Professional Perspective

Supreme Court Clarifies Injury-in-Fact Requirements for Intangible Harms

Edward Soto, Pravin Patel, and Corey Brady, Weil, Gotshal & Manges

Bloomberg Law

Supreme Court Clarifies Injury-in-Fact Requirements for Intangible Harms

Contributed by Edward Soto, Pravin Patel, and Corey Brady, Weil, Gotshal & Manges

The U.S. Supreme Court recently issued an important decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), holding that the mere risk of future harm does not suffice to confer Article III standing in a suit for damages. While the court suggested that there could be standing when a plaintiff is independently harmed by exposure to the risk itself (for example, through emotional injury), no such evidence was presented in this case.

This decision has immediate practical consequences for corporations nationwide and will require plaintiffs who are seeking damages to demonstrate either that the alleged harm has materialized or is sufficiently likely to do so. This article first discusses the history and reasoning of this seminal case, and then outlines the narrowed path for plaintiffs seeking redress for intangible harm.

Background

To establish the "irreducible constitutional minimum" of standing, the "plaintiff must [1] have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is [2] fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). The first element requires "an injury that is both concrete and particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016), as revised (May 24, 2016).

It was less clear before *TransUnion*, however, when an intangible harm could satisfy this concreteness requirement. In *Spokeo*, the Supreme Court counseled that "history and the judgment of Congress" play a role in determining "whether an intangible harm constitutes injury in fact." When a plaintiff could demonstrate that "the common law permitted suit" based on a "risk of real harm," that sufficed to show injury in fact. On the other hand, a "bare procedural violation" was not enough—there had to be "a material risk of harm."

The *TransUnion* decision picked up where *Spokeo* left off. In a class action suit, plaintiffs challenged TransUnion's practice of purportedly matching consumers to a government list of suspected terrorists and other bad actors, and then linking this "potential match" to those consumers' credit reports.

Plaintiffs argued that TransUnion's reliance on a simple name search to designate an individual as a potential match violated the Fair Credit Reporting Act's (FCRA) requirement that TransUnion implement procedures to assure maximum possible accuracy. In addition, TransUnion would provide a consumer, upon request, with a credit report that contained an FCRA-mandated summary of their right to dispute and correct inaccurate information; however, Transunion omitted the "potential match" and instead included it in a separate mailing.

The Supreme Court ruled that, to establish an injury in fact for purposes of standing, a mere risk of future harm does not suffice. It also provided further clarity on the "material risk of harm" standard from *Spokeo*, finding that plaintiffs had not demonstrated an adequate likelihood of harm where the parties had stipulated that disclosure of the "potential match" occurred to approximately a quarter of the identified plaintiffs.

TransUnion's Appeal to the Supreme Court

In the case below, the U.S. Court of Appeals for the Ninth Circuit held that every member of a Fed. R. Civ. P. 23 class must have standing in order to be awarded individual monetary damages. Further, it determined that all 8,185 class members had standing, because TransUnion's acts created "a real risk of harm to their concrete privacy, reputational, and informational interests protected by the FCRA." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014), vacated and remanded, 136 S. Ct. 1540 (2016). The statutory damages award was affirmed, while the punitive damages award was reduced to a 4:1 ratio.

TransUnion petitioned for certiorari, which the Supreme Court granted in December 2020. The question presented was: "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 briefs submitted by TransUnion and the plaintiffs offered different views on the likelihood of harm required to establish standing. Emphasizing that 75 percent of the class did not have their credit report with the "potential match" disseminated to any third party, TransUnion argued that an alleged injury must be "imminent" or "certainly impending," whereas this case involved a "bare procedural violation, divorced from any concrete harm."

Plaintiffs argued that TransUnion mischaracterized the harm, which was not "the sale or publication of a credit report containing a terrorist record," but "the risk of significant injury of that inaccurate information being reported," thus creating "sufficient injury in fact [because] defendant's statutory violation creates a 'risk of real harm' to a plaintiff's concrete interest."

Competing Principles Face off at Oral Argument

On March 30, 2021, oral argument began with Chief Justice John Roberts asking TransUnion's counsel whether the class members would have had standing if they had brought suit before TransUnion had removed the "potential match" from their reports. Counsel responded that without knowledge, in a suit for retrospective damages where the risk of harm never materialized, this was "cause to sort of break out the champagne, not to break out a lawsuit." Justice Elena Kagan followed up on this point, noting that this seemed to fall squarely within the "material risk of harm" language from *Spokeo*. Plaintiffs' position was that knowledge was not a relevant part of the inquiry.

Several justices foreshadowed the opinion by suggesting that the 25 percent of class members who had their reports shared with third parties did suffer an injury in fact. Justices Samuel Alito and Brett Kavanaugh went so far as to ask TransUnion's counsel what should happen on remand if the court were to find that the 75 percent whose reports had not been shared lacked standing.

When Justice Kavanaugh asked respondent's counsel to clarify the risk of harm for the 75 percent, the response was two-fold. Counsel first argued that, based on the history of the common law tort of defamation, there was no requirement of publication under *Spokeo* because a serious risk of defamation would suffice. Counsel also contended that the factual record indicated there could have been publication here.

Several justices asked TransUnion's counsel to clarify what would constitute an injury in fact based on a material risk of harm. Justice Neil Gorsuch asked if the critical inquiry is whether there was no material risk faced by the class members, or whether they were aware of the risk. TransUnion's counsel responded that it was both, because there was a "need to have some knowledge of the information in order to have any material risk of injury."

The Supreme Court's Decision

On June 25, 2021, Justice Kavanaugh delivered a 5-4 majority opinion that began by pointing out that Article III standing has been built on the concept of separation of powers, whereby federal courts cannot adjudicate "hypothetical or abstract disputes" or act as "a roving commission to publicly opine on every legal question." If Congress could authorize unharmed plaintiffs to sue, the majority reasoned, this would violate Article III and infringe on the Executive's Article II authority. It would also permit a plaintiff to enforce a defendant's compliance with the law absent "any harm to herself."

Turning first to the reasonable procedures claim, the majority determined that the class members whose credit reports were disclosed to third parties with the "potential match" designation had suffered a concrete harm, while those whose credit reports had not been shared lacked standing. The court distinguished the statement in *Spokeo* that "a material risk of future harm can satisfy the concrete harm requirement," pointing out that *Spokeo* had cited *Clapper v. Amnesty International*, 568 U.S. 398 (2013)—a case involving injunctive relief.

However, in a suit for damages, "the mere risk of future harm, without more," is not enough. Plaintiffs should instead demonstrate that the harm materialized or that "exposure to the risk itself" constituted "some other injury (such as an emotional injury)." Importantly, the majority also found that plaintiffs had not shown a sufficient likelihood that their reports would be disclosed, even though approximately one in four of the identified class members had actually experienced a disclosure. This was nevertheless "too speculative."

As to the other two claims, the court determined that only the named plaintiff had standing, because the other class members did not provide "any evidence of harm caused by the format of these mailings," so they amounted to "bare procedural violations." Given its ruling on Article III standing, the court did not engage with TransUnion's arguments related to the Rule 23 typicality requirement, which revolved around the purportedly unique circumstances of Mr. Ramirez's identification as a "potential match."

The Dissenting Opinions

Justice Clarence Thomas, joined by Justices Stephen Breyer, Sonia Sotomayor, and Kagan, dissented. The dissent pointed out a distinction that has existed since the Founding for both common-law and statutory rights: when an individual sought to vindicate a private right, only a violation was necessary, while when an individual sought to vindicate a public right, damages also had to be proven.

Historically, an "injury in law to a private right was enough to create a case or controversy." Further, the injury-in-fact requirement, which came about in the 1970s, "represented a substantial broadening of access to the federal courts." Justice Thomas stated that "[i]n the name of protecting the separation of powers . . . this Court has relieved the legislature of its power to create and define rights."

This dissent also contended that the majority had "rework[ed]" *Spokeo* to "all but eliminat[e] the risk-of-harm analysis." This analysis fails, according to the dissent, because it ignores both *Spokeo*'s specific language and that the *Spokeo* Court remanded the plaintiff's statutory damages claims to the Ninth Circuit to determine "whether the . . . violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." And even setting all this aside, Justice Thomas appealed to common sense, which he said counsels that "receiving a letter identifying you as a potential drug trafficker or terrorist is harmful. All the more so when the information comes in the context of a credit report, the entire purpose of which is to demonstrate that a person can be trusted."

Justice Kagan, along with Justices Breyer and Sotomayor, also dissented separately, identifying one difference of opinion with Justice Thomas. These dissenters did not agree that "any violation of an individual right created by Congress gives rise to Article III standing." Instead, they adhered to the view expressed in *Spokeo* that "Article III requires a concrete injury even in the context of a statutory violation." However, "deference to those congressional judgments" is critical, because "Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world."

A Narrower Path for Plaintiffs

In a suit for damages based on an alleged intangible harm, the burden for plaintiffs will now be higher. The court's decision in *TransUnion* has set a tone that appears less deferential to Congress in its creation of private statutory rights—despite professing to maintain the separation of powers. The court has indicated that it will not simply accept Congress's judgment of what constitutes a concrete injury in fact.

TransUnion suggests that plaintiffs should allege (and ultimately establish) that the purported harm materialized or that exposure to the risk itself constituted an independent injury. This will make it more difficult to secure recovery for intangible harm. In framing their allegations, plaintiffs' counsel should now consider how the alleged harm may plausibly be tied to concrete events that have already occurred. On the other side of the bar, defendants' counsel should closely evaluate whether the allegations at issue are rooted in future, speculative harms that do not give rise to standing under *TransUnion*.

TransUnion also sheds light on when a risk of harm—assuming it is ever sufficient to confer standing—is too speculative. While the court did not establish precisely what degree of risk might be sufficient, by rejecting the 25 percent risk presented in *TransUnion*, the court put down a stake that this level, at a minimum, is too speculative. Prior to *TransUnion*, some courts and practitioners may have assumed that "speculative" risk meant something more unlikely than 25 percent—but that assumption no longer holds.

These determinations will significantly impact the standing analysis in a range of cases involving alleged harms that have not materialized, particularly class actions. The decision will obviously affect "informational harm" cases under statutory regimes like the FCRA, where plaintiffs allege intangible injury arising from an inappropriate disclosure of information or a failure to provide mandated information. Perhaps less obvious, *TransUnion* also has implications for product liability cases, which often involve the issue of defect manifestation. For example, claims based on a mere risk of harm from a product that has not yet failed, but allegedly may fail, will now face heightened scrutiny. That scrutiny may prove particularly difficult when a putative class seeks certification, due to the individualized issues associated with determining whether a given class member's product has actually failed (and whether that failure was attributable to the alleged defect). *TransUnion* also bears on the rate of alleged failure in product liability cases—even a 25 percent risk of failure now appears too speculative to confer standing.

In the context of statutory violations, however, as the dissent pointed out, the court's decision in *TransUnion* "does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases." In other words, state courts may now have "exclusive jurisdiction" over these sorts of actions, which could ultimately transform *TransUnion* into what Justice Thomas called a "pyrrhic victory." State courts may ultimately prove more favorable for plaintiffs, insofar as they are hostile to large corporate defendants or less versed in applying federal statutory regimes. Practitioners should remain aware of this potential alternative forum for such claims.

Conclusion

The *TransUnion* decision marks an important chapter in the progression of the standing doctrine. By foreclosing reliance on a mere risk of future harm, the Supreme Court has made it more difficult for certain plaintiffs to have their cases heard, at least in federal court.

With assistance from Nathalie Sosa