Cahill

November 10, 2021

The Supreme Court Holds That A Statutory Violation, Without Actual, Concrete Harm, Is Insufficient To Give Rise To Article III Standing

To establish standing under Article III of the Constitution of the United States, a plaintiff must demonstrate an injury-in-fact. The Supreme Court of the United States previously explained in the seminal opinion of *Lujan v. Defenders of Wildlife*, that a plaintiff must have suffered an injury-in-fact that is both "concrete and particularized" and "actual or imminent" — i.e., abstract or speculative harm will not suffice. 504 U.S. 555, 560 (1992). The Court in Lujan and its later opinions did not address, however, whether a violation of a federal statute, standing alone, could satisfy Article III's injury-in-fact requirement.

In *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021),[1] the Supreme Court addressed that question and concluded that violation of a federal statute, in itself, is insufficient to create an injury-in-fact for Article III purposes. The Court explained that in determining whether a plaintiff has suffered an injury-in-fact that is sufficiently concrete to give rise to Article III standing, courts "should assess whether the alleged injury to the plaintiff has a 'close relationship'" to injuries that are "'traditionally' recognized as providing a basis for a lawsuit in American courts." This may include both tangible (e.g., physical and monetary) and intangible (e.g., reputational) harms. When making this determination, courts are not relieved of their responsibility to conduct this analysis by virtue of statutory causes of action created by Congress. Those causes of actions are instructive but not dispositive.

I. Article III's Injury-in-Fact Requirement

Article III of the Constitution of the United States gives the federal judiciary the power to decide only live "cases" or "controversies." *Raines* v. *Byrd*, 521 U.S. 811, 819-20 (1997). For a plaintiff to establish standing under Article III, a plaintiff must demonstrate: (1) an injury-in-fact, (2) causation, and (3) redressability. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To establish the requisite injury-in-fact, a plaintiff must show an injury that is "concrete and particularized" and "actual or imminent." *Id*. at 560. The injury must be "real" and not "abstract," *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016), to prevent the courts from issuing advisory opinions or general oversight over the people or other branches of government. *California* v. *Texas*, 141 S. Ct. 2104, 2116 (2021).

In 2016, the Supreme Court in *Spokeo*, reviewed named plaintiff Robins' standing to bring claims against petitioner Spokeo, an online "people search engine." 136 S. Ct. 1540 (2016). Robins alleged Spokeo published inaccurate information about him in violation of the Fair Credit Reporting Act ("FCRA"), which requires consumer

[1] Unless otherwise cited, all quoted statements in this memorandum are taken from this decision.

reporting agencies to follow certain procedures to assure the accuracy of such reports. *Id.* at 1542-43. Although the question before the Court was whether Congress could confer Article III standing on a plaintiff who suffers no concrete harm, the Court ultimately determined that the analysis by the United States Court of Appeals of the Ninth Circuit of the concreteness of the harm Robins suffered was incomplete and remanded the case for further consideration. *Id.* at 1550.

In reaching that conclusion, the Court indicated that violating a statutory right may sometimes be sufficiently concrete to constitute an injury-in-fact without an allegation of any additional harm beyond the statutory violation itself. *Id.* at 1549. However, it rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* The Court left open for another day when exactly a violation of a statutory right would satisfy Article III's injury-in-fact requirement. *Id*. at 1550.

II. Background of *TransUnion*

In 2011, Sergio Ramirez was attempting to purchase an automobile. The car dealership pulled his TransUnion credit report, which wrongly indicated that Mr. Ramirez was on the U.S. Department of Treasury's Office of Foreign Asset Control ("OFAC") list of "specially designated individuals" who are considered a threat to national security, such as terrorists. ("At the time, TransUnion did not compare any data other than first and last names" when generating these alerts, so this system resulted in "many false positives"). Because it is generally illegal for businesses to engage in commerce with individuals on the OFAC list, the dealership refused to sell Ramirez the car. The next day, Ramirez requested a copy of his file from TransUnion. TransUnion sent Ramirez his credit file and a statutorily-required summary of rights prepared by the Consumer Financial Protection Bureau but not the OFAC alert. The following day, Ramirez received a second letter with the OFAC alert included, but without the statutorily-required summary of his rights. TransUnion eventually removed the OFAC alert from Ramirez's file.

Ramirez sued TransUnion alleging three violations of the FCRA, specifically that TransUnion (1) failed to follow reasonable procedures to ensure the accuracy of information in his credit file; (2) failed to provide Ramirez with all of his credit information upon his request (i.e., by omitting the OFAC alert in the initial mailing); and (3) failed to include a summary of his rights in the second mailing, as required under the statute. The District Court for the Northern District of California certified a class of all people in the United States to whom TransUnion sent a mailing during the class period, similar in form to the second mailing Ramirez received.

Before trial, the parties stipulated that the class contained 8,185 members, including Ramirez, and that only 1,853 members of the class had their credit reports disseminated by TransUnion to third-party businesses. The other 6,332 received mailings from TransUnion that they were a potential match with a name on the OFAC list, but that information had not been given to any third parties. After a full trial, the jury returned a verdict for plaintiffs and awarded $60 million in statutory and punitive damages to the entire class.

TransUnion appealed to the Ninth Circuit. On appeal, the Ninth Circuit applied the two-part inquiry, established on remand in *Spokeo*, into whether a statutory violation constitutes a concrete injury: "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged . . . actually harm, or present a material risk of harm to, such interests." *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017). Analyzing the second prong, the court ruled that all 8,185 members of the class had standing but reduced the total award to approximately $40 million. *Ramirez* v. *TransUnion LLC*, 951 F.3d 1008, 1025 (9th Cir.), *rev'd and remanded*, 141 S. Ct. 2190 (2021). The Ninth Circuit ruled that the 1,853 members whose credit reports were disseminated

experienced a reputational harm due to the disclosure and the 6,332 members experienced a material risk of harm to their concrete interests from the availability of the reports to third parties. *Id*. at 1027. A dissent argued that only the 1,853 class members who had their credit reports disseminated suffered a concrete injury sufficient to give rise to Article III standing. *Id.* at 1038 (McKeown, J., concurring in part and dissenting in part).

TransUnion filed a petition for a writ of certiorari, and the Supreme Court granted the petition.

III. The Supreme Court's Decision

In a 5-to-4 decision, the Supreme Court reversed. It held that only the 1,853 class members whose credit reports contained inaccurate OFAC alerts and were disseminated to third-party businesses had Article III standing to sue. The other 6,332 class members who received notices that their credit reports contained inaccurate OFAC alerts did not.

In reaching this conclusion, the Court addressed the issue left open in *Spokeo*: in what circumstances does a statutory violation create Article III standing? The Court held that to answer that question, courts should look to "history and tradition" to assess whether "the injury to the plaintiff has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." In doing so, the Court rejected the proposition that the creation of a statutory right to bring a cause of action relieves a court of its role in determining whether a plaintiff has suffered a concrete harm under Article III. To have Article III standing, a plaintiff still must establish an injury-in-fact even after it has demonstrated that an injury-in-law has been suffered.

Applying that principal, the Court held that the 6,332 class members with inaccurate OFAC alerts in their TransUnion credit files that were never sent to any third parties did not have standing because they did not experience a concrete harm. The majority recognized that, although the FCRA granted a private right of action, the 6,332 class members failed to demonstrate injury-in-fact because their inaccurate OFAC alerts were not disclosed. The Court held that there was no cognizable harm in the mere presence of an inaccuracy in an internal TransUnion credit file, but it was the act of disclosing the inaccurate file to a third party that created the harm to a class member.

The Court also rejected plaintiffs' argument that the potential disclosure of the misleading information in the internal credit files constituted a risk of future harm that satisfied the concreteness requirement, noting that future harm can satisfy the concrete-harm requirement in a suit for injunctive relief but not in one for retrospective damages. Here, the Court ruled that the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized or that they suffered any injury by the mere fact that these inaccurate alerts existed in the files of TransUnion.

Justices Thomas, Kagan, Breyer, and Sotomayor dissented and argued that that 6,332 class members who received an inaccurate OFAC alert had established Article III standing. Justice Thomas, in a dissenting opinion not joined by another justice, wrote that if the statute identifies a right and provides for a recovery of damages, Article III's injury-in-fact requirement is satisfied with no specific showing of loss.

In a separate dissent, Justice Kagan, joined by Justices Breyer and Sotomayor, agreed with Justice Thomas that the 6,332 class members who received an inaccurate OFAC alert had established Article III standing, but for different reasons. They wrote that, while a statutory violation and right of action were generally sufficient to satisfy Article III's injury-in-fact requirement, there were still limits on Congress's power to define an injury for purposes of Article III. Specifically, these dissenters contended that courts must still assess whether the right of action Congress created contributes to compensating or preventing the harm at issue.

IV. Implications

In *TransUnion*, the Supreme Court made clear that a statutory violation, standing alone, is insufficient to give rise to the level of "concrete harm" needed for Article III standing. Instead, it is the courts' role to determine whether the harm the statutory violation is designed to prevent is rooted in "history and tradition." In doing so, the Court has created limitations on future plaintiffs bringing suits in federal court alleging only statutory violations. The result may be more consumer protection class actions filed in state courts, which have no Article III standing requirements, and more litigation regarding the appropriateness of using a federal forum in consumer protection cases.

* * *

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; Adam S. Mintz (Counsel) at 212.701.3981 or amintz@cahill.com; or Austin Popham (Associate) at 212.701.3347 or apopham@cahill; or email publications@cahill.com.