

Supreme Court to Review Article III Standing Requirement for Absent Class Members

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The U.S. Supreme Court granted review last week in *TransUnion LLC v. Ramirez*, which presents the question of whether Article III or Rule 23 of the Federal Rules of Civil Procedure permits a damages class action where most class members experienced no actual injury. This question has taken on increasing urgency over the past several years, as plaintiffs and their counsel routinely seek classwide statutory damages on claims for technical violations of statutory requirements even though most class members experienced no resulting injury. *TransUnion* provides the Supreme Court with an opportunity to resolve whether a class action may be certified where plaintiff can recover massive damages on behalf of class members who have suffered no injury-in-fact within the meaning of Article III.

As we detailed in a [prior client alert](#), the underlying litigation arises from allegations that TransUnion placed inaccurate alerts on credit reports of plaintiff Sergio Ramirez and over 8,000 class members. The alerts incorrectly matched the names of Ramirez and class members with individuals on the U.S. Department of the Treasury's Office of Foreign Asset Control (OFAC) list of terrorists, drug traffickers and other individuals prohibited from doing business in the United States for national security reasons. Ramirez filed a putative class action claiming that TransUnion's OFAC alert practices violated various provisions of the Fair Credit Reporting Act (FCRA). While Ramirez alleged that he experienced difficulty obtaining a car loan after a dealership reviewed his inaccurate credit report, the parties stipulated that more than 75 percent of the proposed class did not have a credit report disseminated to a third party during the class period. There was also no evidence that absent class members received, opened or read a notice from TransUnion making them aware of the OFAC alert on their credit reports. Nonetheless, the district court certified the class of all 8,000 consumers, and a jury awarded Ramirez and the class \$60 million in statutory and punitive damages.

On appeal, the 9th Circuit held that each member of a class certified under Rule 23(b)(3) must establish Article III standing at the final judgment stage of a class action in order to recover monetary damages. Despite the fact that the majority of class members did not have their credit reports disseminated to third parties, the 9th Circuit found that the mere fact that the credit reports were available to potential creditors and

Contact Information

If you have any questions concerning this alert, please contact:

Rex S. Heinke

Partner

rheinke@akingump.com

Los Angeles

+1 310.229.1030

Natasha G. Kohne

Partner

nkohne@akingump.com

San Francisco

+1 415.765.9505

Neal Ross Marder

Partner

nmarder@akingump.com

Los Angeles

+1 310.728.3740

Michael J. Stortz

Partner

mstortz@akingump.com

San Francisco

+1 415.765.9508

Ali R. Rabbani

Senior Counsel

arabbani@akingump.com

Los Angeles

+1 310.728.3742

Shelly A. Kim

Associate

shelly.kim@akingump.com

Los Angeles

+1 310.728.3333

employers upon request sufficed to show a “material risk of harm” to the concrete interests of all class members. In so ruling, the court confirmed that its holding was limited to the entry of a classwide damages judgment following a jury trial of class claims certified under Rule 23(b)(3)—and did not “alter the showing required at the class certification stage or other early stages of a case.” In other words, the 9th Circuit implied that plaintiffs do not need to establish Article III standing for absent class members at the class certification stage.

In its petition for writ of certiorari, TransUnion pointed to federal appellate court rulings, including a string of published circuit court decisions, holding that a mere risk of dissemination of customer data retained in violation of a federal statute or the mere receipt of an allegedly deficient disclosure is insufficient to confer standing.

TransUnion argued that aside from the 9th Circuit, “no other circuit would have allowed this class action to proceed given the absent members’ lack of standing and the class representative’s atypicality.” Thus, according to TransUnion, the 9th Circuit’s decision “eviscerated critical Article III, Rule 23, and due process constraints, thereby paving the way for one highly atypical plaintiff to recover massive damages on behalf of thousands of uninjured class members.”

The Supreme Court has granted certiorari on the issue of “whether either Article III or Rule 23 permits a damages class action when the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffer.” It is not yet clear whether the Court will both address Article III standing of absent class members and clarify when those standing requirements must be evaluated during the course of a class action. Although the Supreme Court has previously scrutinized class action plaintiffs invoking the FCRA based on intangible harms (see *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)), some district courts have failed to address the standing inquiry as to absent class members until the final judgment stage. In light of the prolific use of the class action device to leverage the risk of aggregate statutory damages despite actual injury to class members, Supreme Court guidance on both issues is welcome and needed. We will continue to provide updates on the case as it proceeds before the Supreme Court.

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