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SCOTUS decision in TransUnion LLC v. Ramirez raises hurdle for establishing standing in class action claims under the Illinois Biometric Information Privacy Act and other data privacy and consumer protection statutes

By Abby L. Risner and Lauren A. Daming, Greensfelder, Hemker & Gale PC

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If a tree falls in a forest and no one is around to hear, does it make a sound? If a man is labeled a potential terrorist in a file about his credit history and no one reads the file, has he been harmed? And does he have Article III standing to pursue a claim under the Fair Credit Reporting Act (FCRA)?

According to the Supreme Court's decision in *TransUnion LLC v. Ramirez*, [1] the answer is no. Along with adding to the Court's standing jurisprudence, the opinion significantly limited the scope of a class that was originally awarded over $40 million in damages.

TransUnion raises questions about how future data privacy class claims will be defined, especially for alleged violations that may harm some purported plaintiffs and have no impact on others.

Beyond that immediate impact, the lessons of *TransUnion* will have significant influence on how plaintiffs bring class action claims for statutory damages under other privacy and consumer protection statutes such as the Illinois Biometric Information Privacy Act (BIPA).

The opinion is clear that even when a consumer protection or data privacy statute provides a cause of action, the violation of the statute alone is not enough to create a class of plaintiffs who have suffered no harm beyond the technical violation.

The Supreme Court's standing jurisprudence

In order to bring a claim in federal court, a plaintiff must have standing — a personal stake in the case. To do so, the Supreme Court has explained that a plaintiff must show that he suffered an injury that is concrete, particularized, and actual or imminent.

As the Court discussed in *Spokeo, Inc. v. Robins*, another recent FCRA case, a concrete injury is real and is not abstract. In *Spokeo*, the Court explained that the question of concreteness hinges on whether the alleged injury has a "close relationship" to a harm "traditionally" recognized as a basis for a lawsuit.

Spokeo concluded that a plaintiff does not automatically satisfy the standing requirement simply by alleging the violation of a statutory right; instead, the violation must be coupled with a concrete injury in order to meet Article III's standard.

The Court also recognized in *Clapper v. Amnesty International USA* that the potential for a future harm can be the basis for standing, but the harm must be "certainly impending" — not speculative. In a class action case, each class member must have Article III standing for each claim asserted and for each form of relief sought in order to prevail and recover damages.

TransUnion v. Ramirez

At stake was whether Article III of the Constitution and Rule 23 of the Federal Rules of Civil Procedure permit a damages class action when the majority of the class has suffered no actual injury. In an opinion authored by Justice Kavanaugh, the Court held that only individuals who have been "concretely harmed" by a defendant's violation of a statute have Article III standing to seek damages in federal court.

The holding will have a significant impact on how classes are defined and who is included. Interestingly, the 5-4 lineup pitted most of the Court's conservatives against the three liberal justices plus Justice Thomas, who authored the primary dissent.

The Fair Credit Reporting Act (FCRA) was implemented to promote fair and accurate credit reporting and safeguard consumer privacy. The FCRA regulates consumer reporting agencies and the consumer data that they collect, store, and disseminate.

Among the protections available under the FCRA, consumers have the right to request and receive a full copy of their credit reports and

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are entitled to receive a summary of their rights under the statute alongside their requested credit reports.

TransUnion is one of the "big three" consumer reporting agencies. It collects and disseminates consumer credit information used by third parties in making decisions about extending credit, renting properties, and hiring.

TransUnion offered an add-on service to its traditional credit history reporting that purported to identify whether an individual was on the Office of Foreign Assets Control's (OFAC) list of individuals that companies are prohibited from doing business with. The individuals on these lists include terrorists and drug traffickers and are referred to as Specially Designated Nationals or SDNs.

Ten years ago, lead plaintiff Sergio Ramirez and his wife walked into a Nissan dealership to buy a car. After agreeing on a Maxima, the dealership ran a credit check on the couple through TransUnion and learned that Mr. Ramirez had been labeled a potential terrorist or SDN.

The dealership refused to do business with Mr. Ramirez and required his wife to purchase the car in her name alone. The next day, Mr. Ramirez requested a copy of his credit report from TransUnion.

The company responded by sending two letters: one containing his credit report and the required FCRA notice of rights and a second containing only the information related to his designation as a potential terrorist. Frustrated with the experience, he brought suit against TransUnion on his own behalf and on behalf of over 8,000 other individuals for three alleged violations of the FCRA.

Mr. Ramirez claimed that TransUnion's actions caused him to be embarrassed in front of his family members at the car dealership and forced him to cancel a vacation to Mexico. Mr. Ramirez stipulated at trial that, unlike him, more than three quarters of the putative class had never had a credit report with incorrect OFAC information shared with a third party.

Essentially, about 6,300 class members simply had an incorrect designation as a potential terrorist sitting in their files at TransUnion that was never shared. Each class member also received an incomplete credit history and notice of rights when requested.

Mr. Ramirez did not present evidence of any particular harm that any other class member suffered. The jury found for the plaintiffs and awarded every class member nearly $1,000 in statutory damages and over $6,300 in punitive damages.

In total, the award exceeded $60 million. On appeal, the Ninth Circuit affirmed with the exception of reducing the punitive damages awarded to each class member to less than $4,000. TransUnion appealed to the Supreme Court, which heard oral argument in March 2021.

The opinion

Justice Kavanaugh boils down his holding to "No concrete harm, no standing," which is Supreme Court speak for "no harm, no foul." The opinion examined each FCRA violation alleged by the plaintiffs and analyzed whether each class member, including those with no injury apart from the violation of the statute, had standing to bring their claims:

- Alleged failure to follow reasonable procedures to ensure the accuracy of information in consumer credit files

  The Court concluded that only the class members whose information was shared with third parties suffered an injury-in-fact sufficient to confer standing. In their case, the disclosure to third parties bears a "close relationship" to the harm associated with the tort of defamation — a harm "traditionally" recognized as providing a basis for a lawsuit in American courts.

  For the remaining class members, the Court looked at whether the existence of inaccurate information in their files alone was a concrete injury. However, the Court explained that the mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm.

  Additionally, the risk of harm — the potential that information sitting in a file will be shared with a third party — did not confer standing. Unlike *Clapper*, which found that the material risk of harm could create standing, this case does not involve injunctive relief, an important distinction for plaintiffs seeking statutory damages rather than equitable relief.

  As a result, the Court found that only the 1,853 individuals whose information was shared with third parties had suffered a concrete injury and could be included in the class for this alleged violation.

- Alleged failure to provide complete credit file and required summary of rights

  As TransUnion characterized the claim, Mr. Ramirez and the class alleged that they were harmed by receiving their credit histories and summary of rights in two envelopes instead of one. The plaintiffs claimed that TransUnion did not send complete copies of their credit files and did not include the FCRA's summary of rights in second mailings containing the plaintiffs' OFAC information.

  Although Mr. Ramirez claimed this confused the class members and prevented them from exercising their rights under the FCRA, TransUnion pointed out that there was no evidence that any class members had even opened up the envelopes much less were harmed by TransUnion's actions.

  Unlike Mr. Ramirez, the remaining class members had only produced evidence of a bare procedural violation without any concrete harm. The Court concluded that Mr. Ramirez alone could proceed with this claim.

  The Court did not reach the issue of whether Mr. Ramirez's claims were typical of those of the entire class, as Rule 23 requires, because the standing issue ended the Court's inquiry.

BIPA and Article III standing

The lessons of *TransUnion* will impact how plaintiffs view standing in class claims brought seeking statutory damages, particularly

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those involving harms for which "concreteness" is a fuzzy concept such as those involving data privacy and consumer protection.

With class actions continuing to multiply under Illinois' Biometric Information Privacy Act, these cases will almost certainly be a testing ground for the standing concepts articulated in *TransUnion*. BIPA regulates the collection, use, and transfer of individuals' biometric information such as a fingerprints and retina scans.

It creates a private right of action with statutory damages for violations including the failure to create, publish, and follow a biometric information retention policy; failure to obtain informed consent prior to collecting biometric information; improper disclosure or sale of biometric information; and failure to properly and securely store of biometric information.

In an opinion authored by Justice Kavanaugh, the Court held that only individuals who have been "concretely harmed" by a defendant's violation of a statute have Article III standing to seek damages in federal court.

Although litigation under BIPA is in its early stages, several state and federal cases have already laid the foundation for viewing standing under the statute. In *Rosenbach v. Six Flags*, the Illinois Supreme Court concluded that BIPA does not require plaintiffs to allege an actual injury beyond a technical violation of the statute as a matter of statutory standing for those claims brought in Illinois state court.

The court reasoned that the violation of the statute itself is sufficient to create statutory standing and that plaintiffs should not be forced to "wait until they have sustained some compensable injury beyond violation of their statutory rights before they may seek recourse."

But what about BIPA claims that are brought in or removed to federal court? The Seventh Circuit, which has seen far more BIPA cases than any other circuit, has considered Article III standing several times.

In *Bryant v. Compass Group USA, Inc.,* the court decided that when it comes to federal standing, a bare violation of BIPA's section 15(b), the informed consent requirement, constitutes an "injury-in-fact" consistent with *Spokeo*'s holding without the need to show "tangible consequences."

The court characterized the injury experienced by the plaintiffs as the "loss of the power and ability to make informed decisions about the collection, storage, and use of [their] information."

Interestingly, the opinion also distinguishes between section 15(a)'s requirement that companies create and publish a retention policy and its requirement that companies *actually follow* its retention and destruction policies.

While the first duty is owed to the public alone, only the obligation to follow established policies creates a privately enforceable right without some additional allegation of a specific harm experienced by a plaintiff.

This reasoning mirrors Justice Kavanaugh's summary of public versus private rights in *TransUnion*: "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."

In *Fox v. Dakkota Integrated Systems, LLC*, the Seventh Circuit expanded on *Bryant* by clarifying that an alleged failure to comply with section 15(a)'s duties "to develop, publicly disclose, *and comply with* a data-retention schedule" results in the unlawful retention of a person's biometric data. It held that this is a concrete and particularized injury for purposes of Article III.

The Seventh Circuit has also looked at standing in the context of claims under BIPA's section 15(c), which prohibits companies from selling, leasing, trading, or profiting from a person's biometric information.

In *Thornley v. Clearview AI, Inc.*, the plaintiffs alleged that Clearview compiled a database containing their biometric information that had been pulled from photos publicly posted on social media. The plaintiffs also alleged that they had not "suffered any injury as a result of the violations of Section 15(c) of BIPA other than the statutory aggrievement."

The court explained that by doing so, the class had alleged only a general, regulatory violation — not a concrete, particularized harm sufficient for Article III standing.

The Second and Ninth Circuits have also examined standing in BIPA class actions. In *Patel v. Facebook, Inc.*, the Ninth Circuit issued an opinion consistent with the Seventh Circuit's position that alleged violations of section 15(b)'s informed consent provision and section 15(a)'s retention policy compliance provision create Article III standing.

However, the Second Circuit's nonprecedential *Santana v. Take-Two Interactive Software, Inc*. decision was an outlier, holding that the plaintiffs had not established that they faced a material risk of harm to the interest BIPA was intended to protect: the prevention of the unauthorized use, collection, or disclosure of an individual's biometric data.

BIPA and beyond

The *TransUnion* case drew amicus briefs from tech giants such as Google, Facebook, and eBay and a variety of industry groups and consumer protection advocates. Several amicus briefs referenced BIPA and emphasized the broad implications of the Court's standing jurisprudence for statutory claims related to the collection and use of personal data.

Many state and federal statutes provide statutory damages for violations of privacy rights similar to those discussed in *TransUnion*, including the Telephone Communication Protection Act, the Electronic Communications Privacy Act, and the Video Privacy Protection Act.

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Companies complain that these statutes allow class action attorneys to collect multi-million-dollar settlements for non-existent injuries, but the plaintiffs' bar and consumer advocates emphasize that the infringement of an individual's privacy right is a real injury in itself worthy of vindication through statutory damages.

The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm. Additionally the potential that information sitting in a file will be shared with a third party did not confer standing.

This tension is evident in the difficulty courts experience in determining when an injury is concrete enough to justify federal standing when intangible harms under a data privacy statute are implicated. In the words of the Seventh Circuit, intangible injuries stemming from a statutory violation are "conceptually difficult" to recognize.

TransUnion raises questions about how future data privacy class claims will be defined, especially for alleged violations that may harm some purported plaintiffs and have no impact on others. It's easy to imagine scenarios under BIPA when this might be the case.

For example, a claim under section 15(e) alleging a failure to securely store biometric information could involve both individuals whose data was accessed in a breach and those whose data was not. *TransUnion* suggests that the individuals whose data was not actually compromised could not properly be included in the class.

This is good news for businesses, as *TransUnion* gives companies a shield against claims that turn one plaintiff's egregious, atypical experience (such as identity theft resulting from a data breach) into a million- or billion-dollar class case simply because a large class of individuals who did not experience any harm can claim the same statutory violation, such as the failure to publish a retention schedule or securely store data.

Similarly, it seems unlikely that plaintiffs will be able to achieve Article III standing in these circumstances by claiming a risk of future harm, as in the risk that their improperly stored data could be breached in the future.

The *TransUnion* opinion also underscores the distinction between public rights and private rights that the Seventh and Second Circuits have already raised in the BIPA context.

Future plaintiffs will face difficulties alleging concrete injuries when asserting violations of BIPA's more public obligations, such as section 15(a)'s retention policy publishing requirement, as discussed in *Bryant*, or section 15(c)'s prohibition on profiting from biometric information, as seen in *Thornley*.

As the Seventh Circuit explained in *Thornley*, "allegations matter," and future plaintiffs will need to take care in choosing which violations to claim and which allegations of harm to plead. This nuanced parsing of each of section 15's provisions and the facts necessary to establish standing will create a playground for defendants at both the pleading and class certification stages.

BIPA defendants may appreciate some benefits of *TransUnion*'s impact, such as the narrowing of classes, the ability to challenge Article III standing early in a case, and the precision that courts will use to dissect specific claims and the facts that support them.

However, the lessons of *TransUnion* also underscore plaintiffs' ability to prevent removal by pleading themselves out of federal court in their state court complaints by drafting around Article III standing.

Such strategic pleading was seen in *Thornley*, in which the defendant removed the case to federal court and the plaintiffs argued against their own federal standing in a case the court described as one that "only a civil procedure buff could love."

Going forward, defendants must think strategically about how to challenge standing and class composition without sacrificing their opportunities to proceed in federal court. The risk is that if a defendant raises a standing issue based on class members who have not alleged a concrete injury, it may not lead to the beneficial result of a narrowed class.

Instead, the challenge may convince a judge that the case needs to be heard in state court due to the lack of Article III standing. As we've seen with BIPA, more permissive standing doctrines in state court allow claims to proceed there when plaintiffs cannot satisfy Article III standing in federal court.

Although the TransUnion decision may stem the scope of claims under BIPA and similar statutes, the best course for companies remains diligent compliance with the increasing web of state and federal privacy statutes.

This can be true even when plaintiffs allege no injury other than a technical violation of a statute. As a result, plaintiffs have more tools to remain in plaintiff-friendly state courts or succeed on motions to remand after removal.

A related challenge involves how classes are characterized in the first place: how do you define a class to meet both the requirements of Rule 23 and Article III standing in cases involving intangible injuries to thousands of individuals that range from technical violations to very concrete harms?

This task is further complicated by the different standards applied to certifying classes under Rule 23 for claims seeking damages versus those seeking only injunctive relief. Federal courts hold

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injunctive relief classes to a lower standard and do not require a demonstration that questions of law and fact predominate over individual issues.

Coupled with *Clapper*'s approval of classes seeking injunctive relief for future, "certainly impending" damages without evidence of concrete injuries, the door is open for large plaintiff classes that justify large attorneys' fees awards. One clear consequence for all parties is that the escalating amount of collateral litigation on these issues will increase the costs of class action cases.

As courts begin applying the lessons of *TransUnion*, continued litigation will further outline the contours of standing requirements for claims under BIPA and other data privacy or consumer protection statutes alleging intangible harms. Clearview is poised to file a petition for certiorari to the Supreme Court to challenge the Seventh Circuit's decision in *Thornley* that may further develop this body of law.

Although the *TransUnion* decision may stem the scope of claims under BIPA and similar statutes, the best course for companies remains diligent compliance with the increasing web of state and federal privacy statutes.

Dozens of states have proposed BIPA-like data privacy laws, and Texas [2] and Washington [3] already have similar statutes on the books although they don't contain private rights of action.

Portland [4] enacted a city ordinance earlier this year restricting the use of facial recognition software in public places and New York City enacted an ordinance [5] similar to BIPA set to go into effect on July 9, 2021; both of those ordinances include private rights of action.

California [6] and Virginia [7] have both enacted comprehensive consumer privacy data protection statutes, although only California's CCPA has a limited private right of action.

Although only a patchwork of privacy laws exists at the moment, the momentum is growing for more state statutes similar to BIPA and even comprehensive federal individual privacy protections. As these statutes continue to proliferate, businesses can expect to encounter more class claims involving intangible injuries such as those discussed in *TransUnion*.

Notes

[1] https://bit.ly/3k1sXw6

[2] https://bit.ly/3hRUJID

[3] https://bit.ly/3qV8xX7

[4] https://bit.ly/36mFJ0b

[5] https://bit.ly/36kJXpf

[6] https://bit.ly/2VohLzx

[7] https://bit.ly/3qUiaVS

About the authors

Abby L. Risner (L) and **Lauren A. Daming** (R) are attorneys at **Greensfelder, Hemker & Gale PC** in St. Louis. Risner is the leader of Greensfelder's Energy Industry and Litigation Class Action groups and defends energy companies, franchisers, manufacturers and distributors against claims related to consumer fraud, advertising, franchise termination, unfair business practices, contract disputes and other matters. She can be reached at alr@greensfelder.com. Daming is a certified information privacy professional and counsels clients on the many privacy issues that affect employers, including employee monitoring and surveillance and employee data collection, the Illinois Biometric Information Privacy Act, biometric information and facial recognition technology. She also represents clients on other diverse employment matters. She can be reached at ldaming@greensfelder.com.

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