



## Litigation ADVISORY ■

**JULY 2, 2021**

### Supreme Court Hardens Concrete Injury Requirement for Article III Standing

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At first glance, the injury-in-fact requirement for Article III standing is a straightforward issue: “No concrete harm, no standing.” But what happens if Congress deems an issue so important that it enacts a law granting individuals the right to recover damages if that law is violated? In a [5–4 decision](#), a fractured U.S. Supreme Court held that congressional action alone cannot confer constitutional standing: “An injury in law is not an injury in fact.” Every class member seeking to recover individual damages instead *must* demonstrate that she suffered a concrete harm.

Imagine sitting at a car dealership, ready to pull the trigger on the convertible. The dealership runs your credit, but finds that there is an “OFAC ADVISOR ALERT” on your credit report because your name matches that of a terrorist, drug trafficker, or other serious criminal on a list maintained by the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC). Needless to say, the dealership declines the transaction.

That is what happened to the named plaintiff, Sergio Ramirez, who promptly sued TransUnion, raising class claims against the credit reporting agency for violations of the Fair Credit Reporting Act (FCRA). Under the FCRA, credit reporting agencies must implement reasonable procedures to “assure maximum possible accuracy” of consumers’ credit files and prevent inaccurate, harmful information from appearing on a consumer’s credit report (such as an alert that incorrectly implies that you might be terrorist). The district court certified a class of 8,185 individuals who received the OFAC alerts in their credit files. Not every class member, however, had the same car dealership experience as the named plaintiff, and at trial the parties stipulated to divide the class into two groups. The first consisted of 1,853 individuals who, like the named plaintiff, had their credit reports disseminated to third parties. The second group (6,332 individuals), in contrast, had inaccurate OFAC alerts on their credit files that were not shared with any third party. The jury returned a verdict for both groups, awarding each class member compensatory and punitive damages, and the Ninth Circuit affirmed.

In a 5–4 decision penned by Justice Kavanaugh, the Supreme Court reversed as to both groups. The Court reaffirmed the core tenet under Article III that every class member must have standing to recover individual damages. So the first group had standing because they suffered a concrete, particularized harm—reputational injury—when their inaccurate OFAC alerts were shared with third parties.

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But the majority held that the second group *lacked* standing. The credit files of those class members were not provided to third parties during the class period, leaving them to assert only a statutory cause of action “over the defendant’s violation of federal law” with no concrete harm. The rub here is that congressional action—even creating a private right of action to recover statutory and punitive damages for a credit reporting agency’s failure to implement reasonable procedures to ensure the maximum possible accuracy of information—was not enough to confer standing. Although Congress may grant legal significance to a concrete injury, it may not bestow constitutional significance on an abstract harm. “An injury in law is not an injury in fact.” Similarly, while statutes enacted by Congress may inform courts about what constitutes a concrete injury, Congress cannot “simply enact an injury into existence.” Article III standing carries constitutional import that neither Congress nor the courts can cast aside for convenience. Heavy lies the standing requirement.

The Court also rejected the argument that, even if the mere existence of an inaccurate, potentially harmful OFAC alert in a class member’s credit file did not amount to a concrete injury *at that moment*, the risk that the information would be disseminated in the future did. The Court found that argument conflated the standing to pursue injunctive relief with the standing to recover retrospective damages. A class member must demonstrate standing separately for each form of relief sought. Although an imminent and substantial risk of future harm could satisfy standing for injunctive relief, that is not the same as an injury in fact to recover damages—a concrete, particularized harm.

## Key Takeaways

There is much to unpack in *TransUnion*, but above all, the Supreme Court’s decision punctuates that a concrete harm is *essential* to establishing an injury in fact for Article III standing. *TransUnion*, therefore, will have an immediate impact on a range of cases asserting an abstract or attenuated theory of harm, and especially claims premised on a private right of action granted under a congressional statute.

In addition, although the Supreme Court declined to decide whether “every class member must demonstrate standing *before* a court certifies a class,” litigants should expect to see an increase in standing arguments at class certification, particularly for typicality and predominance arguments. Notably, the Supreme Court could have affirmed the trial court’s judgment as to the 1,853 class members who had standing. It didn’t, and instead reversed and remanded the entire case with the direction that the Ninth Circuit “may consider in the first instance whether class certification is appropriate.” Although it remains to be seen what the Ninth Circuit will decide on remand, the Supreme Court’s decision is a signal that standing will likely play a much greater role at the class certification stage.

Finally, *TransUnion* clarifies a frequently litigated issue in class action cases about standing to pursue injunctive relief. The Supreme Court observed that a class member must establish standing for a claim for prospective relief and separately establish standing for retrospective damages. The converse is also true. A plaintiff who has suffered harm in the past may not simply claim they are entitled to injunctive relief, but instead must establish she has standing to pursue such relief.

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