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NEW LIMITS ON STANDING TO PURSUE STATUTORY DAMAGES CLAIMS

In the recent TransUnion case, the Supreme Court held in a consumer financial services class action that Congress lacked authority to allow a bounty to a person who did not suffer concrete harm as a result of the alleged violation. In this article, the author discusses the decision in detail and its implications for a broad variety of statutory regimes. He then lays out the arguments that TransUnion *also bars federal statutory damages in state courts. He closes by noting an important procedural question in class actions that the Court expressly declined to decide.*

By Stephen J. Newman *

The Supreme Court's recent decision in *TransUnion LLC v. Ramirez*[1] marks a major change in consumer financial services litigation. Numerous federal statutes governing financial institutions and related businesses authorize private plaintiffs to recover ─ in lieu of proving actual damages ─ statutory damages of a particular dollar amount (or range of amounts) per violation. Proponents of statutory damages regimes argue that compliance is encouraged if a bounty is available to those who bring violations to light. Statutes authorizing such bounties include the Fair Credit Reporting Act, the Truth in Lending Act, the Fair Debt Collection Practices Act, the Telephone Consumers Protection Act, and the Fair Credit Reporting Act. However, for companies whose interactions with the public routinely number in the thousands or millions, the bounty regime hypothetically creates astronomical legal exposure, if statutory damages can be sought on a classwide basis. *TransUnion* greatly reduces the risk by holding that Congress lacks authority to allow a bounty to a person who did not suffer concrete harm as a result of the alleged legal violation. The case also acknowledges that in class actions, persons without such concrete harm may not remain in any certified class. As a practical matter, *TransUnion* will focus the legal system's efforts on achieving compliance in the areas where consumers are most likely to benefit in the form of actual financial losses avoided. Pre-*TransUnion* law encouraged excessive focus on areas where a technical violation might be shown, even if the violation had no

[1] 141 S. Ct. 2190 (2021).

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impact on the public, or even if the supposedly violative conduct was actually beneficial to consumers. Going forward, cases can be expected to focus on whether and how a particular compliance issue actually affects the population the law is intended to protect.

THE DECISION

TransUnion involved a claim under the Fair Credit Reporting Act ("FCRA"), which purports to allow consumers to recover either their actual damages or statutory damages of $100 to $1,000 upon proof of a violation of "any requirement" of the statute.[2] The defendant offered a product that could be used to screen applicants for credit against a list of persons prohibited from transacting in the United States. At the time, the product screened against first and last names only, and the plaintiff argued that the failure to screen further (for example, to eliminate potential subjects by date of birth, as well as by name) violated the statute's requirement to employ reasonable methods to achieve "maximum possible accuracy."[3] A class of 8,185 consumers was identified by reference to individuals who had received their own credit reports and who were informed that they would be potential matches under the name-only criteria, but in a manner plaintiff contended violated other provisions of the FCRA. According to plaintiff, the disclosure was made in a letter that was separate from the regular credit report package and the separate letter failed to include a new copy of the statement of dispute rights plaintiff claimed was mandated by the FCRA.[4]

Of these 8,185, however, only 1,853 had reports sold during the class period to third parties containing information based on the allegedly improper name-only screening tool. Further, at trial, no evidence of harm was presented as to any class member except for the class representative, who argued that he was denied the ability to purchase a car as a result of the screening tool. As for the disclosure claim, the defendant presented evidence at trial, which went unrebutted, that the supposedly improper disclosure was more effective at informing consumers of their dispute rights than the manner of disclosure plaintiff argued was necessary for compliance. Nonetheless, the full class went to trial and a jury awarded more than $60 million in statutory and punitive damages, which was reduced by the Ninth Circuit Court of Appeals to approximately $40 million.

The defendant sought review in the Supreme Court, arguing that statutory damages are not recoverable without proof of concrete injury, and further, that in a class action, persons who lacked any actual harm could not be included within a class. These arguments were mostly accepted. No class member, the Court held, could pursue the disclosure claims because the trial evidence did not show that the supposed disclosure violations had any measurable impact on any consumer.[5] As for the accuracy claim, only those class members who had inaccurate reports sold to third parties had standing to seek statutory damages.[6] Even if inaccurate information within the defendant's files created the hypothetical risk of future harm, that is not sufficient injury to support standing, the Court ruled. The fact that no risk "materialize[d] … [should] be cause for celebration, not a lawsuit."[7]

The Supreme Court also explained that allowing uninjured parties to recover statutory damages violated three important constitutional principles. *First*, Article III limits the judicial power to address only true controversies; the mere possibility of future harm is not sufficient to invoke federal judicial power.[8] *Second*, Congress lacks authority "to enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[9] An attempt by Congress to allow uninjured

[2] 15 U.S.C. § 1681n(a).

[3] *Id.* § 1681e(b).

[4] *Id.* § 1681g.

[5] *TransUnion*, 141 S. Ct. at 2213-14. Although not addressed by the Supreme Court, this analysis was foreshadowed by *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) ("a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled and that the denial of that information creates a 'real' harm with an adverse effect").

[6] *TransUnion*, 141 S. Ct. at 2208-12.

[7] *Id.* at 2211.

[8] *Id.* at 2213.

[9] *Id.* at 2205 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

parties to access the courts violates separation of powers principles by distracting courts from their constitutional duties. "Federal courts do not exercise general legal oversight . . . of private entities."[10] *Third*, permitting private parties to enforce the law through a bounty system violates Article II of the Constitution, which reserves to the executive branch the power to determine how best to enforce the laws, and when to exercise prosecutorial discretion. "[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."[11]

Accordingly, the Supreme Court ruled that even the reduced judgment could not survive, and the case was remanded to the lower courts for further proceedings, which are ongoing.

IMPLICATIONS

TransUnion is one of the few class action cases to result in an appellate decision after a full jury trial. That alone marks the case as significant. Additionally, the reasoning of the Supreme Court's ruling is exceptionally broad and will have important implications across multiple fields of litigation, including financial services matters.

The ruling will of course have the broadest effect in the credit reporting context, making it clear that accuracy claims can be pursued only based on *actual* dissemination of credit reports. The mere presence of inaccurate information in a database ─ or even transmission of information across multiple databases ─ does not justify a claim when such information has not been examined by a human being with power to use the information to the consumer's detriment.[12] Indeed, one district judge took it on his own initiative to issue an order to show cause why a credit reporting case should not be dismissed on standing grounds, when plaintiff conceded that he had not been denied credit, but instead was *afraid* to apply for credit due to the presence of supposedly harmful information in his file. After letter briefing on the order to show cause, the case was dismissed based on the plaintiff's inability to plead harm in compliance with *TransUnion*: "fear of rejection fails to satisfy the injury requisite."[13] A more difficult question is whether a consumer has standing to seek statutory damages when he requests correction of a specific inaccurate item, and correction is refused, but before the consumer actually applies for (or is denied) credit. The Eleventh Circuit previously held, in *Collins v. Experian Information Solutions, Inc.*,[14] that standing exists to pursue such a claim, but *TransUnion* calls this authority into doubt.

Moreover, although *TransUnion* involved credit reporting claims, *TransUnion* also will apply to a broad variety of statutory damages regimes, and will require plaintiffs to prove some quantum of measurable, real-world harm to support any statutory damages award. Critically, the Supreme Court expressly approved cases rejecting statutory damages outside of the credit reporting context, including an opinion written by Justice Barrett when she was on the Seventh Circuit Court of Appeals.[15] The lower courts have already begun to apply *TransUnion* standing principles to other statutes.[16] In one notable recent decision, a federal

[10] *Id.* at 2203.

[11] *Id.* at 2207 (internal citations omitted).

[12] *See id.* at 2210 n.6.

[13] *Poremba v. Discover Fin. Servs. Inc.*, No. 2:21-cv-1407 (E.D.N.Y. Aug. 25, 2021). However, the Sixth Circuit recently ruled that when a consumer abandoned his plan to apply for credit based on information communicated only to him, such consumer has standing to pursue an FCRA claim. *Krueger v. Experian Info. Sols., Inc.*, No. 20-2060, 2021 WL 4145565, at *2 (6th Cir. Sept. 13, 2021).

[14] 775 F.3d 1330 (11th Cir. 2015).

[15] *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019).

[16] *E.g., Wadsworth v. Kross, Lieberman & Stone, Inc.,* 12 F.4th 665, 668-69 (7th Cir. 2021) (alleged Fair Debt Collection Practices Act ("FDCPA") violation was immaterial and did not confer standing); *Ward v. Nat'l Patient Account Servs. Solutions, Inc.*, 9 F.4th 357, 362-63 (6th Cir. 2021) (same); *In re FDCPA Mailing Vendor Cases,* No. CV 21-2312, 2021 WL 3160794 (E.D.N.Y. July 23, 2021) (same); *Brewer v. Law Offices of Mitchell D. Blum & Assocs.*, No. 21 C 294 (N.D. Ill. Nov. 4, 2021) (disclosure of partial account number not likely to create risk of harm; FDCPA claim dismissed for lack of Article III standing); *Taylor v. Google*, No. 5:20-cv-7956 (N.D. Cal. Oct. 1, 2021) (allegedly wrongful passive transfer of cellular data allowances did not cause plaintiff any concrete injury in fact, because the allegedly wrongful practice did not increase plaintiff's cost of cellular service and did not result in plaintiff's own data usage being diminished or slowed; further, plaintiff lacked any personal property interest in the data allowance; claim dismissed pursuant to *TransUnion*). *But see Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1191 (10th Cir. 2021) (unwanted phone call is analogous to common-law claim of

district court dismissed a claim for statutory damages under the Truth in Lending Act ("TILA"). The claim was based on alleged failures to make mandatory disclosures on a credit card billing statement. TILA purports to authorize recovery of statutory damages based on faulty disclosures. The allegedly missing disclosure pertained to what steps the cardholder had to take to preserve her right to dispute incorrect charges, but because she did not allege that any incorrect charges were posted to her account (or that any attempt to dispute incorrect charges was rejected), the non-disclosure was immaterial and failed to cause her any injury-in-fact. Thus, despite TILA's statutory damages provision, *TransUnion* mandated dismissal.[17]

Plaintiffs can be expected to file federal statutory claims in state court, in an effort to avoid *TransUnion*'s standing requirements. Indeed, this has already been a common plaintiff strategy in cases where federal judges view claims with skepticism. For the narrow group of cases where state courts have jurisdiction, but federal courts do not, defending the litigation can be more challenging because the case might not be removable to federal court. Nevertheless, defendants have strong arguments that *TransUnion* bars claims brought in state court, because the case is about more than federal jurisdiction. Rather, it is about congressional *power* to create the statutory damages remedy in the first instance. Thus, even if state courts have jurisdiction to hear no-injury cases, *TransUnion* arguably means that no federal statute can be construed to allow recovery of statutory damages without proof of injury-in-fact. The discussion of Congress's limited power, and how statutory damages infringe upon executive branch power, strongly suggests that as a matter of *substantive* law ─ which both federal and state courts must apply ─ statutory damages simply cannot be awarded to an uninjured party. Thus, even if the case cannot be removed to federal court, arguments under *TransUnion* should be valid in any forum. To the extent *TransUnion* speaks to how federal statutes must be construed, the decision should be applied by both federal and state court judges.[18] *TransUnion*-type arguments might even be stronger in state courts, because if Congress were to create a remedy enforceable only in state courts, and not in federal courts, principles of federalism might be violated. Both unfunded federal mandates and efforts to commandeer state institutions to achieve federal policy goals are potentially subject to Tenth Amendment scrutiny.[19]

Finally, *TransUnion* leaves open an important procedural question for class action practice: *When* should a district court attempt to eliminate uninjured persons from a class? *TransUnion* expressly declined to decide "the distinct question whether every class member must demonstrate standing *before* a court certifies a class."[20] In *TransUnion* itself the case proceeded to trial; uninjured persons should certainly have been removed from the class at some point before judgment was entered. Litigants should expect to see this issue raised at early stage of litigation.[21] Even if a class is certified based on the possibility of injury to all class members, defendants may well develop evidence of lack of injury to support a decertification motion. And ─ as the Supreme Court again reminded plaintiffs ─ "the specific facts set forth by the plaintiff to support standing 'must be supported adequately by the evidence adduced at trial.'"[22] A defendant may therefore seek decertification at the close of plaintiff's evidence or in post-trial motions. All this suggests even more intense litigation over class certification and decertification issues going forward. ■

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intrusion upon seclusion; finding standing to pursue FDCPA claim); *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, No. 19-14434, 2021 WL 4998980 at *6-7 (11th Cir. Oct. 28, 2021) (allegedly improper disclosure of medical information in violation of FDCPA is analogous to common-law tort of public disclosure of private facts; following *Lupia* to find standing proper); *Lynch v. AML Network Ltd.*, No. 2:21-cv-3574, 2021 WL 4453470, at *3 (C.D. Cal. Sept. 27, 2021) (finding standing to pursue state-law statutory damages claim based on sending unsolicited e-mails because "'invasions of privacy, intrusion upon seclusion and nuisance' are harms American courts have long recognized") (quoting *Von Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (finding standing to pursue claim under Telephone Consumer Protection Act)).

[17] *Zevon v. American Express Co.*, No. 20-cv-4938, 2021 WL 4330578 (S.D.N.Y. Sept. 22, 2021).

[18] U.S. Const. art. VI, par. 2.

[19] *Printz v. United States,* 521 U.S. 898 (1997); *New York v. United States,* 488 U.S. 1041 (1982).

[20] *TransUnion*, 141 S. Ct. at 2208 n.4 (emphasis in original).

[21] In *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, No. 19-56514 (9th Cir., argued Sept. 22, 2021), an antitrust case, the *en banc* 9th Circuit is presently considering whether class certification should be denied on the grounds that a significant proportion of the proposed class did not suffer economic harm. According to the defendant, at least 28% of the class was not harmed by the alleged antitrust violation.

[22] *Id.* at 2208 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).