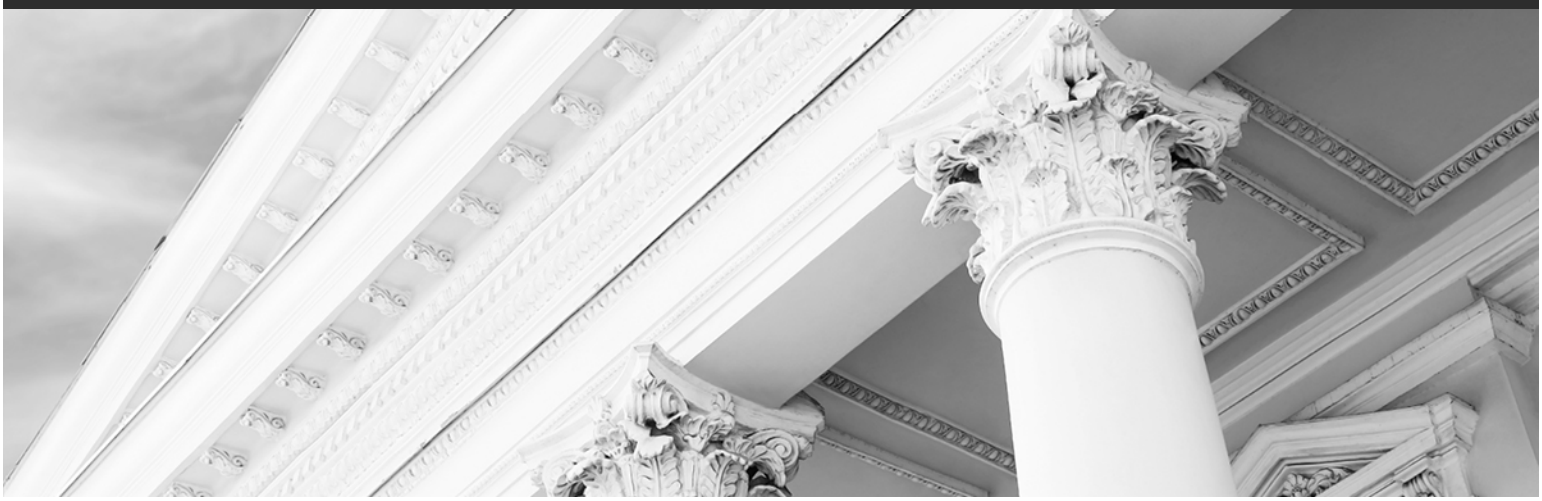
GT GreenbergTraurig

Alert | Class Action Litigation



June 2021

'No Concrete Harm, No Standing': Supreme Court Reverses Judgment Where Class Members Did Not Have Standing

On June 25, the Supreme Court addressed whether a violation of a federal statute providing for a private right of action, without concrete harm, will provide standing in federal court. In a 5-4 decision, the Court reversed a Ninth Circuit decision approving a damages award to 6,332 class members asserting that TransUnion violated the Fair Credit Reporting Act by mislabeling their credit reports as a "potential match" to a name on the list of terrorists, drug traffickers, and other criminals maintained by the U.S. Treasury Department's Office of Foreign Asset Control (OFAC). *See TransUnion, LLC v. Ramirez*, No. 20-297, slip op. (U.S. June 25, 2021). These class members comprised more than 3/4 of the total class, but their claims were distinct in that TransUnion had only flagged their credit reports internally, without distributing the reports to potential creditors or any other third party.

Writing for the majority, Justice Kavanaugh explained that mislabeling, alone, was not a "concrete injury" needed to establish Article III standing, because "the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts." *TransUnion*, Slip op. at 18. The risk of future harm resulting from potential distribution also was not enough. Though the Court recognized that someone "exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, … so long as the risk of harm is sufficiently imminent and substantial," *TransUnion*, Slip op. at 20 (citation omitted), here, the plaintiffs sought only money

damages. And Justice Kavanaugh explained, "a plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages." *Id*. at 20.

This opinion has potentially broad implications. The majority commented that "the mere existence of a misleading OFAC alert in a consumer's internal credit file" does not "constitute[] a concrete injury," *TransUnion*, Slip op. at 18; there is no "historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury," *id*. (internal citation and quotation marks omitted); and "[a] letter that is not sent does not harm anyone, no matter how insulting the letter is. So too here." *id*. at 19. This language, and the strict construction of "concrete injury," tee up a tough course for plaintiffs seeking money damages based on speculative (or even *probable*) future harm based on allegations that false information *might* be published.

Nonetheless, in the first of two dissents, Justice Thomas noted that the victory for TransUnion (and like companies) may be "pyrrhic" given the majority opinion did "not prohibit Congress from creating statutory rights for consumers," and a jury conclusively held that the mislabeling of class members' credit reports violated the Fair Credit Reporting Act. *TransUnion*, Slip op., Thomas, J., dissenting, at 8, 18 n.9. As Justice Thomas noted, rather than bar such class actions entirely, the majority merely "ensured that state courts will exercise exclusive jurisdiction" over them. *Id*. at 18 n. 9. Therefore, those states that lack a standing requirement akin to Article III should expect to see an increase in the filing of class-action suits grounded in mere statutory violations.

The second dissent — authored by Justice Kagan and joined by Justice Breyer and Justice Sotomayor – joined Justice Thomas's dissent with one caveat. *TransUnion*, Slip op., Kagan, J., dissenting, at 1-3. In Justice Thomas's view, any violation of a statutory right could give rise to Article III standing, while Justice Kagan maintained that some concrete injury is still needed. *Id*. at 3. Even so, Justice Kagan proffered that courts should defer to Congress's judgment "to determine when something causes harm or risk in the real world," and that "[o]verriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue." *Id*.

Authors

This GT Alert was prepared by:

- Jonathan H. Claydon | +1 312.456.1022 | claydonj@gtlaw.com
- Taylor H. Arana | +1 312.456.1045 | aranat@gtlaw.com