5th Circ. Class Action Rulings Reflect Post-TransUnion Trends

By **Robert Sparkes, Wesley Prichard and Nick Chan** (December 1, 2022)

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Class action defense counsel often face situations where it appears that a significant number of putative class members, either named or absent, are unharmed.

In June 2021, the U.S. Supreme Court addressed part of the problem in TransUnion LLC v. Ramirez, holding in a 5-4 decision that a statutory violation alone is not necessarily sufficient to establish an injury-in-fact for Article III standing.[1]

While TransUnion's impact continues to make its way through U.S. courts of appeals and district courts, some trends are clear within the U.S. Court of Appeals for the Fifth Circuit.

First, according to Campaign Legal Center v. Scott in February, "an injury in law is not an injury in fact," meaning that Article III requires a concrete injury even in the context of a statutory violation.[2]

Second, a concrete injury cognizable under Article III must bear a close relationship to a common-law harm, according to the Perez v. McCreary Veselka Bragg & Allen PC **ruling** in August.[3]

These trends highlight the importance of closely evaluating standing challenges in TransUnion's wake where the injury-in-fact is questionable, even where a statutory violation might exist.

And, while TransUnion expressly did not "address the distinct question whether every member must demonstrate standing before a court certifies a class,"[4] according to the opinion, these trends signal that standing issues in putative class actions are real at the class-certification stage where countless unnamed class members may lack standing.[5]

A Primer on TransUnion

In TransUnion, a certified class alleged violations of the Fair Credit Reporting Act for which Congress had created a statutory cause of action –– specifically, the inclusion of incorrect information in their credit reports, suggesting they were on a terrorist watch list.

But the parties stipulated that the vast majority of the class members' at-issue credit reports had never been sent to a third party.[6]

The Supreme Court noted that, while Congress can create a statutory cause of action and Congress's view on what constitutes a concrete injury could be instructive, a plaintiff alleging a violation of a statute has not necessarily suffered an injury-in-fact sufficient for Article III standing.[7]

Instead, the court clarified that a concrete harm for standing purposes must have a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in U.S. courts.[8] While the inquiry does not require an exact duplicate in American history and

tradition, a plaintiff must identify a close historical or common-law analogue for their asserted injury.[9]

As applied, the court found that the class members whose credit reports were disseminated to third parties had suffered a reputational harm akin to that "associated with the tort of defamation."[10]

On the other hand, the court found that while the class members whose at-issue credit reports had never been disseminated to a third party had alleged a violation of the Fair Credit Reporting Act, they did not allege a cognizable injury — at best, they alleged a speculative, future injury.[11]

The court then deemed this unmaterialized risk of harm not to be an injury-in-fact because, it held, "the risk of future harm on its own does not support Article III standing for the plaintiffs' damages claims."[12]

TransUnion's Impact Within the Fifth Circuit

Since TransUnion, the Fifth Circuit and its district courts have been vigilant in evaluating standing.

These cases have made clear that the violation of a statute by itself is not enough to satisfy Article III standing; and further defined the scope of traditional harms recognized at common law, with many cases emphasizing that an unmaterialized risk of future harm alone is insufficient to support standing.

Statutory Violations

In Campaign Legal Center v. Scott, the plaintiffs alleged that Texas violated the National Voter Registration Act's public disclosure requirement when it withheld the Texas Secretary of State's list of potential non-U.S. citizens who were registered to vote, which allegedly gave rise to an informational injury.[13]

Applying TransUnion, the Fifth Circuit disagreed in September, holding that there were no downstream consequences or adverse effects from failing to receive the list of personal voter information.

The plaintiffs could not particularize the consequences of them not obtaining the requested personal voter information, their lack of opportunity to identify non-U.S. citizens who were registered to vote was speculative, and no plaintiff was a Texas voter.[14]

Traditional Harms Recognized at Common Law

Applying TransUnion's requirement that cognizable harms must bear a close relationship to those traditionally recognized at common law, the Fifth Circuit and its district courts have further defined what alleged injuries are too speculative for Article III standing.

In a decision issued Nov. 21, the Fifth Circuit in Earl v. The Boeing Co. reversed a class certification order on appeal via Rule 23(f) and remanded with instructions to dismiss the case for lack of jurisdiction.[15]

The plaintiffs alleged they were subjected to an increased risk of physical harm and overpaid for plane tickets based on alleged fraudulent concealment concerning alleged

safety defects in the Boeing 737 MAX 8 aircraft.[16] The Fifth Circuit disagreed on both counts.

As to the alleged risk of physical injury, the plaintiffs conceded they suffered no physical harm.[17] At most, plaintiffs alleged a past risk of physical injury.[18] But, since that risk "never materialized," the Fifth Circuit held that "plaintiffs have suffered no injury in fact and lack Article III standing."[19]

As for the alleged economic harm, the Fifth Circuit held that the "plaintiffs' theory of injury rests on two unsupportable inferences," and, once those inferences are set aside, the plaintiffs "offered no plausible theory of economic harm."[20]

As the panel saw it, the more plausible inferences from the available evidence was that, in the absence of the alleged fraudulent concealment, the airline tickets that plaintiffs purchased "would have been unavailable and they'd have had to take different, more expensive (or otherwise less desirable) flights instead."[21]

In Perez v. McCreary, the Fifth Circuit sua sponte analyzed whether an alleged statutory violation was sufficient to confer a class representative standing in the context of a Rule 23(f) appeal of class certification.[22]

There, the plaintiff on behalf of a putative class alleged that a law firm that collects debts owed to Texas local governments violated the Fair Debt Collection Practices Act by sending letters demanding payment of a delinquent utility debt without disclosing that the statute of limitations on that debt had run. However, the plaintiff had not paid the time-barred debt.[23]

The plaintiff in Perez alleged multiple theories for injury-in-fact — that the letter:

- Was a de facto violation of her statutory rights;
- Subjected her to a material risk of financial harm;
- Confused or misled her;
- Required her to waste her time to consult an attorney; and
- Was analogous to the tort of intrusion upon seclusion.[24]

However, the Fifth Circuit held that an alleged state of confusion or wasting another's time are not injuries that bear a close relationship to a harm recognized at common law.[25] Further, as to the theories relying on a risk of harm, the Fifth Circuit held that, since "the risk hasn't materialized," then "the plaintiff hadn't yet been injured."[26]

In another class action exemplar, the U.S. District Court for the Western District of Louisiana in Shields v. State Farm Mutual Auto Insurance Co. redefined a proposed class in January to exclude policyholders who were not underpaid because of the insurance company's cash valuation product.[27]

While plaintiffs asserted that an alleged breach of fiduciary duty in and of itself gave rise to an intangible harm, the court held that a breach of fiduciary duty or bad faith claim with no resulting harm did not provide standing to sue in federal court.[28]

Therefore, the court excluded from the class definition those plaintiffs who were not underpaid on their auto claims based on the method the insurance company used to determine the actual cash value of the policyholder's vehicle.[29]

Finally, while not in the class action context, the 2021 Glen v. American Airlines Inc. case in the Fifth Circuit provides an example of an alleged statutory violation where the alleged harm was held to be a close analogue to a cognizable injury at common law.

There, a U.S. national sued the defendants under the Helms-Burton Act, which provides a judicial remedy to U.S. nationals who were victims of Fidel Castro's confiscation of U.S. nationals' property in Cuba.[30]

The court found that the plaintiff met standing requirements because the alleged harm caused by trafficking bears a close relationship to unjust enrichment, which has indisputable common law roots.[31]

Practical Takeaways

As shown by these decisions, a robust class action defense strategy should continually evaluate standing, even where an alleged statutory injury exists.

TransUnion directed that those injuries must have a close relationship to a harm recognized at common law, and the above-referenced cases show that directive has teeth.

But the issue of unharmed plaintiffs implicates more than a motion to dismiss for lack of jurisdiction. After all, as the Supreme Court held in TransUnion, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[32]

Where a proposed class would contain unharmed absent class members, Rule 23(b) issues of cohesiveness, predominance and superiority are implicated where individualized mini-trials would be required to sort the unharmed plaintiffs from the harmed plaintiffs, if any.[33]

Further, unharmed absent class members may give rise to arguments that the class definition is overbroad, like in Shields, or present ascertainability issues.

Where the proposed class representative has their own standing issues, arguments against class certification arise under commonality, typicality and adequacy, in addition to direct jurisdictional challenges to defeat a proposed class.

As TransUnion's impact continues to make its way through the Fifth Circuit, expect to see cases directly addressing arguments related to unharmed plaintiffs in the Rule 23 context, in addition to Article III standing.

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[1] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021). In so holding, the Court bolstered its earlier decision in Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (rejecting argument that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a

statute grants a person a statutory right and purports to authorize the person to sue to vindicate that right.")

[2] Campaign Legal Ctr. v. Scott, 49 F.4th 931, 936 (5th Cir. 2022).

[3] Perez v. McCreary, Veselka, Bragg & Allen, P.C., 45 F.4th 816, 821 (5th Cir. 2022).

[4] TransUnion, 141 S. Ct. at 2208 n.4.

[5] See Flecha v. Medicredit, Inc., 946 F.3d 762, 768 (5th Cir. 2020).

[6] TransUnion, 141 S. Ct. at 2200.

[7] Id. at 2204–05.

[8] Id. at 2204.

[9] Id.

[10] Id. at 2208–09.

[11] Id. at 2209–12.

[12] Id. at 2213.

[13] Campaign Legal Ctr., 49 F.4th at, 934–36.

[14] Id. at 937.

[15] Earl v. Boeing Co., No. 21-40720, 2022 WL 17088680, at *1 (5th Cir. Nov. 21, 2022).

[16] Id. at *1–2.

[17] Id. at *5.

[18] Id.

[19] Id.

[20] Id. at *4–5.

[21] Id. at *4.

[22] Perez, 45 F.4th at 820.

[23] Id.

[24] Id. at 823.

[25] Id. at 824–25.

[26] Id. at 824.

[27] Shields v. State Farm Mutual Auto. Ins. Co., No. 6:19-CV-01359, 2022 WL 37347, at *7 (W.D. La. Jan. 3, 2022).

[28] Id.

[29] Id.

[30] Glen v. Am. Airlines, Inc., 7 F.4th 331, 333–34 (5th Cir. 2021).

[31] Id. at 334.

[32] TransUnion, 141 St. Ct. at 2208 (quoting Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)).

[33] See Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) ("Accordingly, we have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." (collecting cases)).