

# SCOTUS Rejects Intangible Statutory Injuries as Basis for Class Member Standing and Sets Stage for Renewed Emphasis on Standing at Class Certification

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On June 25, 2021, the U.S. Supreme Court decided *TransUnion LLC v. Ramirez*, holding long after a jury verdict that three quarters of a certified class of more than 8,000 Fair Credit Report Act (FCRA) class members lacked Article III standing. The Court held that those class members lacked standing to complain about credit reports misidentifying them as potential criminals and terrorists because they could not show that those errors actually harmed them. They could not even show, for example, that their credit reports were disseminated to third parties. The Court reiterated that a plaintiff alleging intangible injury must show a close relationship between that harm and an injury traditionally recognized as grounds for a lawsuit. It also stressed that Congress' creation of rights or obligations by statute does not relieve courts of their judicial responsibility to "independently decide" whether a plaintiff has suffered a concrete harm under Article III. While the Court's decision focused on whether the plaintiffs had standing rather than when a court must make that determination, both the ruling and its procedural history — the dismissal of thousands of claims long after class certification and a jury verdict — could have significant implications at the class-certification stage in a broad range of cases going forward.

The plaintiffs in *TransUnion* alleged that TransUnion had violated the FCRA by failing to use reasonable processes to ensure the accuracy of their credit files (the "reasonable-processes claim"). In particular, the plaintiffs alleged that TransUnion included false alerts in their files incorrectly stating that they were on a federal government list of potential terrorists, drug traffickers and serious criminals. The plaintiffs also alleged that TransUnion violated the FCRA by sending consumers credit reports with certain formatting defects (the "formatting claim"). Although more than 8,000 individuals fit the class definition, TransUnion had shared the credit reports of fewer than a quarter of the class members with third parties during the relevant time period. The vast majority of class members' reports had remained private. The district court nonetheless certified the entire class, later concluding that the entire class had Article III standing. At trial, the jury returned a verdict for plaintiffs, awarding more than \$60 million in statutory and punitive damages. On appeal, the Ninth Circuit agreed that all plaintiffs had standing, although it lowered the damages award to just over \$40 million.

The Supreme Court reversed, holding that no class member had standing as to the formatting claim and that all those class members whose information had not been shared with any third parties also lacked standing with respect to their reasonable-processes claims. The Court began by concluding that the small percentage of class members whose information had been shared with third parties suffered a "concrete harm" because such an injury bore a "sufficiently close relationship" to the harm traditionally recognized in defamation actions. But the same logic precluded a finding of standing as to the class members whose information had never been shared. The Court likened that situation to writing "a defamatory letter and then stor[ing] it in" a desk drawer. Simply put, although the class members were exposed to the "risk of harm" by the inaccurate information contained in their files, there was "no concrete" harm absent publication of that information. Finally, as to the formatting claim, the Court held that there was no evidence that "a single other class member so much as *opened* the" mailings, "nor that they were confused, distressed, or relied on the information in any way." Accordingly, the absent class members did not meet the requirements of Article III standing because they only asserted "bare procedural violation[s], divorced from any concrete harm."

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## Takeaways

The principal takeaway from *TransUnion* is that a plaintiff who seeks to ground Article III standing on an intangible statutory injury cannot rely solely on a statutory right or obligation. Instead, the plaintiff must allege (and ultimately prove) that the injury has “a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts.” While “an exact duplicate” analog is not required, the inquiry “is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.” And it is the courts that have the final word on that issue. In *TransUnion*, the closest analog the Supreme Court could find for the intangible injury Congress created through the FCRA (*i.e.*, invasion of one’s right to accurate consumer credit reports) was the traditional tort of defamation, which requires proof that the purportedly false information was actually published. The Supreme Court’s more exacting approach to Article III standing has obvious significance for FCRA suits going forward, and it also is likely to reverberate beyond the FCRA context, requiring plaintiffs in all sorts of consumer class actions arising out of purportedly misleading or inaccurate information to adduce proof that such information caused them concrete harm — at least where certified classes proceed to trial.

But *TransUnion* also may have significance for decisions about when to address Article III standing in class actions. Specifically, the case raises important questions about whether courts going forward — unlike the district court in *TransUnion* — should address and resolve standing issues *prior* to certifying a class, especially when there are good indications that not everyone in the class is injured. The Supreme Court did not provide express guidance on this question; indeed, in a footnote, it declined to “address the distinct question whether every class member must demonstrate standing before a court certifies a class.” But the case — which dragged on for several years and produced a jury verdict after a six-day trial — is a cautionary tale of how parties and courts can squander vast resources by failing to apply the correct Article III standing requirements early on in litigation.

Whether to address Article III standing before class certification is a question that has vexed the lower courts and litigants for decades, with a number of decisions suggesting that standing issues need not be resolved at the class-certification stage, and a number suggesting the opposite. Compare, *e.g.*, *Kohen v. Pac. Inv. Mgmt.*, 571 F.3d 672, 676 (7th Cir. 2009) (insisting that addressing standing at the certification stage “put[s] the cart before the horse”), with *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1026 (8th Cir. 2010) (holding that a “named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves”).

Although *TransUnion* did not address the issue directly, the logic of the ruling and the lessons learned from the experience of litigating the case all the way to final judgment could supply new force to arguments in support of resolving standing issues earlier in the proceedings, for several reasons.

First, by doctrinally tightening the Article III standing requirements in the class-action context, *TransUnion* strengthens the argument that standing is a threshold constitutional requirement that applies to individual class members just as it would to individual litigants, and that it should therefore be addressed and resolved at the earliest practicable point in the case — and certainly well before final judgment. As the majority opinion in *TransUnion* explained, that bedrock principle “ensures that federal courts decide only ‘the rights of individuals’ ... and that federal courts exercise their ‘proper function in a limited separated government.’” Deferring resolution of absent class member standing until trial runs afoul of that precept by permitting a court to certify a class of uninjured class members — effectively exercising its adjudicatory power with respect to individuals whose claims are not true “Cases” and “Controversies” and over whom there is no federal subject matter jurisdiction.

Second, *TransUnion* vividly highlights the pragmatic problems that result when courts refuse to address the issues of standing at the early stages of a case — especially where congressionally-created rights or other features of the case make clear that standing is likely to be an issue for many class members. The class-action device is designed to promote efficiency. But the district court’s approach in *TransUnion* was highly *inefficient*. It required the parties to litigate the merits of the case all the way to a jury verdict, even though the court lacked jurisdiction over the vast majority of the claims. Resolving standing issues at the outset will help streamline discovery and trial-preparation efforts by the parties going forward.

Third, *TransUnion* also highlights the significant unfairness to defendants in the settlement context from refusal to address standing issues at the class-certification stage. Delaying resolution of standing questions greatly exaggerates the plaintiffs’ already outsized settlement leverage and provides the opportunity for significant windfalls to uninjured class members. As the Supreme Court has expressly acknowledged in prior rulings, a certified class produces an “in terrorem” effect so strong that it drives most defendants to settle rather than roll the dice on a class trial — often without any regard to the underlying merit of the claims in question. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). As a result, deferring consideration of absent class member standing until after certification, and particularly until trial, risks proceeding without Article III jurisdiction, making it easier for plaintiffs to certify sweeping

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class actions and secure fast and easy settlements even where just a fraction of the class members may have suffered a concrete injury. Such a dynamic also inflates the overall cost of settlements by generating agreements in which uninjured class members — frequently, the vast majority of the class — could get paid. And those payments, in turn, end up driving up the amount of attorneys' fees, culminating in exorbitant settlements that bear little relationship to the actual value of the claims.

*TransUnion* itself illustrates the degree to which a court's refusal to address standing at the threshold can inflate the size of settlements and create windfalls to uninjured class members. Only years after class certification, and after a six-day trial, did the Supreme Court determine that less than a quarter of the class members — just 1,853 out of 8,185 — had standing. Had the case settled, the class eligible to recover payments could have

been inflated by as much as 342%. Put differently, had injured and uninjured class members alike participated in the settlement in proportion to their numbers, 77% of the payments would have constituted a windfall, made possible solely by the court's refusal to resolve standing issues at class certification.

## Conclusion

In sum, the *TransUnion* ruling provides important guidance on the kind of showing that absent class members must make to justify the recovery of damages. And while the Supreme Court did so in the context of a classwide verdict, the case provides new concrete support for arguments that courts should tackle objections to absent class member standing at class certification rather than later in the case.

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