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Diving Into the Supreme Court's Latest Class Action Challenge

The most likely outcome in this Spokeo sequel is a splintered court.

BY EUGENE SOKOLOFF

Which way would you rather lose? That's a question that lawyers for Sergio Ramirez are probably asking themselves right now.

The U.S. Supreme Court will hear argument March 30 in *TransUnion v. Ramirez*, a class action under the Fair Credit Reporting Act. The case presents important questions—from what kinds of statutory violations support Article III standing to what makes a class representative "typical" under Rule 23(a)—that seem certain to divide the justices and make an affirmance unlikely. But just how the court resolves the case may wind up being more important to class-action litigants than the bottom line.

The facts of the case are unsettling. When Ramirez and his wife went to buy a car, the dealership told him his credit report flagged him as a potential terrorist. Ramirez reached out to TransUnion, which mailed him a credit report that looked fine along with an explanation of how to correct any errors. Then, a day later, TransUnion sent Ramirez a separate letter disclosing that his name had matched to a list of "specially designated nationals" maintained by the Treasury Department's Office of Foreign Assets Control.

The "match" was a mistake, but it was no fluke. It turned out that TransUnion added erroneous OFAC alerts to thousands of credit reports, some of which went out to potential creditors.

Photo: Diego M. Radzinschi/ALM

The U.S. Supreme Court building is seen in Washington, D.C., on Sept. 23, 2020.

Ramirez brought suit in the Northern District of California, asserting that TransUnion violated the FCRA three ways: by failing to use "reasonable procedures" to ensure that its OFAC alerts were correct; by redacting the OFAC alert from the credit report it sent to Ramirez; and by failing to include the statutorily required "summary of rights" along with the letter it sent subsequently.

The district court certified a class of individuals who had received a letter like the one TransUnion sent to Ramirez. A jury eventually found TransUnion liable on all three counts, awarding over $40 million in statutory and punitive damages. A divided panel of the U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the absent class members had standing and that Ramirez was sufficiently "typical" to represent them. TransUnion petitioned for certiorari.

Although there is nominally just one question before the court, there are at least two distinct issues at play. The first picks up where *Spokeo v. Robins* left off: Do the FCRA's "reasonable procedures," disclosure, and "summary of rights" requirements create the kinds of rights that can support a lawsuit in federal court? If so, when? TransUnion urges the justices to cut the latter claims off altogether. At the very least, it says, only those plaintiffs whose credit reports were actually sold (less than a quarter of the class) could possibly show a sufficiently concrete threat of harm.

The second issue concerns the relevance of a class representative's individual circumstances in the typicality analysis under Rule 23(a). Although not necessarily disqualifying, facts peculiar to the representative can make it difficult to establish liability and damages by common evidence—a key requirement for class certification. TransUnion points out that Ramirez was the only class member who testified at trial, so his testimony was the only basis for the verdict and damages award. And while Ramirez told the jury that he experienced anguish on learning of the OFAC alert and confusion when TransUnion sent him separate mailings, there's no evidence that other class members felt that way.

That makes things tricky for Ramirez and his lawyers. To win outright, they'll need to convince at least five justices that all three FCRA violations can support a cognizable injury; that all of the class members suffered that injury; and that Ramirez was sufficiently typical to represent them. The far more likely outcome is that the justices will splinter on these questions. Take the Article III issue. Although Justice Samuel Alito's majority opinion in *Spokeo* was noncommittal, two members of today's court previewed their thinking more directly. Justice Clarence Thomas, in concurrence, was open to reading the FCRA's reasonable-procedures provision to support standing without more. He sounded the same note in *Frank v. Gaos*, arguing that violations of the Stored Communications Act's individualized protections were sufficient to establish standing. And Justice Sonia Sotomayor joined a dissent in *Spokeo* that would have read the FCRA's reasonable-procedures provisions the same way.

But even assuming that Justices Thomas and Sotomayor agree on the reasonable-procedures claim, they may not agree on the summary-of-rights or disclosure claims. Justice Alito—often skeptical of private rights of action—might take an even harder line. Justice Neil Gorsuch, normally a standing hawk, might be open to Ramirez's arguments from Blackstone that the FCRA echoes common-law defamation. Such diversity of views on a bedrock issue might prompt the consensus-oriented chief justice to look for an easier way out.

The most attractive option may well be to vacate and remand the case for a fresh look at typicality. That's the proposal the solicitor general floated in a brief supporting neither party. While the government argues there is no Article III problem, it says the Ninth Circuit should have considered whether Ramirez's evidence was too individualized to support the jury's class-wide verdict. If that approach gets traction, the door to actions like Ramirez's will remain open for the moment. And litigants may get the benefit of several separate writings that could offer insight into how the newly constituted court is likely to approach class actions.

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