The Ghost of Spokeo: More on Standing in Statutory Damages Class Action Litigation, with a Typicality Twist

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CLASS ACTION LITIGATION

The Ghost of *Spokeo*: More on Standing in Statutory Damages Class Action Litigation, with a Typicality Twist

CASE AT A GLANCE

This appeal from the Ninth Circuit revisits standing and typicality requirements for absent class members in statutory class actions. The Court will return to the question whether a court may certify a class action, consistent with Article III of the Constitution and Federal Rule of Civil Procedure 23, where the defendant contends that most class members allegedly have not suffered actual injury. The Court also will address whether a court may certify a class action where the defendant contends that the class representative's alleged injuries are not typical of most class members.

TransUnion LLC v. Ramirez
Docket No. 20-297

Argument Date: **March 30, 2021** From: **The Ninth Circuit**

by Linda S. Mullenix
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Issue

May a court certify a damages class action consistent with Article III of the Constitution and pursuant to Federal Rule of Civil Procedure 23 where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered?

Facts

On February 28, 2011, Sergio Ramirez, accompanied by his wife and father-in-law, went to a Nissan car dealership in Dublin, California, with the intention to buy a car. He and his wife completed a credit application. The Nissan dealership then received a credit report from a third-party vendor called DealerTrack, based on a credit report from TransUnion. This report indicated that Ramirez's name matched a name on the federal government's Office of Foreign Assets Control (OFAC) list. The purpose of the OFAC list is to identify persons known as Specially Designated Nationals (SDNs) who pose threats to national security or the economy. These include international narcotics traffickers, dealers of weapons of mass destruction, terrorists, and notorious criminals. The law prohibits U.S. companies from transacting business with an SDN on the OFAC list and imposes civil and criminal penalties.

To avoid penalties, businesses rely on credit reporting companies such as TransUnion to identify whether a credit applicant's name potentially matches a name on OFAC's list. Beginning in 2002, TransUnion's clients were able to elect, as part of their service contracts, to use a software program known as Name Screen to identify potential OFAC name matches. TransUnion contracted with a third party, Accuity, Inc., to develop and deploy the software for compiling the OFAC list. Using this program, if the first and last names of a person matched those on the OFAC list, TransUnion would place an alert on that persons' credit report, with the notation that the name was a "potential match."

The credit report that Nissan obtained from DealerTrack flagged Ramirez's name as matching the name of two

individuals on the OFAC database. Nissan informed Ramirez of this information, and based on this warning, the dealership recommended that Ramirez purchase the car in his wife's name alone. Ramirez subsequently testified that he felt embarrassed, shocked, and scared at being subjected to this experience in the presence of his wife and father-in-law.

The following day Ramirez contacted TransUnion to request his credit file. That day TransUnion sent Ramirez two separate communications. The first included his credit file with a summary of his rights. The second letter alerted him to additional information, informing Ramirez that TransUnion had received information considering him as a potential match to names on the OFAC database. The letter explained the nature of the OFAC list and advised Ramirez to contact TransUnion with questions or concerns. Ramirez subsequently testified that he was confused by the two mailings. After receiving the two TransUnion communications, Ramirez canceled a preplanned trip to Mexico because of his concern over the OFAC report. He also contacted TransUnion and succeeded in having TransUnion remove the OFAC alert from all his future credit reports.

Ramirez filed a class action lawsuit against TransUnion in federal district court, alleging that TransUnion had violated the Federal Credit Reporting Act, 15 U.S.C. § 1681 (FCRA). He also alleged similar claims pursuant to California's FCRA analogous statute. Ramirez's class litigation focused on TransUnion's sending two separate but contemporaneous mailings, only one which contained a summary of consumer rights. Ramirez defined his class to include "all natural persons in the United States to whom Trans Union sent a letter similar in form to the March 11, 2011, letter Trans Union sent to [Ramirez] regarding [OFAC] from January 1, 2011–July 26, 2011." The class embraced 8,184 absent class members.

Ramirez alleged three violations of FCRA. First, Ramirez alleged that TransUnion violated the FCRA by failing to maintain reasonable procedures to assume maximum accuracy of his credit report. Second, TransUnion failed in its obligation to provide consumers with all the information in their files, because it sent him the OFAC information in a separate contemporaneous mailing. Third, Ramirez alleged that TransUnion failed in its obligation to provide consumers with a summary of their rights, because TransUnion's second mailing did not include such a summary. Ramirez argued that all three alleged violations were willful actions on TransUnion's part.

Ramirez alleged that the relevant facts relating to his claims were the same for all class members. All had received the same two "confusing" TransUnion mailings after requesting their credit file. Ramirez and all class members sought statutory damages, not actual damages. After July 26, 2011, TransUnion stopped sending consumers two separate reports.

TransUnion opposed class certification and asked the court to dismiss the litigation because the unnamed class members lacked sufficient injury in fact to satisfy Article III standing requirements; TransUnion contended that Ramirez could not prove that the class suffered any common Article III injury. TransUnion further argued that sending two letters, rather than one, was not a concrete injury. While some class members possibly suffered an Article III injury, nothing in the class definition assured that any or all class members suffered an actual injury. Finally, TransUnion contended that Ramirez failed Rule 23(a)(3)'s requirement that the class representative be "typical" of the absent class members, arguing instead that the circumstances giving rise to his claims were entirely atypical of absent class members.

The district court rejected TransUnion's arguments and certified the class. At that time, the Supreme Court had not yet decided *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). Relying on the Ninth Circuit decision in *Spokeo*, the district court held that whether an absent class member was actually injured was not an element of an FCRA claim or statutory damages. It also rejected TransUnion's argument of a lack of typicality, holding that myriad distinction between Ramirez's claim and those of the class members were immaterial. Instead, Ramirez's claim for statutory damages were identical to all class members, and he received the same two mailings as all other class members. However, because California state law required class members to show actual harm, the court declined to certify the California subclass, and Ramirez dropped his state law claims.

The Supreme Court subsequently decided *Spokeo*. Based on that precedent, TransUnion moved to decertify the class, which the district court refused. The court indicated that nothing in the Court's *Spokeo* decision altered the Ninth Circuit precedent that only the class representative, but not class members, needed to satisfy Article III standing for a court to certify a class action. Consequently, the Ramirez class action went to trial.

In June 2017, the court conducted Ramirez's class-wide litigation during a six-day trial. The jury heard

evidence concerning the factual circumstances involved in Ramirez's case, but nothing about the comparative circumstances of the absent class members. The jury also heard evidence of TransUnion's alleged improper conduct. The jury returned a favorable verdict for the entire class based on Ramirez's claims. The jury awarded every class member $984.22 in statutory damages and $6,353.08 in punitive damages, for a total verdict of more than $60 million.

TransUnion again appealed to the Ninth Circuit. With one judge dissenting, the appellate court sustained the jury's verdict, holding that each of the 8,185 class members had Article III standing. Citing *Spokeo*, the appellate court agreed with TransUnion that every class member must satisfy Article III standing at the final judgment stage. The court concluded that the class had suffered a material risk of harm to their concrete interests because of the severity and nature of the inaccurate labeling and the fact that the reports were easily available to creditors even without consumers' knowledge in some cases. TransUnion's practice of sending two mailings that inadequately informed consumers of the damaging SDN label and the means for removing the incorrect information was sufficient to establish a concrete injury in fact for Article III standing.

The Ninth Circuit upheld the jury's finding of willful violation of FCRA to support an award of punitive damages but reduced the punitive damages award to a 4:1 ratio. The appellate court further concluded that the differences between Ramirez's case and the absent class members' claims were not sufficient to defeat Rule 23(a)(2) typicality. The court concluded that Ramirez's injuries arose from the same event or practice or course of conduct that gave rise to the claims of the other class members.

Judge M. Margaret McKeown dissented. She suggested that the standing and typicality requirements for class certification were intertwined. Thus, the plaintiffs' failure to demonstrate that anyone other than Ramirez had Article III standing also indicated that Ramirez's particular circumstances were not typical of other class members.

TransUnion petitioned to the Supreme Court, suggesting that the Court consider two questions on appeal. In January 2021, the Court granted *certiorari* limited solely to TransUnion's first issue: "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." The Court declined to grant *certiorari* to an issue concerning the quantum of punitive damages.

Case Analysis

The Fair Credit Reporting Act (FCRA) is the basis for Ramirez's litigation. Congress enacted the FCRA to secure three goals: accuracy in credit reporting, efficiency in the banking system, and protection of consumer privacy. The FCRA sets forth requirements for the creation and use of consumer reports. These include that reporting agencies follow reasonable procedures to assure maximum accuracy, allow consumers to identify and correct inaccurate information, and when requested, disclose information in a consumer's file.

The FCRA creates a private right of action against consumer reporting agencies for violations of the act. Under the FCRA, reporting agencies may be held liable for actual damages as well as attorney's fees and costs. In addition, if a reporting agency has engaged in willful violation of the FCRA, a consumer may obtain either actual damages or statutory damages ranging between $100 and $1,000, attorney's fees and costs, and punitive damages.

In 2016 the Supreme Court decided *Spokeo, Inc. v. Robins*, the core precedent involving an attempted statutory "no injury" class action for violations of FCRA. The fundamental question the Court addressed in *Spokeo* concerned whether, in a statutory violation lawsuit, the class representative had standing to sue and whether he could represent a so-called no-injury class of absent claimants. The Ninth Circuit permitted the class to proceed, holding that the plaintiff had alleged sufficient injury to establish Article III standing.

In a 6–2 decision, the Court reversed and remanded, holding that a plaintiff's mere allegations of a claim for statutory damages under the FCRA did not confer Article III standing. The Court held that the Constitution's "case or controversy clause" requires plaintiffs to allege an injury in fact that is concrete and particularized, even in the context of a statutory violation. The alleged injury must be actual or imminent and may not be hypothetical or conjectural. When a statutory violation gives rise to a "real risk of harm" to congressionally protected interests, the *Spokeo* concreteness requirement is satisfied. However, the injury does not have to be physical or monetary, and intangible injuries may be concrete in some circumstances.

Applying these principles, the Court in *Spokeo* held while the lower courts had identified harms to the plaintiff

Robins, the Ninth Circuit erred in not determining whether the harms were concrete. Thus, the Court remanded the case, taking no position whether the plaintiff had adequately alleged a sufficiently concrete harm to establish an injury in fact. On remand, the Ninth Circuit permitted Robins's case to proceed, finding that he had alleged a sufficiently concrete harm to establish injury in fact.

Spokeo left open questions concerning what constitutes a concrete harm for purposes of Article III standing. Post-*Spokeo*, some courts have ruled that intangible injuries may be deemed concrete if the common law traditionally provided a basis for suit, such as in defamation actions. However, courts have split concerning application of *Spokeo*'s standards. Courts disagree concerning evaluation of the degree of risk for impending injuries and the concreteness of intangible injuries resulting from violations of consumer laws. Some courts have applied a standard which asks whether a harm or injury is "certainly impending." Other courts have faithfully applied *Spokeo*'s core requirement of a concrete injury, even in the context of a statutory violation. Still other courts have been receptive to the contention that *Spokeo* did not alter standing law and that mere allegation of a statutory right violation provides access to federal courts in no-injury class actions.

Regarding litigation pursuant to alleged FCRA violations, the Second, Fourth, Seventh, and Eighth Circuits have found that alleged statutory violations without more do not meet the concreteness requirement for standing, but the Third and Ninth Circuits have reached opposite results. Courts have struggled with standing requirements in hundreds of cases after *Spokeo*. Courts have articulated splits reflecting conflicting judicial interpretations of *Spokeo*'s standing principles in litigation pursuant to the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, the Video Privacy Protection Act, the Cable Communications Privacy Act, and the Consumer Credit Protection Act.

In addition to the Article III standing issue, the Court may address the Rule 23(a)(2) typicality requirement. For a court to certify a class action, the court must be satisfied that the class representative is typical of the absent class members. Courts have issued myriad decisions articulating standards for assessing the typicality requirement. Generally, courts look to the underlying events giving rise to the class representative's claims and defenses and compares these to the class members' situations. Typicality does not require that class members' claims be identical to those of the class representative. Rather, the Court has indicated that the claims of class members should be "fairly encompassed by the named plaintiffs' claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Typicality looks to whether the class representative has the same interest and suffers the same injury as class members. Some circuit courts have indicated that the typicality standard can be satisfied if the class representatives' and members' claims arise from the same events, practices, course of conduct, or legal theories.

The *TransUnion* appeal returns the Court to a consideration of standing requirements since its *Spokeo* decision. TransUnion agrees with the basic tenets of *Spokeo*: that merely alleging a violation of the FCRA does not suffice to prove Article III injury, and that an anticipated injury must be "certainly impending" to satisfy Article III requirements. TransUnion sweepingly argues that the Ninth Circuit decision upholding class certification "eviscerated core Article III, Rule 23, and the Rules Enabling Act constraints." TransUnion asks the Court to decertify the class action.

TransUnion argues that this class action should never have been permitted to proceed in the first place—let alone advance to trial resulting in a $60 million judgment for 8,184 class members who were never proven to have suffered any concrete injury. TransUnion maintains that the class should have been decertified and class members should not have received monetary damages if they could not satisfy the threshold requirement of Article III standing.

TransUnion interprets *Spokeo* to require that class plaintiffs must allege and ultimately prove more than a mere allegation of harm, divorced from any concrete harm. In addition, the class representative must demonstrate that every class member suffered a common injury that is sufficiently concrete to satisfy the Article III injury-in-fact requirement. TransUnion contends that Ramirez failed on both grounds: not only did he fail to prove his own Article III standing, but he failed to show that every member of the class had standing to pursue the FCRA claims. TransUnion maintains that Ramirez did not suffer any concrete injury based on the way he received the OFAC alert letter.

TransUnion suggests that the plaintiffs' class was both over-inclusive and underinclusive. Thus, the class included individuals who received their credit files but never had a credit report disseminated to a third party with the Name

Screen information. On the contrary, the class excluded persons who were denied credit because of the OFAC alert, if that individual did not request that their credit file be sent to their home.

TransUnion contends that the only thing that united Ramirez with the absent class members was the allegation that each—like Ramirez—received two separate mailings indicating that their names were a potential match on the OFAC list. TransUnion objects that the two-envelopes-instead-of-one mailing constitutes an archetypal hypertechnical violation that cannot be presumed to inflict concrete injury and was patently insufficient to satisfy Article III standing. Moreover, Ramirez stipulated that 75 percent of class members never had a credit report with the Name Screen information sent to a third party—confirming that 75 percent of the class had not suffered an injury. Regarding the remaining 25 percent of the class, Ramirez provided no evidence that anyone but himself was denied credit or suffered any injury because of dissemination of information.

TransUnion further contends that Ramirez was anything but typical of other class members and the court should have decertified the class for failure to satisfy the independent Rule 23(a)(2) typicality requirement. Construing the requirement, TransUnion maintains that typicality demands that a class representative's injuries—and not just his legal theories—be typical of the rest of the class, citing *Wal-Mart Inc. v. Dukes*. This inquiry looks to the underlying factual circumstances giving rise to the plaintiff's claims.

TransUnion argues that Ramirez was "wildly atypical of the 8,184 individuals on whose behalf he obtained tens of millions of dollars in damages." At trial, Ramirez's evidence and testimony focused on his experience, thereby appealing to the jury's sympathies based on his unpleasant car dealership experience and subsequent cancellation of his Mexico trip. Thus, the jury's attention focused on Ramirez's particular experience and not those of the absent class members, whose situations were not typical of Ramirez's. TransUnion concludes that "[it] is problematic to have a home-run plaintiff represent a class of single hitters…"

TransUnion criticizes the Ninth Circuit's decision for various policy reasons. TransUnion notes that the availability of statutory damages class actions with few barriers to class certification provides potential litigants with an incentive to sue. This is especially true where statutes promise sizable damages for technical violations, even to those who have not suffered any actual injury. This problem is worsened by the possibility that a successful recovery may include the award of attorney's fees or punitive damages.

TransUnion argues that the Ninth Circuit committed two errors: finding an Article III injury for Ramirez where none existed and "waving off" his glaring typicality requirement. Characterizing these holdings as "deeply flawed," TransUnion suggests that the Ninth Circuit's decision offers entrepreneurial litigants a "roadmap for generating outsize awards: find a plaintiff who has suffered real injuries, and instead seek statutory damages and punitive damages on behalf of a substantial class who suffered only a foot fault; repeat."

In response, Ramirez recasts the Supreme Court appeal to focus on a different question on which the Court did not grant *certiorari*, namely: "Whether a party can challenge trial evidence and jury instructions that it did not oppose in the district court to manufacture an Article III or typicality argument on appeal?" Having reframed the appeal, Ramirez repeatedly insists that all of TransUnion's appellate arguments focus on its own trial tactics, strategies, evidence, and choices, and not on class certification concerns.

In Ramirez's view, the trial context of the litigation has foreclosed all of TransUnion's arguments. "In the end," Ramirez argues, "TransUnion is stuck with its trial strategies. It cannot use the very trial it approved to argue that Article III and typicality were not satisfied." "Neither Article III nor Rule 23 is a vehicle to request a do-over for strategic choices that went awry."

Regarding the nature of concreteness to support Article III standing, Ramirez indicates that the correct *Spokeo* standard asks whether an alleged statutory violation gives rise to a "risk of real harm" that Congress sought to protect against. *Spokeo*'s "real risk of harm" test is the appropriate test for the Court to apply. Ramirez rejects TransUnion's invocation of the alternative "certainly impending" risk of harm formulation some courts utilize, indicating that test is more appropriately applied in forward-looking injunctive litigation and not retrospective damages cases.

Ramirez further posits that *Spokeo* affirmed that intangible injuries can satisfy Article III's concreteness requirement if the harm is closely related to an analogous suit at common law. Ramirez contends that TransUnion's statutory violations of FCRA—falsely labeling persons as on the

OFAC list—are indistinguishable from defamation *per se* under common law. Ramirez argues that TransUnion's designation of persons on the OFAC list are "paradigmatic of this long-recognized common law tort…" Moreover, statutory damages fill the role of presumed actual damages at common law.

Finally, Ramirez disagrees with TransUnion's understanding of the Rule 23(a)(2) typicality requirement for class certification. TransUnion mocks what it calls TransUnion's "Goldilocks" approach to typicality: that a class representative's case can be neither too strong nor too weak. Typicality, then, should not be used to exclude class representatives with strong or sympathetic underlying facts, such as Ramirez.

According to Ramirez, typicality focuses on the class members' claims and not on the class representative and is intended to protect class members (and not the class representative). Typicality is satisfied if the plaintiff can show that all class members' claims arose from a uniform course of a defendant's conduct. Typicality guarantees that the class representative has the same interest and suffers the same injuries as class members. Hence, the class was united by TransUnion's falsely designating the class members on the OFAC list and by sending them the two separate letters.

Ramirez's brief is replete with a litany of arguments and objections he contends that TransUnion waived by its trial conduct. For example, Ramirez maintains that TransUnion broadly waived its argument that Ramirez's testimony defeated typicality under Rule 23(b)(3). Ramirez contends that TransUnion also waived its argument that the class period for claiming injuries was only seven months. TransUnion further waived any objection to the jury instructions that resulted in undifferentiated damages, by failing to object to a composite jury form. Ramirez also faults TransUnion for a failing to call other class members to give testimony who did not have facts like Ramirez, for failing to seek discovery relating to absent class members' claims, and for failing to attempt to limit Ramirez's testimony through motions *in limine*.

Moreover, Ramirez argues that throughout the litigation TransUnion confused the distinction between a class definition and a class period. Thus, a class definition embraces who is in the class, while a class period encompasses when a harm occurred that gave rise to a claim. Ramirez maintains that the harm in this case was not merely the two TransUnion letters mailed during the 7 months, but TransUnion's use of the flawed name-matching software related back to 2010. Thus, citing the FCRA statute of limitations, Ramirez argues that the class period was 46 months and not 7 months and the class encompassed 8,185 class members rather than 1,854.

Significance

The *TransUnion* appeal is significant because it offers the Court an opportunity to provide some further clarity and guidance concerning the contours of standing requirements after *Spokeo*. The Court in *Spokeo* set forth broad general concepts concerning the Article III requirements for individual plaintiffs in the statutory class action setting. *Spokeo* was unclear concerning whether courts may certify no-injury classes or standing requirements for absent class members. Since the Court handed down *Spokeo*, hundreds of lower courts have grappled with the application of *Spokeo*. Rather than converging on a common understanding, the courts instead have rendered an array of fact-specific rulings concerning whether alleged plaintiffs' injuries satisfied *Spokeo*'s standing requirements for concrete injury and immediacy.

It remains to be seen how the Court will approach this appeal and whether the Court will hew narrowly to the sole issue on which the Court granted *certiorari*, or not. While TransUnion has adhered closely to the Article III standing and typicality issues, Ramirez has wandered afield and raised myriad considerations that are pregnant in or tangential to the central issues on the appeal. While Ramirez asks the Court to affirm the Ninth Circuit's and trial court's decisions, as a fallback position Ramirez asks the Court to remand the case so that the Ninth Circuit can address the waiver issues Ramirez identified in its brief.

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