
# New rules: *Ramirez v. TransUnion*

## Ninth Circuit requires each class member to have standing for damages, furthering Chamber of Commerce's quest to make "no injury" class actions go away

**By Dan LeBel**

"A class action jury trial is a high-stakes affair more common in cinema than an actual courtroom." (*Ramirez v. TransUnion LLC* (9th Cir. 2020) 951 F.3d 1008, 1038.)[1] This is how Judge M. Margaret McKeown begins her partial concurrence/partial dissent in the Ninth Circuit's latest decision defining the boundaries of class action litigation. "But no screenwriter would feature the complex issue raised in this appeal: a standing infirmity during a time of flux in the doctrine." (*Ibid.*) Perhaps not. But there is plenty in the 56-page opinion to keep the class action practitioner riveted.

The Ninth's Circuit's previous holdings that only the representative plaintiff – *not absent class members* – need allege standing at the motion to dismiss and class certification stages remains in place. However, when a class is certified for money damages, each individual class member must establish standing at the final (damages) phase of the litigation.[2] Below, I will provide some context for *Ramirez*, some key case details, and provide some suggestions for future-proofing your cases from the evolving Article III standing requirements.

### The backdrop

*Ramirez* opens the next chapter in corporate defendants and the Chamber of Commerce's quest to make "no injury" class actions unconstitutional. The "no injury" argument goes that plaintiffs filed a "gotcha" case based on "technical" violations of a federal law that provides statutory damages. Therefore, regardless of a clear violation of substantive law, without proof that harm directly resulted, no statutory damages shall be awarded and the case must be dismissed because the federal court lacks jurisdiction over the controversy. As we will discuss, Article III challenges could effectively wipe out your case at the pleading, summary judgment, class certification, and trial stages of litigation.

The Chamber's greatest advance in its attack on standing so far came in *Spokeo II*.[3] There, the Supreme Court confirmed plaintiffs must do more than allege "a bare procedural violation" since it's possible that the violation did not "cause harm or present any material risk of harm."[4] *Spokeo II* however refused to determine whether the plaintiff in that case established a particular concrete harm.

Three years ago, I wrote an article for these pages concerning the obstacles "*Spokeo II* presents for the unwary."[5] My thesis was essentially that the hurdles were readily surmountable if class counsel think more like trial attorneys. Presenting the emotions of the class members subjected to the corporate defendants' wrongful conduct can reframe the litigation in a way that makes the "no injury" arguments ring hollow. The article discussed practical pointers on bringing out class representatives' emotions and dealing with them before they testify at deposition, presenting arguments in a "Brandeis brief," and taking into account the worldview/emotional fingerprint of the particular jurist who will rule on class certification.

Plaintiff's counsel in *Ramirez v. TransUnion* certainly embraced that strategy. At trial, counsel obtained a jury verdict awarding statutory damages to the class on three counts of violation of the Fair Credit Reporting Act and punitive damages for a total verdict of approximately $60 million. The emotional content of the record Ramirez created was central to both the majority opinion and Judge McKeown's dissent.

### The players and the plot

Sergio L. Ramirez's story begins with a Bay Area dealership refusing to sell to him because TransUnion LLC reported him as a match for the terrorist watchlist. The United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") maintains a list of Specially Designated Nationals ("SDNs"), i.e., individuals who are prohibited from transacting business in the United States for national security reasons. Because merchants who transact with an SDN can face harsh fines, TransUnion saw a business opportunity in matching consumers' names to individuals on the OFAC list. Absent from the opinion, but according to trial counsel, TransUnion charged merchants a fee in addition to the fee for the credit inquiry whenever it generated a report "matching" a consumer with the government's list.

Although the dealership submitted Ramirez's full name, birth date, SSN, and


address, TransUnion only ran his first and last name through the database. Simply put, TransUnion profited by generating false positives. The company knew this was a problem because numerous concerned citizens wrongfully fingered as potential terrorists had contacted the Treasury Department, which then informed TransUnion that a search "that does not include rudimentary checks to avoid false positive reporting can create more confusion than clarity and cause harm to innocent consumers."

Ramirez called TransUnion and spoke with multiple representatives who tried to assure him that he was not on the terrorist watchlist. When Ramirez received his credit report it did not state he matched the list. But the next day he received a letter which did state he was a match for the list. That letter, unlike the credit report, did not contain the statutorily mandated language informing him of his right to challenge the report and how to do so. It was illegal to fail to include this language because, as the majority stated, another jury "slammed" TransUnion with an $800,000 verdict (subsequently remitted to $150,000) for essentially the same course of conduct. In other words, this is not a "wrong zip code" case.

## The conflict and resolution

Judge McKeown's dramatic flourish in dissent seems intended to highlight her annoyance with the dramatic evidence Plaintiff presented at trial. Ramirez testified he was "shocked" at receiving TransUnion's letter matching him to the terrorist watchlist. He was "confused" by being denied credit because of TransUnion's report, then by its representatives telling him he wasn't on the terrorist watchlist, receiving his consumer credit report which also did not mention the watchlist, and finally receiving a letter from TransUnion stating he was a match for the list, but not telling him that he could do anything to dispute it.

All this was too much, the dissent complains. Given his testimony, no one could deny Ramirez was harmed and therefore had standing on each claim. However, the absent class members reported as terrorists may not have been "shocked" or "confused" at all. According to the dissent, trial should not have been "the story of Mr. Ramirez." Instead, there should have been more evidence of the woes of the absent class members. In its absence, "harm as to the bulk of the class was conjectural." The dissenting opinion goes on to propose "expert testimony, representative class members, and credit agency protocol [would] fill this gap. But none was proffered."[6] But as lead counsel pointed out in a discussion with the author, *that's not his job*.

So although *Ramirez* would make a logical follow-up to the SCOTUS decision in *Spokeo II*, and a majority of the Supreme Court may find the dissent's arguments appealing, the record here seems a bulwark to TransUnion's petition.[7] But eventually, there may be a case that presents a scenario where the absent class members are less sympathetic. We should do what we can to not present that case.

## Lessons for the practitioner

Class counsel surely has a duty to the class to put up a worthy representative, one with compelling facts and, if possible, a person who presents well. We shouldn't shy away from creating a record that's "too good." If defendants feel the representative is not typical, it is *defendants'* job to present those facts which would tend to establish that narrative. We should be ready to fight defendants' attempts to create an adverse record using absent class members.

We should resist attempts by defense counsel (and the courts) to blur the lines between standing requirements and typicality. Although Constitutional standing is a requirement in federal court, Rule 23 is still meant to allow representative actions. Of course, we must allege a sufficient basis for standing and establish the class representative's standing, but we should also be prepared at the class certification stage to demonstrate how, when it is time to award damages, there's a process to establish injury to each absent class member. Keep in mind that it's not fatal to certification if some class members lack standing.[8]

An interesting aside left out of the published opinion is that there actually was evidence relating to someone other than Ramirez who was adversely affected by TransUnion's illegal conduct. TransUnion prevailed on its motion in limine to keep out evidence of Ms. Cortez and her $800,000 verdict. However, TransUnion's corporate representative referred to Ms. Cortez on the witness stand, opening the door to Plaintiff's counsel's eliciting favorable testimony. We would do well to be armed with favorable stories from other, similar cases. When defendants argue that the class representative must present evidence of the absent class members, we should be permitted to present stories from other lawsuits.

This will continue to be an evolving area of law in class action litigation. Hopefully our community will continue to prepare these cases always with an eye toward the stage performance of trial because that should remain the prescription to Article III concerns.


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## Endnotes

[1] Rehearing denied by, En banc, Rehearing denied by *Ramirez v. Trans Union LLC*, 2020 U.S. App. LEXIS 11100 (9th Cir. Cal., Apr. 8, 2020); Stay granted by *Ramirez v. Trans Union LLC*, 2020 U.S. App. LEXIS 12024 (9th Cir. Cal., Apr. 15, 2020)

[2] All three judges concurred in this holding, however the issue was not challenged by *Ramirez*. Further the majority went on to hold that it didn't matter in this case because the evidence supported their finding that each absent class member had established standing at trial. As such, the ruling which the Circuit deemed of first impression is arguably dicta.

[3] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)

[4] *Spokeo II*, 136 S. Ct. at 1550.

[5] "Why Class Counsel Must Think Like A Trial Lawyer," Plaintiff Magazine (2017).

[6] *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1040 (9th Cir. 2020)

[7] At the time of writing, it is only a threatened certiorari petition.

[8] *Id*. at 1024 citing Newberg on Class Actions section 2:3 (5th ed. 2019).