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A half year after the standing decision in *Ramirez* — Where are we today?

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Federal court jurisdiction — even for class action cases post CAFA (2005) — is not guaranteed. Most federal statutes provide for dispute resolution in either state or federal court. But federal courts are only authorized to determine "actual cases and controversies" under Article III of the Constitution.

This so-called standing to sue is jurisdictional — meaning that, without it, the federal court has nothing to decide. For federal courts to adjudicate disputes which do not qualify amounts to constitutional over-reach and also impinges on executive branch authority.

Confusion sometimes rules if a federal court case must pass through the gauntlet of contested standing. The right to challenge standing can be brought up by the court's own initiative and it might be waived if it's not raised in the answer or otherwise. The duty to advocate according to legal precedent demands diligence.

Congress cannot simply enact an injury into existence via the passage of legislation.

So — where are we now that we are more than half a year post the latest decision to teach lessons on federal standing?

SCOTUS standing instructions

Spokeo (May 2016)[1] teaches that an alleged FCRA injury must be "concrete and particularized," or, in sum, "a real controversy with real impact on real persons." A website aggregating data about individuals and indicating that a plaintiff was a wealthy person did not cause damage to the job prospects of that individual. The harm cannot be abstract.

The lens to view the harm is through history and tradition — namely, "whether the alleged injury to the plaintiff has a close relationship to a harm traditionally recognized as providing the basis for a lawsuit."

Congress cannot simply enact an injury into existence via the passage of legislation. A statute granting certain rights and the ability to sue does not confer automatic standing. The concrete injury element must still be satisfied.

Also, in the context of a FCRA claim, *Ramirez* (June 2021)[2] makes clear that under Article III "an injury in law [statutory right] is not an injury in fact [concrete harm]." Inaccuracies in a credit report maintained by the credit reporting agencies which have never been disseminated to third parties (to satisfy the harm element) will not support standing, and simple errors in the formatting of reporting by the CRAs to consumers is not concrete harm.

Moreover, the risk of future harm by inaccurate internal records, standing alone, will not satisfy standing — unless "the exposure to the risk of future harm itself causes a separate concrete harm." This is true even if the uncirculated credit report inaccurately indicates that a borrower might be a terrorist or a drug smuggler on an OFAC watch list.

An asserted "informational injury" that "causes no adverse effects does not satisfy Article III." Of the 8,185 potential class claimants in *Ramirez*, only 1,853 (22.6 %) had standing to support the jury verdict of $750,000 in punitives (reduced to $100,000) and the affirmation opinion of the Ninth Circuit.

As *Ramirez* instructs, the standing analysis does not differ if the legal statutes at issue are state or federal. Also, it does not matter if the rights conferred by statute are deemed "substantive" or "procedural." The generalized injuries protected by the statutory scheme are not as important as are the particularized injuries actually suffered by the plaintiffs themselves.

In *Ramirez*, the Supreme Court plainly admitted that its lessons may be hard to interpret: "To be sure, the concrete harm requirement can be difficult to apply in some cases." Ya think? Let's take a look at some of the post-*Ramirez* efforts of courts to apply these standing concepts in the real world of federal court litigation.

Are the lessons of *Spokeo* and *Ramirez* adding clarity or confusion on standing? What unintended consequences might there be to the apparent divergence from the decades long trend directing into federal courts most of the filed class action lawsuits? Some of the relevant cases are discussed chronologically.

Tenth Circuit — 8/17/21 — yes, standing under FDCPA

In *Lupia v Medicredit*,[3] on appeal from the Colorado District Court, the Tenth Circuit affirmed a grant of summary judgment against a medical debt collection firm for placing a call to collect after the plaintiff had sent a letter disputing the debt and asking not to be called.

The defendant asserted a *bona fide* error defense, but the court rejected that as a matter of law because the debt collection company admitted it made the call and failed to present sufficient evidence of reasonable procedures in place to avoid such errors.

In terms of particularized/concrete harm, the Tenth Circuit quoted *Ramirez* as indicating that Congress can weigh in on cognizable injures to the privacy of individuals, and that at common-law the recognized tort of intrusion upon seclusion sought to protect a violation of a person's privacy.

The Tenth Circuit was persuaded by the holding and reasoning of the Seventh Circuit in *Gadelhak v. AT&T Servs*,[4] "determining that a consumer's receipt of a few unwanted text messages under the Telephone Consumer Protection Act is a 'modern relative' of the tort of intrusion upon seclusion …"

"When *Spokeo* instructs us to analogize to harms recognized by the common law, we are meant to look for 'a close relationship' in kind, not degree."

The Tenth Circuit distinguished *Ramirez* as factually different in that "the necessary defamation component that the tortious words were published" makes that harm different in kind from the common law.

Sixth Circuit — 9/13/21 — yes, standing under the FCRA

The *Kreuger v. Experian*, *Cenlar*[5] case involves a furnisher of credit information, Cenlar, facing a claim of inaccurate reporting FCRA data, after a bankruptcy discharge. Cenlar reported that his mortgage loan was "past due" even after the discharge.

The plaintiff claimed this inaccuracy damaged him in the form of credit impairment to his ability to pay a lower rate on a car loan for which he never applied. He had contemplated a new car purchase, but after he saw his credit score lowered by the reported mortgage loan as past due, he decided against getting a new car.

Summary judgment on the FCRA claim in favor of the furnisher was granted by the District Court in Michigan but reversed on appeal by the Sixth Circuit. Standing was determined to exist on these facts.

Kreuger had argued that the inaccurate credit reporting brought concrete harm "because his low credit score caused him to abandon his plans to buy a new car." A loan would have given him a new car and the added benefit of helping rebuild his credit.

His forbearance was deemed "not abstract." The fact that the damages asserted are perhaps nominal or difficult to quantify was deemed inconsequential by the Sixth Circuit. Concreteness and traceability of damages was determined even though there was no evidence that a third party or creditor ever saw the adverse credit information or acted on it in some way.

It is hard to square this standing determination with the testing guidance of *Ramirez*. Anyone can claim a theoretical risk of forbearance-type-harm if they are not required to establish that they in fact applied for some benefit which was denied or restricted as a proximate result of credit scoring inaccuracies.

The holding demonstrates, however, that the application of standing principles can be quite tricky. Creative advocacy may allow some claims to proceed which might otherwise be rejected.

Second Circuit — 11/17/21 — no standing for infractions of NY mortgage recording/discharge law

This *en banc* decision by the Second Circuit (*Maddox v. The Bank of New York Trust Co., NA*[6]) is perhaps one of the most instructive on the challenge of the standing analysis post *Ramirez*.

Judge Dennis Jacobs wrote the "rehearing" opinion for the majority, and he had authored a 16-page dissent in the prior appeal determination in the matter (dated in May 2021 and revisited in light of *Ramirez*). The Second Circuit performed a complete flip-flop.

This class action claim involved alleged violations of the New York Real Property Law Section 275 which requires mortgage lenders to place notice on the public real estate records when a certain mortgage lien has been satisfied by such things as payoff or sale.

Creative advocacy may allow some claims to proceed which might otherwise be rejected.

The plaintiffs did not allege that they suffered an injury such as duplicative filing fees or having a cloud on the title to their property. Indeed, there could be no such allegation since the plaintiff's property was sold. Yet, the plaintiffs pursued the statutory penalty of $1,500 for the delayed satisfaction certificate.

Notably, the plaintiffs did not claim that they suffered any reputational harm for the delayed filing of the notice of satisfaction. The public record was not alleged to have been read by anyone. The Second Circuit opined that the plaintiffs "may have suffered a nebulous risk of future harm during the period of delayed recordation … but that risk, which was not alleged to have materialized, cannot form the basis of Article III standing."

While the plaintiffs did claim (without specifics) to have suffered some emotional and psychological distress, they did not even know about the delayed recordation, and a distress response was regarded by the court as implausible, and also not able to satisfy the typicality requirement for class actions under Rule 23 of the FRCP.

Instead of having filed this federal court class action, the Second Circuit opined that the plaintiffs should have pursued their individual claims for the $1,500 penalty in state court.

Fourth Circuit — 1/10/22 — maybe no standing for violations of WV Consumer Credit and Protection Act

On March 10, 2021, the Fourth Circuit handed down a 2-1 split decision affirming a class action summary judgment award to a group of West Virginia mortgage borrowers against the lender Quicken Loans n/k/a Rocket Mortgage.[7]

The damages awarded to the certified class of 2,769 borrower claimants was $9.69 million — which was the statutory penalty amount of $3,500 per infraction. The underlying case was before the District Court in Wheeling, WV.

The class alleged that Quicken had violated the state's Consumer Credit and Protection Act by "unconscionable inducement" of borrowers to pay for supposedly independent appraisals via their network of certified appraisal companies, when in reality, the appraisals were "inflated," were not "independent," and did not reflect the true value of the properties securing the loan transactions.

No-injury class actions, for technical "gotcha" claims, are here to stay no matter where they are litigated.

Salient facts included:

- that the borrowers all wanted and received appraisals and their desired mortgage transactions;
- the influence that the borrowers complained of was the reporting-up via Quicken of the borrowers' own believed-value of their properties on forms requesting the loan transactions;
- this was the common industry practice at the time — pre 2009 — and was before the Home Valuation Code of Conduct prohibited lenders from providing the estimated values to appraisers (December 23, 2008);
- appraisers testified that the estimated values did not influence their valuations;
- the plaintiffs were not told by anyone that their estimates of value would be provided to the appraisers;
- and plaintiffs admitted that they did not even realize that Quicken passed along their estimates (and thus could not be "induced" by something of which they were unaware), nor were they unsatisfied with their borrowing transactions.

Despite this record, the District Court and the Fourth Circuit upheld the class wide damages award and specifically determined that the entire class had standing to sue. The concrete harm analysis was mostly a side-step.

The panel simply opined: "plaintiffs paid an average of $350 for independent appraisals, that as we conclude below, they never received. Instead, they received appraisals that were tainted ... Of course, financial harm is a classic and paradigmatic form of injury in fact."

The panel rejected any argument that a large number of people included in the class did not suffer any real injury at all, because their appraisals were not influenced, or did not differ from the "true value" of their homes. Quicken attempted to appeal the Fourth Circuit decision to an *en banc* panel but was denied. Quicken next petitioned SCOTUS for review.

Eight months later, on January 10, 2021, the Supreme Court issued a short and summary disposition order vacating the Fourth Circuit's March opinion and remanding the dispute back to the Fourth Circuit "for further consideration in light of" *TransUnion v. Ramirez*. We await that reconsideration.

If the Fourth Circuit does as instructed there is a significant chance that the case will be dismissed for lack of standing — at least as to any class members without proof of actual reliance on some representation or inducement concerning appraisals being free of any lender influence.

The *Ramirez* paradigm seems to require that the Fourth Circuit analyze the history of the WV Consumer Credit and Protection Act, relate the type of harm to be prevented to the common-law equivalent of a fraudulent or an unconscionable inducement to contract (including its necessary proof elements), and determine that the entire class has suffered harm of the type the statute intended to protect.

As the record stands right now, this case looks a lot like the Second Circuit's reconstituted opinion in *Maddox* — which was altered in light of supplemental briefs after *Ramirez*.

EDNY — no FDCPA standing — no privacy injury by use of third-party company to mail collection letters

These related cases in *Cicone v. Cavalry Portfolio Services* and *Pearl v. Financial Recovery Services, Inc.*[8] involved the co-called "mailing vendor" theory of FDCPA liability for the use of private facts conveyed to vendors for them to originate "dunning letters" to advise consumers of their debt obligations. The communicated facts concerned the plaintiffs' name and address, their status as a debtor, and the precise amount of the debt.

Such use of vendors supposedly violates the FDCPA prohibition on communication with anyone other than the debtor without prior consent of the consumer allegedly resulting in reputational harm. This claim theory traces back to the Eleventh Circuit ruling in *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*[9]

The analogy at common law to such a FDCPA communication is that it is similar to the tort of public disclosure of private facts because it would be highly offensive to a reasonable person. However, this rationale for concrete injury and standing was flatly rejected.

First, the essence of the harm to be protected at common law was the public disclosure of private facts and communications to a trusted vendor was/is contemplated by other provisions in the FDCPA.

Second, the factual harm in *Hunstein* is different — that case involved a medical debt in the name of the plaintiff's son as to which the son had potential liability and detailed his medical treatments. That was deemed more intensely private information than at issue in the *Cicone* and *Pearl* matters denied standing.

TCPA cases demonstrate inconsistencies

As expected, some courts have found sufficient standing in TCPA cases, while others dismissed the claims for lack of standing.[10, 11]

Destabilizing result

Even if the standing argument is ultimately successful, it probably leads to the re-filing of the case in a state court. For this very reason, the dissenting opinion in *Ramirez* dubbed the ruling "a Pyrrhic victory" — the removal path may turn out to be a long detour back to state court.

There are often significant advantages for both sides to litigating statutory actions in a federal court. Positives include, for example, greater efficiency, MDL aggregation, expediency, predictability, preservation of resources, and potentially even reduced litigation costs.

When the courts reverse field on legal conclusions and argue about confusing concepts, messiness seems inevitable.

Thus, companies facing such lawsuits may want to think twice before invoking *Ramirez* as a defense. And note that the opinion in *Ramirez* specifically left open the "distinct question whether every class member must demonstrate standing before a court certifies a class."[12] It's possible, therefore, that a federal settlement-class resolution might still pass constitutional muster.

State court standing is practically inscrutable

So, what if many of these financial services class actions have to be decided in state courts? Several large states do not allow class action procedures absent specific legislative authorization (*e.g.*, Ohio and Virginia; and in Texas class actions are severely restricted).

Over 27% of the total U.S. population resides in just three states — California, Texas and Florida. The principles governing judicial standing for litigation claims in those three states exemplifies the patchwork of precedent which the parties face.

California has no "case or controversy" requirement in its Constitution and standing is tested with reference to the substantive law controlling whether the plaintiff has a claim. Texas has two state Constitutional provisions requiring standing — a separation of powers clause and a judicial access-to-court-clause for "every person for an injury done to him."

Florida, by contrast, has no overarching doctrine regarding standing. It equates standing with access to a cause of action — often delineated by statute. Given this maze of state law rules for testing standing, the decision whether to raise the doctrine as a basis to defeat federal court jurisdiction is fraught with uncertainty over the consequences.

Clarity in opaqueness?

This search for understanding is to be continued. So-called no-injury class actions, for technical "gotcha" claims, are here to stay no matter where they are litigated. Unknowns are an inevitable part of the process. To be sure, the standing requirement is ignored at considerable peril.[13]

This unpredictable issue can rise from any direction at various points in the dispute. Indeed, plaintiffs have successfully raised the doctrine of standing to refute a defendant's attempted removal of a class action to federal court.[14]

When the courts reverse field on legal conclusions and argue about confusing concepts, messiness seems inevitable. So, here we are — and, where we may stay for quite a while.

Notes

[1] *Spokeo Inc. v. Robbins*, 136 S. Ct. 1540 (2016).

[2] *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

[3] *Lupia v Medicredit Inc.*, 8 F.4th 1184 (10th Cir. 2021).

[4] *Gadelhak v. AT&T Servs. Inc.*, 950 F. 3d 458 at 462-63 (7th Cir. 2020), *cert denied*, 141 S. Ct. 2552 (2021) (No. 20-209).

[5] *Krueger v. Experian Information Solutions Inc.*, No. 20-2060, 2021 WL 4145565 (6th Cir. 2021).

[6] *Maddox v. Bank of New York Mellon Trust Co. NA*, 19 F.4th 58 (2d Cir. 2021).

[7] *Alig v. Quicken Loans Inc.*, 990 F.3d 782 (4th Cir. 2021), *cert. granted*, 2022 WL 89247 (U.S. Jan. 10, 2022).

[8] *Ciccone v. Cavalry Portfolio Services LLC; Pearl v. Financial Recovery Services Inc.*, Nos. 21-cv-2428 and 21-cv-3764 (E.D.N.Y. Nov. 29, 2021).

[9] *Huntstein v. Preferred Collection and Management Services Inc.*, 994 F.3d 1341 (11th Cir. 2021).

[10] *Krakauer v. Dish Network LLC*, 925 F.3d 643 (4th Cir. 2019); *Melito v. Experian Marketing Solutions Inc.*, 923 F.3d 85, 88 (2d Cir. 2019); *Manuel v. NRA Group LLC*, 722 Fed. Appx. 141, (3d Cir. 2018); and *Van Patten v. Vertical Fitness Group LLC*, 847 F.3d 1037 (9th Cir. 2017) (all finding standing).

[11] *Compare Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) (finding that one unsolicited text message did not cause a concrete injury); *with Sartin v. EKF Diagnostics Inc.*, No. CV 16-1816, 2016 WL 3598297 at *3 (E.D. La. July 5, 2016) (no standing); *and Shuckett v. DialAmerica Mktg.*, No. 17-cv-2702, 2019 WL 3429184 (S.D. Cal. July 30, 2019) (no standing unless the plaintiff can show the call caused a "nuisance").

[12] *Citing Cordoba v. DirecTV LLC*, 942 F.3d. 1259, 1277 (11th Cir. 2019).

[13] *Frank v. Gaos*, 139 S.Ct. 1041 (2019) (class claims against Google for violation of the Federal Stored Communications Act class action *cy pres* settlement vacated and remanded *sua sponte* to the District Court to analyze standing before any ruling can be made on the propriety of a class settlement).

[14] *See Guerra v. Newport Beach Auto Grp. LLC*, No. 21-cv-20568, *order on motion to remand filed* (S.D. Fla. March 15, 2021).

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