



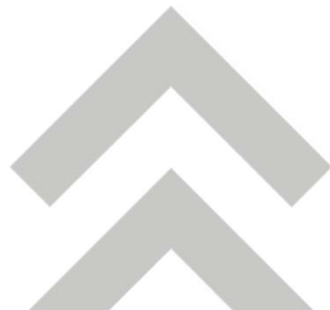
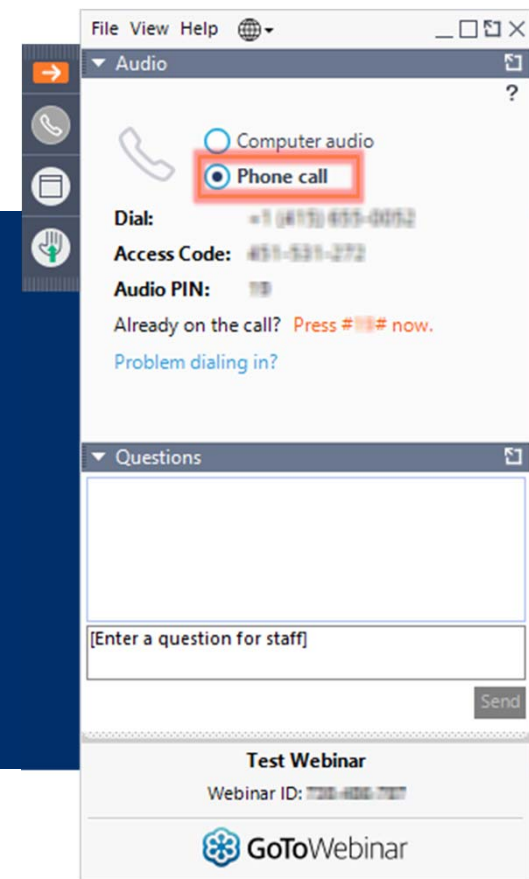
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TransUnion LLC v. Ramirez and the Impact on Class Action Litigation

July 13, 2021

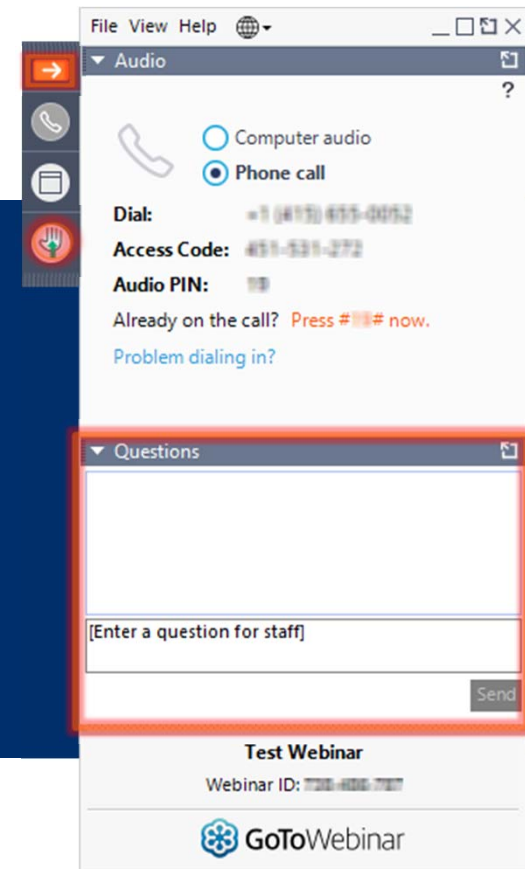
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Meet the Speakers



Objectives

- Discuss the *TransUnion* ruling
- Discuss impact of *TransUnion* ruling on pending cases and practical implications for class action litigation.



TransUnion LLC v. Ramirez.
“No Concrete Harm – No Standing”





TransUnion: Facts and Background

- Ramirez denied car loan after TransUnion credit report indicated he was a “possible match” on U.S. Dept. of Treasury’s OFAC database.
- Ramirez requested credit file from TransUnion; file did not indicate OFAC alert.
- TransUnion sent subsequent letter disclosing OFAC alert that did not contain a CFPB “summary of rights.”



TransUnion: The Claims

- Three Fair Credit Reporting Act (“FCRA”) Claims:
 - TransUnion did not follow “reasonable procedures” to ensure accuracy of consumer credit reports in violation of 15 U.S.C. § 1681(b).
 - TransUnion did not disclose “[a]ll information in the consumer’s file” when requested, in violation of § 1681(g)(a)(1).
 - TransUnion did not provide a “summary of rights” with each written disclosure to the consumer, in violation of § 1681(g)(c)(2).
- FCRA contains a private right of action against “any person who willfully fails to comply with any requirement ... with respect to any consumer is liable to that consumer” for actual and statutory damages.



TransUnion: The Class

- All people in the United States who TransUnion sent a similar mailing from January 1, 2011, through July 26, 2011.
- 8,185 Members
 - 1,853 had TransUnion disseminate their credit file to third parties.
 - 6,332 did not have credit file disseminated.
- District Court (N.D. Cal.) certified entire class.



TransUnion: Majority Opinion (Kavanaugh)

- Issue: Whether the 8,185 class members have Article III standing for each claim.
- “The question in this case focuses on the Article III requirement that the plaintiff’s injury in fact be ‘concrete’—that is, ‘real, and not abstract.’” *TransUnion*, 594 U.S., slip op. at 8 (quoting *Spokeo, Inc. v. Robins*, 578 U. S. 330, 340 (2016)).

TransUnion: Majority Opinion (Kavanaugh)

- Article III Standing
 - “To answer that question in a way sufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.” *TransUnion*, 594 U.S., slip op. at 7 (citing *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–61 (1992)).
 - “If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve.” *Id.* (citing *Casillas v. Madison Avenue Assocs., Inc.*, 926 F. 3d 329, 333 (7th Cir. 2019)).

TransUnion: Majority Opinion (Kavanaugh)

- Concrete Harm: Courts must assess whether alleged injury has a “close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts.” *Id.*, slip op. at 9 (quoting *Spokeo*, 578 U.S. at 341).
 - Traditional, tangible harms;
 - Intangible: reputational, disclosure of private information, intrusion upon seclusion;
 - Harms specified by the Constitution itself.



TransUnion: Majority Opinion (Kavanaugh)

- Federal Statutory Claims:
 - “But even though ‘Congress may “elevate” harms that “exist” in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.’” *Id.*, slip op. at 10 (quoting *Hagy v. Demers & Adams*, 882 F. 3d 616, 622 (6th Cir. 2018)).
 - Courts must still independently determine if alleged injury is concrete.
 - Only plaintiffs who have been concretely harmed by defendants’ statutory violations may sue in federal court.



TransUnion: Majority Opinion (Kavanaugh)

- Reasonable Procedures Claim: Only Class Members With Files Disseminated to Third Parties Have Standing.
 - Dissemination to Third Parties bears “close relationship” to traditional reputational harm associated with tort of defamation.
 - Internal credit files reviewed within TransUnion and its vendors are not “published” unless disclosed to a third-party.
 - Intra-company disclosures are not actionable reputational harms. *Id.*, slip op. at 19, n.6.
 - Risk of future harm only provides standing for claims seeking injunctive relief, not money damages.



TransUnion: Majority Opinion (Kavanaugh)

- Disclosure and Statement of Rights Claims: Only Named Plaintiff Has Standing
 - Individual class members did not offer evidence of injury from receiving statements missing OFAC alerts or statement of rights.
 - No “informational injury” where class members did not identify “downstream consequences” of the inadequate disclosures.

TransUnion: Dissenting Opinion (Thomas)

- Justices Thomas, Breyer, Kagan, and Sotomayor
 - Thomas, Breyer, and Kagan were in the *Spokeo* majority
- Public vs. Private Rights Distinction for Statutory Claims
- Plaintiffs here allege violations of their private rights, particularized by the FCRA private right of action
- “A statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing. A statute that creates a private right and a cause of action, however, does give plaintiffs an adequate interest in vindicating their private rights in federal court.” *Id.*, slip op. at 11 (Thomas, J., dissenting) (citations omitted).



TransUnion: Dissenting Opinion (Thomas)

- Majority discounts Plaintiffs' alleged injuries:
 - Withholding of Requested Information
 - Majority privileges financial harms
 - Majority too broadly limits "publication" harms in reputational or defamation cases to exclude publication to vendors and agents.



TransUnion: Dissenting Opinion (Thomas)

- Footnote 9:
 - “Today’s decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as the sole forum for such cases, with defendants unable to seek removal to federal court. courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.” (citations and quotations omitted).



Implications for Cases and Issues in Class Action Litigation



TransUnion and “Intra-Company” Disclosures

- *TransUnion*, 594 U.S., slip op. at 19, n.6.
 - “Intra-company” disclosures not actionable publications for purposes of the tort of defamation.
 - “Nor have [courts] necessarily recognized disclosures to printing vendors as actionable publications.”
- *E.g.*, FDCPA litigation – alleged violations of 15 U.S.C. § 1692c(b) for disclosures to “third-party” printing vendor
 - *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 994 F.3d 1341 (11th Cir. 2021)



The Future for Standing Based on “Risk of Future Harm”?

- *TransUnion*, 594 U.S., slip op. at 20.
 - “. . . a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial . . . But . . . a plaintiff’s standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages.”
 - “. . . the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm.”



The Future for Standing Based on “Risk of Future Harm”?

- *E.g.*, Data Breach litigation – standing based on heightened risk of future harm?
 - “On the one hand, the Sixth, Seventh, Ninth, and D.C. Circuits have all recognized—at the pleading stage—that a plaintiff can establish injury-in-fact based on the increased risk of identity theft. On the other hand, the Second, Third, Fourth, and Eighth Circuits have declined to find standing on that theory.”
 - *Tsao v. Captiva MVP Rest. Partners, Ltd. Liab. Co.*, 986 F.3d 1332, 1340 (11th Cir. 2021) (internal citations omitted). *But see* *McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295, 300 (2d Cir. 2021).



Recent 6th Circuit Standing Cases

- *Garland v. Orleans, PC*, 999 F.3d 432, 2021 U.S. App. LEXIS 16107 (6th Cir. 2021)
 - FDCPA
 - Holding: Plaintiff lacked standing.
 - Plaintiffs' alleged "confusion" and "anxiety" injuries were not "cognizable, concrete" injuries.



Recent 6th Circuit Standing Cases

- *Thomas v. Toms King (Ohio II), LLC*, 997 F.3d 629 (6th Cir. 2021)
 - FACTA
 - Holding: Plaintiff lacked standing.
 - “After *Spokeo*, we know there is no such thing as an ‘anything-hurts-so-long-as-Congress-says-it-hurts’ theory of Article III injury.”



Recent 6th Circuit Standing Cases

- *Donovan v. FirstCredit, Inc.*, 983 F.3d 246 (6th Cir. 2020)
 - FDCPA
 - Holding: Plaintiff *did* have standing.
 - Article III's standing requirement was satisfied because Plaintiff had alleged that the "statutory violation by FirstCredit presented the risk of public disclosure of her status as a purported debtor" and "[t]hat risk 'implicates a core concern animating the FDCPA—the invasion of privacy,'" which is a "concrete" interest "traditionally ... regarded as providing a basis for a lawsuit in English or American courts."



Recent 6th Circuit Standing Cases

- *Brintley v. Aeroquip Credit Union 18-2326*, 936 F.3d 489 (6th Cir. 2019)
 - ADA
 - Holding: Plaintiff lacked standing.
 - “A procedural violation of an informational entitlement does not by itself suffice to keep a claim in federal court.”
 - Without a “real interest in the information,” Plaintiff lacked a cognizable injury under Article III.



Recent 6th Circuit Standing Cases

- *Thompson v. Love's Travel Stops & Country Stores, Inc.*, 2018 U.S. App. LEXIS 24518 (6th Cir. 2018)
 - State-Law Cause of Action
 - Holding: Plaintiffs lacked standing.
 - “Plaintiffs may have alleged a practice by Defendants that could theoretically produce a concrete injury,” but they failed to allege “any arguably concrete injury such as the denial of an opportunity to use their credit, the rejection of an attempted charge, an impairment to a credit rating or credit report, or a fee.”



Practical Implications of *TransUnion* for Class Action Litigation

- State court vs. federal court
 - Justice Thomas: might be a “pyrrhic victory” in making state court “the sole forum for such cases” - *TransUnion*, 594 U.S., slip op. at 5-6, n.9 (Thomas, J., dissenting)
- Plaintiff forum shopping
- Impact on removal/remand analysis and considerations



Practical Implications of *TransUnion* for Class Action Litigation

- “Injury in fact” arguments in State court
- Divergence among States not bound by Article III



Standing at Various Procedural Stages

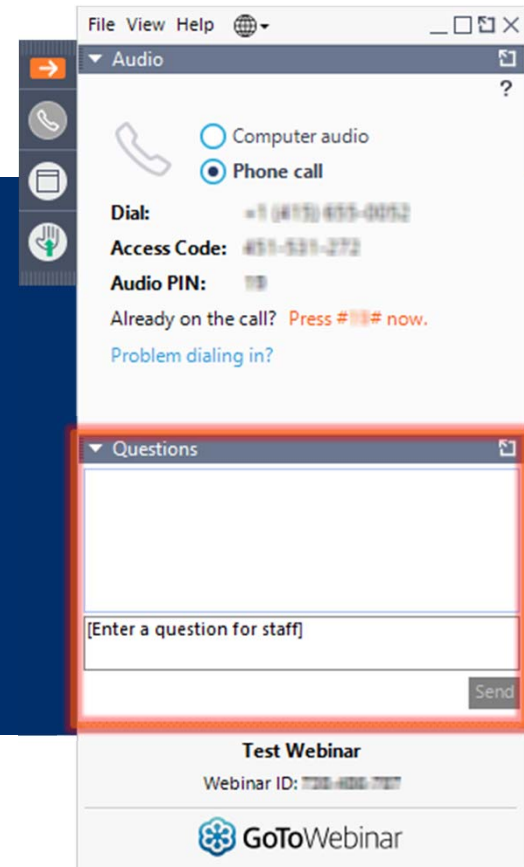
- “A plaintiff must demonstrate standing ‘with the manner and degree of evidence required at the successive stages of the litigation.’” *TransUnion*, 2021 U.S. LEXIS 3401, at *25 (quoting *Lujan*, 504 U.S. 555, 561 (1992)).
 - *TransUnion* – After a jury trial: In a case “that proceeds to trial, the specific facts set forth by the plaintiff to support standing must be supported adequately by the evidence adduced at trial.” *TransUnion*, 2021 U.S. LEXIS 3401, at *25-26.
 - *Spokeo* – At the pleading stage: “Where, as here, a case is at the pleading stage, the plaintiff must ‘clearly ... allege facts demonstrating’ each element.” *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).



Practical Implications of *TransUnion* for Class Action Litigation

- Motions on the Pleadings
- Discovery
 - Named Plaintiff
 - Unnamed/Putative Class Members
 - Experts
- Dispositive Motions
- Class Certification
 - Rule 23 Requirements
 - Ascertainability/Class Definitions

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Questions

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