Consumer Finance Monitor (Season 4, Episode 29): A Close Look at the U.S. Supreme Court's Decision in TransUnion v. Ramirez

Speakers: Christopher Willis, Daniel McKenna

Chris Willis:

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Chris Willis:

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Chris Willis:

Today we're going to be talking about the Supreme Court's recent decision in Ramirez vs TransUnion. And I'm joined by my partner and the practice group leader of our consumer financial services litigation group, Dan McKenna. Dan, welcome to the podcast.

Dan McKenna:

Thanks Chris. Happy to be here.

Chris Willis:

So the Supreme Court decided this Ramirez case recently, and it has something to do with standing and the fair credit reporting act. So can you just start off by telling the audience what happened in Ramirez?

Dan McKenna:

Yeah, for sure. Chris, thank you.

Dan McKenna:

Ramirez is a very interesting case and something that should have significant impact on class litigation for years to come. In order to pursue any claim in federal court. You need to have Article III standing. Prior Supreme Court decisions clarified that establishing standing requires a plaintiff to show three things. First, a concrete, particularized, and actual or imminent injury. Second, that the injury was likely caused by the defendant. And third, that the injury would likely be redressed by judicial relief.

Dan McKenna:

Ramirez, as you pointed out, involves the evaluation and definition of concrete and particularized injury under Article III and whether or not a plaintiff has standing to pursue a claim. It did involve an FCRA claim, a claim under the fair credit reporting act. But I think the impact of it is going to be much broader than that. But let me tell you about what the claim was.

Dan McKenna:

So Ramirez alleged that his name was wrongly added to an OFAC list of terrorists, drug traffickers, and serious criminals. And he claims that he was denied a car purchase as a result of that reporting.

Dan McKenna:

When Ramirez asked TransUnion for a copy of his report, after the denial of that sale, they sent him that report without mentioning the OFAC alert.

Dan McKenna:

The next day, TransUnion sent him a letter advising that his name was considered a potential match to the OFAC list, but didn't include a copy of the summary of rights that was required to be included by the statute.

Dan McKenna:

So Ramirez brought a class action alleging that TransUnion violated the Fair Credit Reporting Act by failing to follow reasonable procedures to ensure the accuracy of the information in its file, failing to provide all of the information in his file upon his request, and failing to include the summary of rights with each written disclosure, being the letter he got the second time.

Dan McKenna:

He sought to certify multiple subclasses, including approximately 8,000 people who received a letter from TransUnion indicating their name was a potential match to one on the OFAC list.

Dan McKenna:

The parties stipulated, however, that only about 1800 of those people had their credit reports sent to potential creditors. So there was just over 6,000 members of the class whose credit reports had not ever been seen by a third party.

Dan McKenna:

Notwithstanding that distinction, the district court found that all 8,000 people had standing and the jury awarded each class members statutory and punitive damages for a huge verdict totaling over $60 million.

Dan McKenna:

The Ninth Circuit affirmed, finding that all of the class members had standing, but it lowered the punitive damages portion, reducing the total verdict to about $40 million.

Dan McKenna:

So the Supreme Court took it up and found otherwise. Justice Kavanaugh wrote for the majority and he found that none of the class, except for the plaintiff, suffered a concrete harm for the claims relating to TransUnion's mailing of the letter to plaintiff. And the court specifically found that plaintiff didn't demonstrate that any of the other putative class members were confused or distressed by the information, or that any of them were prevented from contacting TransUnion to correct the error.

Dan McKenna:

Basically the court found that that sort of informational injury, that the consumer was harmed by being informed of something didn't cause adverse effects sufficient to satisfy Article III.

Dan McKenna:

He then found, and this is where most of the focus has been, that only the 1800 class members whose reports were sent to third parties could establish standing. There only those 1800 could establish that they suffered a concrete harm for the reasonable procedures claim.

Dan McKenna:

And his opinion was very clear. If you don't have concrete harm, you don't have standing. And in fact to use his exact words, "No concrete harm, no standing."

Dan McKenna:

The court noted that under Article III, an injury in law is not the same thing as an injury in fact. And only those people who suffered an injury in fact have standing. Thus the individuals who reports were never shared with third parties had no injury in fact, even if the statute was violated as to them, because the false information was never seen by any third party.

Dan McKenna:

So they had no basis to claim that they suffered an injury. The court also rejected the argument that there was some future risk of harm, because the harm never materialized. Those individuals never had their information sent to third parties, so there was no risk of that information being used by third parties in the future to cause them harm, thereby creating another rule that for future risk of harm to be a viable basis for standing, that future harm has to materialize to be concrete.

Dan McKenna:

So, that's really interesting, but I feel like I'm having deja vu, Dan, because didn't, we have a Supreme Court case called Spokeo five years ago that supposedly answered the same question. Like, how is this different? What has the Supreme Court added to the equation in Ramirez that we didn't already know from Spokeo?

Dan McKenna:

You know, in a lot of ways, Chris, the Supreme Court mirrored Spokeo, but made it clearer because apparently the lower courts were having a real hard time following Spokeo.

Dan McKenna:

So Spokeo addressed the question of whether an, alleging a violation of the fair credit reporting act alone, without any claim of actual damages constituted a sufficient injury.

Dan McKenna:

The Supreme Court answered the question in Spokeo with a resounding no. To obtain Article III standing, a plaintiff can't only alleged that the statute was violated. Claiming that the statute was violated alone is just not enough. You have to identify some harm, even if it's intangible. There has to be some harm beyond the statute was violated.

Dan McKenna:

Unfortunately, however clear that might sound to us, the lower courts really struggled to apply that guidance, especially as it relates to the intangible harm, which led to some pretty alarmingly, varied results.

Dan McKenna:

And, and I think that's probably demonstrated best by how the Ninth Circuit handled the Spokeo case itself on remand. The Ninth Circuit on remand focused entirely on the generalized interests behind the FCRA, rather than any specific harm that the plaintiff claimed he suffered.

Dan McKenna:

And it held that Spokeo, that the plaintiff in Spokeo, had standing, despite the fact that he didn't identify any actual harm at all.

Dan McKenna:

And the court reasoned that the Fair Credit Reporting Act provisions at issue are designed to protect the dissemination of false credit reporting information. And if that false information is disseminated, then it would be actionable. So it was a concrete injury.

Dan McKenna:

What's really frustrating, and I know we experience this a lot in our litigation, is a lot of courts followed that logic, which largely undermined or entirely unwound the Spokeo requirement for actual injury. So Spokeo held you can't just allege a violation of the statute, you have to show an actual injury.

Dan McKenna:

The lower courts looked at that and said, "Okay, but if the violation of the statute itself looks like an injury, then we're going to allow that to be enough, even though there's no, even though there's no actual injury alleged by the plaintiff."

Dan McKenna:

So Ramirez did away with all of that, with the single sentence, "No concrete harm, no standing." So now there really can't be any questions by the courts as to whether or not a person has to say, "Yes, I was harmed. This is how I was harmed." And critically the impact of that on a class. And whether each of those individuals need to be able to demonstrate some actual harm.

Chris Willis:

Speaking of class, you mentioned a minute ago that the Ramirez case is expected by us to have a lot of impact on future class action litigation.

Chris Willis:

Can you expand on that a more, what will the world look like for class plaintiffs, particularly under the federal consumer financial protection laws now that we all have to live with the Supreme Court saying, "I really meant it," in Ramirez?

Dan McKenna:

Well, what's funny, Chris, is you and I agree that they said that. I am certain the plaintiff's bar will argue that there's nothing new, that the statutory injuries should be enough to satisfy Article III standing. We're already starting to see that trickle out a little bit. And we're also starting to see folks argue that this really only applies to the Fair Credit Reporting Act.

Dan McKenna:

I tend to think that all of that should now be rebuffed. That the Supreme Court really, really clearly addressed it now. And there shouldn't be any opportunity for those arguments.

Dan McKenna:

So what would that impact be? First, the Supreme Court clearly held that every member of the class has to have individual standing throughout all stages of the litigation. And that gives us as, as defense counsel, an opportunity to challenge standing at all stages of the litigation. And as you know, many class actions allege violations of state or federal statutes, but are pretty weak on the injuries actually sustained by the class.

Dan McKenna:

In fact, oftentimes there's literally no allegation that the consumers themselves suffered an actual injury as opposed to how the statute violated.

Dan McKenna:

And as you know, the merits aren't decided until after class cert. So usually plaintiffs will allege and argue that a statutory violation is enough and is equivalent to a statutory injury that's the same as an actual injury for Article III standing and rely entirely upon their name named plaintiff having an actual injury.

Dan McKenna:

So under normal circumstances, or historically, if we were to oppose class cert challenging the injury component, a lot of courts would push that off. They would avoid the issue and claim it was an issue of damages and not one of standing.

Dan McKenna:

Now, the courts should be more amenable to putting the class to the task of showing actual injury for each person within the class definition at the class cert stage.

Dan McKenna:

So my very first recommendation is we need to be challenging standing and the individual actual injury of each class member at the class cert stage, and not allowing that to get pushed to the merit stage post-class serve.

Dan McKenna:

There's also an argument, Chris, that the divergent actual injuries needed for standing create many trials. And as you know, there needs to be some common methodology for determining the concrete injury. There needs to be some common methodology for determining the damages for each person. And this mini trial issue is something that should be raised as a opposition to predominance at the class cert stage.

Dan McKenna:

So generally business records, aren't going to show, our clients business records, aren't going to show how each person was harmed. Many of them likely aren't harmed. And without some common methodology of determining that then many trials, which would be contrary to the point purpose of a class action, would be required and we should be making that argument as well.

Dan McKenna:

Then the final point I want to raise Chris, is although the plaintiff's bar hopes otherwise, this really should reach far beyond the Fair Credit Reporting Act.

Dan McKenna:

Any class action that is grounded on a statutory violation in and of itself, now will require each member of the class to establish actual damages to have standing under Article III regardless of the statute that the claim is brought under. And we

need to be very careful to ensure that the class is pursuing that the right way and to be challenging that at each appropriate stage, regardless of the underlying cause of action.

Chris Willis:

Yeah. And speaking of other statutes beyond Fair Credit Reporting Act, let's think of a couple of examples.

Chris Willis:

So for example, let's say you have a Truth In Lending Act claim based on some disclosure being wrong. You know, the Truth In Lending Act has two alternatives for the plaintiffs. They can show actual damages or they can seek statutory damages without showing injury. But it seems to me that Ramirez gets in the way of doing that unless there is an actual injury.

Chris Willis:

Likewise, think about a data breach case where somebody's personal information has been exposed to hackers. And the argument is frequently made that, "Oh, well, even though I haven't suffered identity theft, I have a future risk of harm." And it seems to me the portion of Ramirez that you talked about a minute ago about, well, future harm does account until it materializes sort of throws a wrench into that case too.

Chris Willis:

So I'm sure we can think of tons of examples of cases like that. Don't you agree where the failure to show an actual injury will be fatal to one of these cases?

Dan McKenna:

I think that you're absolutely right, Chris. And it's incumbent upon us and everyone on the defense bar to be raising these issues throughout litigation, regardless of the underlying cost.

Chris Willis:

So let's talk about how this might play out. We talked about class actions a second ago. How about in individual cases? You know, your plaintiff is in court. They're seeking statutory damages or whatever. How will Ramirez affect the way we litigate those individual cases?

Dan McKenna:

So I think it will affect how we litigate those cases, but sadly not as greatly as it's going to affect the class actions.

Dan McKenna:

And that's particularly frustrating because FCRA cases right now are the second most filed case in the country. There is a huge, huge uptick in credit reporting litigation. And it's typically death by a thousand cuts.

Dan McKenna:

In most of those cases, the consumers are alleging some sort of distress, emotional distress is, is considered to be an actual harm under the Fair Credit Reporting Act. Some sort of credit damage, et cetera. That's going to be enough in the individual litigation and that'll continue to suffice in the individual litigation.

Dan McKenna:

However, as we start to see more and more firms transition to credit reporting litigation with the, the dearth of, of TCPA plaintiffs out there nowadays, I anticipate that we will see a, a real drop in the quality of the pleadings. And if they're not

alleging these things, and it is something that we should be challenging at the pleading stage, and that can be done either via motion to strike or motion to dismiss, or even just asserting it in your answer.

Chris Willis:

So, one last question about this, Dan. And it's something that worries me a little bit.

Chris Willis:

A motion to dismiss based on Spokeo and Ramirez is a motion saying the court lacks subject matter jurisdiction of the case, because the federal courts subject matter jurisdiction is defined by Article III.

Chris Willis:

So let's say you have a case in federal court, you successfully moved to dismiss it on the basis of no standing under Ramirez and Spokeo. How much do we need to worry that the case then comes back, now non-removable, in state court because the state constitution, or whatever, doesn't contain as strict of a injury and causation requirement as the federal courts have interpreted Article III to have.

Dan McKenna:

Well, I think that's a huge risk, Chris. And it's really a good thing that you raised it.

Dan McKenna:

We saw a lot of, post Spokeo, we saw a lot of knee jerk reaction to these motions. And I think a lot of defendants found that they needed to be a little bit more careful what they wished for as they saw these motions granted, and then found themselves stuck in, in a state court.

Dan McKenna:

I also think that it creates some negative situations for defendants who remove cases and then immediately argue that there's no Article III standing. And the courts look at that and say, "You know, isn't that a little bit of trickery on your part? Why are you doing this? You're the one who brought it to the court."

Dan McKenna:

And I think it generates potentially longstanding ill will against those defendants the next time that they're in those courts.

Dan McKenna:

So it's something that you need to be careful of. And I would suggest that it is a more appropriate weapon, if we will call it that, to use at class certification than to use at the pleading stage. Because if you are asserting it at the pleading stage, you give them an opportunity to try to remedy it pretty early on. And/or you might be really dissatisfied with the result, as you pointed out, as you may find yourself stuck in state court for a class action.

Chris Willis:

Okay. So thanks for commenting on that.

Chris Willis:

And thank you Dan, for being on the podcast today to talk about this important decision and the really potentially massive impacts that it may have on all kinds of consumer financial services litigation.

Chris Willis:

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