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High Court FCRA Case Could Shake Up Class Action Standing

By **Allison Grande**

Law360 (March 26, 2021, 9:52 PM EDT) -- The U.S. Supreme Court will again tackle the hot-button issue of what conditions must be met for plaintiffs to press statutory privacy claims, when the justices hear arguments on Tuesday in a dispute that could drastically curtail or even eliminate large consumer privacy and data breach class actions.

The justices of the U.S. Supreme Court will hear arguments in a case alleging violations of the Fair Credit Reporting Act. (AP Photo/Patrick Semansky)

In TransUnion v. Ramirez, a class action dispute alleging violations of the Fair Credit Reporting Act, the high court has been asked to consider whether federal courts can certify consumer classes in which the "vast majority" of members haven't alleged the type of concrete injuries necessary to establish Article III standing, even if the class representative has suffered an injury that meets this bar.

The upcoming oral arguments are expected to shed light on where the justices stand on the issue of how to apply Article III standing requirements, which allow plaintiffs to maintain lawsuits in federal court, to absent class members. They may also serve as a gauge for the high court's inclination toward elaborating on its 2016 decision in Spokeo v. Robins, which held that plaintiffs must allege concrete injuries and can't rely on mere procedural violations to prop up statutory privacy claims, and has led to divergent decisions across the country about when plaintiffs should be allowed through the courthouse doors.

"It is believed that Supreme Court took up the case to further limit standing for class actions in no-injury cases," said Richard Perr, chair of the consumer financial services practice group at Kaufman Dolowich & Voluck LLP. "While individual plaintiffs may continue to pursue specific harm done to them, the day of using the name plaintiff as a 'representative' to drive high-stakes consumer litigation in the form of class actions may be drawing to a close."

The dispute **before the justices** stems from plaintiff Sergio Ramirez's claim that he was unable to buy a car because TransUnion told lenders that he potentially matched two entries in the U.S. Department of the Treasury's Office of Foreign Assets Control's database of criminals and terrorists. The class argued that TransUnion did not ensure accuracy as required by the FCRA by cross-checking

OFAC name hits with other results, such as birthdates.

A California federal jury **awarded $8.1 million** in statutory damages and a record $52 million in punitive damages to Ramirez and a certified class of 8,184 individuals in 2017 after finding that TransUnion had willfully violated the FCRA. The Ninth Circuit last year **rejected TransUnion's argument** that the class lacked standing to recover the award because few class members suffered the type of concrete harm that Ramirez had when he was denied credit due to the error, although the appellate court did order the lower court to reduce the size of the payout by about one-third.

With the case now before the Supreme Court, the justices have the opportunity to articulate a clear standard for how lower courts should apply the standing principles articulated in Spokeo and other Supreme Court decisions concerning the class certification process, attorneys say.

"Think of Ramirez as Spokeo on steroids," said Eric Troutman, a partner at Squire Patton Boggs LLP. He explained that Spokeo tackled the "ephemeral issue of when standing exists and when it doesn't, while Ramirez is looking at the application of these Article III principles in the class action setting."

Lower courts have taken various approaches toward analyzing standing for uninjured class members, said Madison Kitchens, a partner at King & Spalding LLP.

Some judges have found that uninjured class members don't pose "an insuperable barrier to certification," Kitchens said, since they can be "winnowed out" at the damages phase or the class definition can be narrowed down later if necessary. However, others have required either that every member who fits the class definition has standing or that a certain, usually unspecified, percentage of absent class members meet that threshold, he said.

Given that Ramirez has stipulated that 75% of the class in the TransUnion dispute never had inaccurate credit reports disseminated to third parties, the case presents the justices with a unique chance to set a bright-line rule for when classes can move forward with members who have been affected differently by the same alleged conduct, according to Kitchens.

"If the court determines that those class members suffered no injury — and that the class should therefore be decertified — then has the court effectively created a floor that no class can be certified if only a quarter of class members suffered an actual injury?" Kitchens said.

Where this line is drawn will be critical for litigants on both sides of the bar, as whether such disputes lead to hefty liability or fizzle out is usually largely dependent on whether defendants are forced to fight massive certified classes or a much smaller batch of claims from a few harmed individuals, attorneys noted.

"If the court extends Spokeo to require Article III standing for the class and not just the class representative, the decision could very well gut or significantly impair the sort of 'no-injury' class actions that defendants have come to loathe," said Bryan Fratkin, who co-leads the class action practice group at McGuireWoods LLP.

Troutman said one thing he'll be listening for in Tuesday's arguments is how often the justices bring up how the harm standard should be applied to the class certification process, and not just the awarding of damages that's at the heart of Ramirez.

"A buzzword I'll be looking for at oral arguments is 'certification,' because that's going to tell me whether this is going to be a hugely important ruling or kind of a shrug case," Troutman said.

"If the ruling is as narrow as plaintiffs can't recover at trial without standing, that's nice for the justices to say out loud, but it doesn't really move the wheel that much," he added. "But if the justices hold that you have to consider Article III standing at the time of certification, then all consumer class actions, whether they're under FCRA, the Telephone Consumer Protection Act, the Illinois Biometric Information Privacy Act, they are in serious jeopardy."

Cases filed in the wake of data breaches, where plaintiffs often allege that consumers' personal information has been exposed but not necessarily misused, would also likely be easier to swat down if the justices affirm that classes with a large number of uninjured class members can't be certified,

attorneys say.

"Plaintiffs will either have to allege actual injuries to the class, which will create predominance issues for them at class certification, or deal with the potential for an early defeat on Article III standing," Fratkin said.

Additionally, a holding that consumer classes can't be certified if some portion of the class lacks standing would likely prompt defendants to shift from trying to get cases thrown out because the named plaintiffs lack standing — which often results in those disputes being refiled in state court — to attacking the standing of the class as a whole, noted Mark Eisen, partner and co-chair of the class action practice at Benesch Friedlander Coplan & Aronoff.

"If defendants can keep their case in federal court by arguing that standing is a classwide problem and not just an individual problem, that's a really important potential tool," Eisen said.

Ramirez also presents a chance for the justices to provide lower courts with more guidance on how to apply the standing requirements the high court set out in Spokeo and in 2013's Clapper v. Amnesty International to a broader range of privacy and data security disputes, attorneys noted.

While the Ninth Circuit agreed with TransUnion that class members must have standing to recover damages under the FCRA, the appellate court concluded that the class had met this bar because they suffered a "material risk of harm" simply by having inaccurate information collected by TransUnion, even if that data just sat in a file and was never disclosed to a third party to make a credit decision.

"The court's decision in TransUnion v. Ramirez is an opportunity for the Supreme Court to expand its interpretation of 'concrete' injuries for purposes of Article III standing," said Matthew Petersen, a partner at Bryan Cave Leighton Paisner LLP.

Lower courts have struggled in recent years to determine whether alleged privacy violations, which are often hard to quantify, constitute the type of concrete harm required by Spokeo or meet the standard established in Clapper that injuries must be real or imminent and not merely speculative. The Sixth, Seventh and D.C. circuits have joined the Ninth Circuit in finding that an increased risk of future harm can count as an injury-in-fact necessary for Article III standing, while the Second, Third, Fourth, Eighth and Eleventh circuits have ruled the opposite way.

"The Ramirez decision could answer many of these questions [fueling this split], not only in the privacy and data breach class action context, but as to the appropriate method to determine whether alleged harms constitute concrete harms for purposes of Article III standing," Petersen said.

Since Spokeo, plaintiffs in a multitude of privacy and data security cases have attempted to satisfy Article III standing requirements by arguing that the exposure or theft of their information constitutes a concrete injury even if it has not yet been misused, either by decreasing the value of the information or creating an imminent threat of misuse, Troutman Pepper partners David Anthony, Misha Tseytlin and Ron Raether told Law360 in a joint email.

"Unless the Court rules narrowly, if the Ninth Circuit's holding in Ramirez stands — that the plaintiffs suffered a 'material risk of harm' simply because TransUnion compiled inaccurate information about them without disseminating it — it could embolden plaintiffs to pursue similar arguments and open up the courts to a greater influx of litigation in the privacy and data security arena," they said.

On the other hand, if the Supreme Court sides with circuits that have found that a mere risk of possible injury from the invasion of privacy is insufficient to confer standing, that "will take the bite out of class actions based on alleged privacy damages," noted Petersen.

"In essence, those claims would be then limited only to situations where the alleged privacy violation actually gives rise to a real-world injury," he said.

The court may also be inclined to revisit its prior standing rulings given the significant changes to its lineup in the nearly five years since the Spokeo decision was handed down.

Justice Antonin Scalia passed away shortly before the case was decided, leaving only eight justices,

including now-retired Justice Anthony Kennedy and the late Justice Ruth Bader Ginsburg, to participate in the decision. Since then, their seats have been filled by more conservative Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett.

"Given the court's current composition, it is reasonable to anticipate that the Supreme Court will clear up the aforementioned circuit splits, likely with a more strict view of Article III standing," Petersen said.

Justice Barrett, in particular, will be important to watch during arguments, attorneys say.

While she was on the Seventh Circuit, **she concluded in** Casillas v. Madison Avenue Associates Inc. that the plaintiff hadn't alleged an injury sufficient to move forward with claims that the debt collector defendant had violated the Fair Debt Collection Practices Act by failing to notify debtors that they must respond in writing if they need more information about their debt. Justice Barrett held that the company had merely "made a mistake" in failing to include the disclosure in the letter it sent to Casillas, and that the plaintiff's claims that she had been harmed by this omission were insufficient to meet the injury threshold established by Spokeo.

"The bottom line of our opinion can be succinctly stated: no harm, no foul," Judge Barrett wrote in opening the opinion.

However, even though the justices have a clear opportunity to resolve lingering questions over what injuries are sufficient to press forward with privacy and data security claims, there's no guarantee that they'll go that far, attorneys cautioned.

"If we have learned anything since Spokeo, it is that we need to be prepared for the possibility that the Supreme Court may not resolve the circuit splits as clearly as we would like," Petersen said. "The fact that the Supreme Court decided to hear the TransUnion appeal is a big deal, but we may want to be prepared for a decision that does not squarely all of the issues that we would like to see resolved."

--Editing by Alanna Weissman and Emily Kokoll.
