forum **and** to the claims asserted in that forum (specific personal jurisdiction). In actions where there are multiple plaintiffs, each plaintiff must individually show that the court has personal jurisdiction over the defendant as to their claim. *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. ___, 137 S. Ct. 1773 (2017).

The situation is murkier when a plaintiff seeks to proceed in a representative capacity. Class representatives are the "named plaintiffs" and the class members they seek to represent ("absent class members") are not, at least initially, parties to the lawsuit. In the past, courts often held that personal jurisdiction over claims of the entire class could proceed so long as personal jurisdiction existed for the class representative's claim.

In *Bristol-Myers*, the Court addressed whether California could exercise personal jurisdiction over claims brought by out-of-state plaintiffs who were joined with in-state plaintiffs in a suit against a pharmaceutical manufacturer. The vast majority of the plaintiffs were from other states and their claims had no connection to California. Analyzing the question under the Due Process Clause of the Fourteenth Amendment, the majority concluded that the exercise of personal jurisdiction over the claims of the non-residents violated the Constitution.

In the wake of *Bristol-Myers*, class action defendants have argued, with at best limited success, that personal jurisdiction must exist over the claims of absent class members and not just those of the named plaintiff. *See, e.g.*, *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020) (holding that personal jurisdiction need exist only as to the named plaintiff's claim); *but see Wiggins v. Bank of Am., N. Am.*, 448 F. Supp. 3d 611 (S.D. Ohio 2020) (stating that "Courts are somewhat split on whether *Bristol-Myers* applies to putative class members, courts generally agree that *Bristol-Myers* applies to named plaintiffs in class actions"). In *Mussat*, the Seventh Circuit refused to apply *Bristol-Myers* to the claims of absent class members, stating:

> We see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so.

953 F.3d at 447. Underlying this reasoning was the court's explicit assumption that subject-matter jurisdiction existed for all claims in a class action so long as it existed for the claims of the named plaintiff.

The holding in *TransUnion* should impact the personal jurisdiction analysis for claims of absent class members. In the first instance, prior to *TransUnion*, federal appellate courts split on whether absent class members were required to have Article III standing in order to recover damages as a class member. *Compare Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015) ("We now squarely hold that unnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing . . . ."), *with Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("no class may be certified that contains members lacking Article III standing").

TransUnion's holding that "every class member must have Article III standing in order to recover individual damages" should lead to re-analysis of whether a court may assert personal jurisdiction over claims of absent class members seeking money damages who have no relationship to the forum. *TransUnion* flatly rejected the notion that so long as there was subject-matter jurisdiction over the named plaintiff's claim there was also subject matter jurisdiction over the absent class members' claims. If the Seventh Circuit in *Mussat* was correct in its assumption that the personal jurisdiction analysis as to claims of absent class members mirrored the subject matter jurisdiction analysis, then *TransUnion* requires a reexamination of that decision.

As with an Article III standing challenge to subject-matter jurisdiction, parties will also have to litigate the timing of any challenge to personal jurisdiction over absent class members' claims. In *Cruson v. Jackson National Life Insurance Co.*, 954 F.3d 240 (5th Cir. 2020), the court held a defendant's objection to personal jurisdiction for absent class members' claims was not "available" until certification of a class. *Id.* at 250; *see also Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020) (motion to dismiss claims of absent class members on personal jurisdiction prior to certification was "premature"). These cases suggest such motions will likely not be entertained prior to certification, although defendants may nonetheless attempt to argue the deficiency of a class definition that would encompass claims of class members over which the certifying court lacks personal jurisdiction.

The practical upshot of a requirement that courts have personal jurisdiction over defendants as to the claims of absent class members would be to effectively eliminate nationwide classes, except in the defendant's home state—i.e., where the court has general personal jurisdiction over the defendant.

CONCLUSION

While *TransUnion* takes a step beyond *Spokeo* in authorizing federal court scrutiny as to alleged harms, it certainly leaves practitioners with a few more questions than answers, indeed. It also leaves practitioners with the possibility for unintended (or perhaps intended) consequences as plaintiffs may end up turning to state court forums for these "no concrete harm" class actions, leaving defendants to make creative arguments to get cases predicated on statutory damage schemes back to federal court.