# THE BRIEF

## FINANCIAL SERVICES LITIGATION QUARTERLY

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HUNTON ANDREWS KURTH

# MESSAGE FROM THE EDITOR

Over the past decade, the complexity of the legal and regulatory framework governing the delivery of financial services to consumers has increased dramatically. As a consequence, many of our clients in the industry find themselves managing through waves of litigation. As we enter a new year, we have decided to compile relevant substantive and procedural developments in the law and to share some commentary. Our first quarterly newsletter is attached. We hope you find it informative.

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# A NEW JUSTICE TAKES HER SEAT

The arrival of a new justice on the Supreme Court leads many businesses, including financial services providers, to wonder how the new justice might rule on issues of importance to them. Justice Amy Coney Barrett's recent ascent is no exception. We look below at her record in an effort to understand how her votes might influence areas of the law of most interest to the financial services industry.

Most of Justice Barrett's career prior to her Supreme Court appointment was in academia, where she focused on constitutional issues with little direct bearing on financial services companies. But in her three-year tenure on the Seventh Circuit, she wrote or signed-on to three opinions addressing issues of note to financial services providers:

## TELEPHONE CONSUMER PROTECTION ACT

Liability under the most frequently invoked section of the TCPA is predicated on whether the phone system used to place a call qualifies as an "Automatic Telephone Dialing System" (ATDS). Many financial services providers contact consumers using systems that dial phone numbers automatically from their customer lists. Most courts, relying on FCC guidance dating back to 2003, had held that such automated systems qualified as ATDSs, and therefore that companies employing them could be liable for significant damages under the TCPA, if calls to cellphones using those systems were made without first obtaining consent.

In 2018, the DC Circuit held that the FCC's guidance failed to satisfy the requirement of reasoned decision-making and vacated the FCC's interpretation of an ATDS. *ACA Int'l v. FCC*, 885 F.3d 687 (2018). *ACA* more or less erased fifteen years of TCPA jurisprudence, leaving the courts to wrangle with the text of what then-Judge Barrett described as a "thorny" statutory provision.

In *Gadelhak v. AT&T Svcs., Inc.*, 950 F.3d 458 (7th Cir. 2020), Justice Barrett wrote for a unanimous three-judge panel which held that dialers that do not use random or sequential number generators are not within the definition of an ATDS, and therefore that companies using them are not subject to TCPA liability. The ruling was seen as a victory for companies that contact customers by phone using predictive dialers. Gadelhak decided the issue consistently with the 11th and 3rd Circuits, but differently from the 9th and 2nd Circuits, and is thus part of the circuit split to be resolved by the Supreme Court this term in *Facebook Inc. v. Duguid*, No. 19-511, cert. granted, Jul. 9, 2020. *See "SCOTUS Hears Argument in Pivotal TCPA Case" on p. 7.*

The Supreme Court granted certiorari in *Duguid* seemingly to resolve the circuit split regarding the definition of ATDS—i.e., whether liability attaches to automated calls made from a list, or only to calls made using a random or sequential number generator. Justice Barrett will not need to recuse herself from consideration of *Duguid*, meaning that users of automated dialing equipment almost certainly have one justice in their corner. Assuming that she votes consistently with her opinion in *Gadelhak*, and her view is held by the majority of the Court, it would not be surprising to see Justice Barrett as the author of a majority opinion narrowing the scope of what constitutes an ATDS.

## STANDING AFTER *SPOKEO*

The Supreme Court's 2016 decision in *Spokeo, Inc. v. Robbins* addressed whether a plaintiff had Article III standing to bring suit for a statutory violation that resulted in no concrete harm. The Court held that a plaintiff must show a concrete and particularized injury to a legally protected interest, and not simply

a "bare procedural violation," to have standing to bring suit in federal court. While the opinion provided a framework to lower courts to use in evaluating standing, lower courts have differed on how to apply it, particularly as to many of the statutes to which financial services providers are subject.

Justice Barrett weighed in on the application of *Spokeo* in *Casillas v. Madison Ave. Assocs*., 926 F.3d 329 (7th Cir. 2019). The Fair Debt Collection Practices Act (FDCPA) requires debt collectors to give written notice to a debtor describing how a debtor can verify the validity of the debt being collected. The FDCPA requires that the verification requests must be made in writing to trigger the statute's protections. The debt collector in *Casillas* sent a notice to the debtor that described the debtor's verification options, but the notice failed to specify that the debtor's request must be in writing. The debtor brought a class action against the debt collector for failing to advise her that verification requests must be in writing.

Justice Barrett, in a unanimous opinion, held that the debt collector's failure to advise that verification requests must be in writing amounted to a bare procedural violation divorced from any concrete harm, so there was "no injury for a federal court to redress" and no standing under *Spokeo*. *Id*. at 330. Significantly, the Sixth Circuit had reached the opposite conclusion in a case that was factually indistinguishable, and the Second Circuit found a plaintiff to have standing in a similar case under a different statute. The circuit split triggered a Seventh Circuit rule requiring Justice Barrett's opinion to be circulated to the other active judges on the Seventh Circuit to consider whether the case should be reheard en banc. A majority of the judges denied en banc rehearing, but three of the judges took the unusual step of writing separately to dissent from the denial of en banc rehearing, because of their view of the importance of the issues presented.

Many statutes that apply to financial services providers, like the FDCPA, contain detailed provisions governing the conduct of those to which they apply. Justice Barrett's approach to *Spokeo* makes it less likely that a violation of one of those detailed provisions would be sufficient, by itself, to confer standing to sue for the violation in federal court.

The Court just granted certiorari in a case concerning injury requirements for absent class members (see "Supreme Court to Address Injury Requirements for Absent Class Members" on p. 13), so we likely will see soon whether Justice Barrett's narrower approach to standing becomes the law of the land.

## NATIONWIDE CLASS ACTIONS

In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), the Supreme Court held that state courts do not have personal jurisdiction over out-of-state defendants for mass tort claims with no connection to the forum state. Lower courts since *Bristol-Myers* have been faced with the question of whether the same analysis would apply to a putative nationwide class in federal court, which potentially would limit the ability of plaintiffs to bring nationwide class actions in a single court. Does a court have jurisdiction over a nationwide class action against an out-of-state defendant, when the claims of absent class members have no nexus to the forum?

In the first circuit court opinion on the issue, the Seventh Circuit, in an opinion by Chief Judge Wood that was joined by Justice Barrett, declined to extend the holding of *Bristol-Myers* to nationwide class actions. *Mussat v. IQVIA, Inc*., 953 F.3d 441 (7th Cir. 2020). In *Bristol-Myers*, plaintiffs were all named parties to a "mass action" (a creature of California state law), making their claims more akin to consolidated individual cases. In effect, the jurisdictional nexus for each party could be determined, and therefore a court wouldn't have jurisdiction over claims to which the court didn't have a nexus. The *Bristol-Myers* court held that a Rule 23 class, by contrast, involves claims of lead plaintiffs who "earn the right to represent the interests of absent class members" by satisfying Rule 23. *Id*. 450. Absent class members "are not full parties to the case for many purposes," and thus are not required to demonstrate either general or specific jurisdiction. Whether the claims of absent class members have a nexus to the forum therefore is irrelevant to whether a court has jurisdiction over a nationwide class action, according to the opinion.

Businesses had hoped that *Bristol-Myers* would be extended by a conservative court and applied to nationwide class actions, which would present a jurisdictional hurdle to the maintenance of such actions against corporate defendants. That view thus far though has failed to gain much traction. With Justice Barrett now on the Supreme Court, the likelihood of expanding *Bristol-Myers* to limit nationwide class actions appears to be further diminished.

Justice Barrett's opinions in *Gadelhak* and *Casillas* are consistent with views normally associated with conservative justices, i.e., careful textual analysis of statutes (rather than attempting to divine how Congress would wish a statute to be applied), and a more limited view of federal court jurisdiction. The opinion in *Mussat* seems driven in large part by reluctance to upend 50 years of class action precedent that more or less assumed that federal courts had jurisdiction over nationwide class actions, rather than a desire to maintain the current class action framework. On balance, Justice Barrett's ascent is likely to be a favorable development on legal issues important to the financial services industry.

# SCOTUS HEARS ARGUMENT IN PIVOTAL TCPA CASE

On December 8, the United States Supreme Court heard oral argument on a case expected to resolve a circuit split regarding the reach of the Telephone Consumer Protection Act (TCPA).

The TCPA prohibits, among other things, calls made without prior consent to a cell phone by use of an Automatic Telephone Dialing System (ATDS). The TCPA defines an ATDS as equipment that has the capacity "(a) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers." 47 U.S.C. § 227(a)(1). The key issue in TCPA cases is whether the Act applies to dialing systems that dial from a list of numbers, such as a customer list, or whether the Act applies only to systems that dial from a list of random or sequentially generated numbers.

On June 13, 2019, the Ninth Circuit in *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019) reaffirmed its decision in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) that an ATDS "need not be able to use a random or sequential generator to store numbers—it suffices to merely have the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" 926 F.3d at 1151. Under *this* interpretation of an ATDS, the TCPA's prohibition on calls to cell phones applies to so-called predictive dialers, which are commonly used devices that automatically dial numbers from a list of phone numbers, but do not generate and dial random or sequential numbers.

The Third, Seventh, and Eleventh Circuits disagree with the Ninth Circuit's interpretation, and read the TCPA to require an ATDS to generate and dial random and sequential numbers, so as not to apply to predictive dialers.

Divining the Court's likely ruling is always difficult based on oral argument. The Justices' questions, however, provide at least some indication of how they may approach the case. One major theme for Justices of course was how to parse the definition: should the phrase "using a random or sequential number generator" be read as modifying both "to store" and "produce telephone numbers to be called"—as Facebook argued—or just the latter—as Duguid maintained? The parties devoted considerable attention to how various grammatical and interpretive canons supported their respective interpretations, but Justice Alito's statement that the interpretation

of the statute should be based on "what makes sense," instead of strict grammatical rules, was reflected in questions from a number of the Justices.

A number of Justices noted generally that Facebook's interpretation was likely the interpretation that an English speaker would reach, but acknowledged it would be difficult to justify that definition if an ATDS could not "store" numbers using a random or sequential number generator. Justices Kagan, Breyer, and Gorsuch inquired whether the technical capacities of dialers when the TCPA was enacted was probative of whether Congress had devices that "stored" numbers with random or sequential number generators in mind in drafting the TCPA.

Most attention focused on the effect of post-1991 changes in technology on the definition of an ATDS and the application of the TCPA. Facebook argued that *Duguid's* definition meant that ordinary smartphones would be ATDSs, and so the millions of Americans who use such devices would be subject to the TCPA. Justice Breyer suggested that that "parade of horribles" did not necessarily cut against *Duguid's* definition, but might just be the result of technological change that expanded the TCPA far beyond what Congress initially imagined. He then asked Duguid's counsel whether in that case it would be appropriate for the Court to "contract" the meaning of the statute—which he seemed to assume covered all devices that can automatically dial stored numbers—to account for those changes in technology.

Justice Sotomayor seemed to take a different view, suggesting that if such unintended consequences arose from *Duguid's* definition of an ATDS, that might be evidence that the TCPA as a whole was simply outdated, in which case Congress, not the Court, should address those consequences. Justice Thomas seemed to take a similar view, saying that the "ill fit" between the TCPA and smartphones showed the TCPA to be "almost anachronistic." Justice Alito echoed Justices Sotomayor's and Thomas' concerns, and noted that the TCPA might be a "good candidate" for being declared obsolete under the doctrine of desuetude; on the other hand, he suggested that the Court might ignore the "parade of horribles" allegedly resulting when *Duguid's* interpretation is applied to smartphones.

Chief Justice Roberts and Justice Barrett raised the intriguing question of how the Court's decision would affect the FCC's ability to proffer a different interpretation of an ATDS that would be entitled to deference under *Chevron*. While neither Justice pursued that issue very far, it suggests that the Court may be concerned with the impact of its decision on the ability of the FCC to offer future guidance on the TCPA.

Throughout oral argument, perhaps the most pervasive theme was the Court's dilemma regarding laws that may have been rendered obsolete by technological advances. The TCPA was drafted in the early 1990s. Since then, technology has progressed in ways that make it difficult to apply the statute to modern practices. What can courts do in such circumstances? Does the Court have the authority to update a statute through interpretation to avoid outcomes that do not make sense in light of changed technology? Or is it up to Congress alone to address laws that no longer "fit" the technological milieu? In light of the rapid advance of technology, it is clear that the issue will arise again, perhaps quite frequently. How the Court addresses the "technological obsolescence" issue in *Duguid* could well be the most lasting aspect of the case.

# NOTEWORTHY

## CFPB REVISES REG F (FDCPA)

On October 30, 2020, the CFPB issued its Final Rule revising in part Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA) and governs the activities of debt collectors (as defined under the FDCPA). The Rule updates the Bureau's interpretation of the FDCPA, principally regarding debt collectors' uses of electronic communications—voicemail, email, text, and mobile devices—with consumers, but also regarding disclosure requirements.

The Rule states that the FDCPA's restrictions on debt collectors' communications with consumers applies to any medium, including telephone, audio recording, text, email, and social media. The Rule further clarifies that whenever a debt collector tries to initiate a communication about a debt, that qualifies as an "attempt to communicate" and so falls within the scope of the FDCPA. Thus, the Rule holds that the FDCPA applies not just to communications that reach a consumer, but also those that do not reach a consumer (e.g., unanswered telephone calls that do not result in a voicemail).

The Rule also provides debt collectors with guidance for limiting their exposure under the FDCPA when using electronic communications. For instance:

- The Rule introduces the concept of a "limited-content message," which is a voicemail message containing only very limited information prescribed in the Rule, and for which a debt collector cannot be liable under the Act.
- The Rule also clarifies the effect of mobile devices on the FDCPA's prohibition on a debt collector contacting a consumer at a place the debt collector knows is inconvenient to the consumer. Recognizing that emails, texts, and mobile phone numbers are not associated with a particular place—and so a debt collector cannot always know when it should avoid using such media—the Rule creates a safe harbor allowing the debt collector to use those media unless it knows that the consumer is in a place that is inconvenient to the consumer when the communication is initiated.
- It provides examples of procedures that satisfy the FDCPA's requirement that consumers have "reasonable and simple" methods of opting out of communications via email or text.
- It also establishes a rebuttable presumption that a debt collector has complied with the statute's prohibition on repeated telephone calls if it calls a person no more than seven times in a seven-day period or within seven days of speaking with that person on the telephone.
- The Rule also creates various safe harbors from liability for violation of the FDCPA's requirements regarding disclosures made through the mail and by email or text message.

The final rule will be effective as of November 30, 2021.

## CFPB ADVISORY OPINION POLICY

The CFPB has published a final rule, effective November 30, 2020, setting out the Bureau's procedures for advisory opinions and the effect of its advisory opinions. Under the new Advisory Opinion Policy, the Bureau may issue an advisory opinion in response to a specific request by a regulated entity, or may act on its own in response to questions it receives from the public. The Bureau will focus on clarifying significant issues, but will not opine on subjects that are part of an ongoing Bureau investigation or enforcement action. An advisory opinion will have the status of an interpretive rule under the Administrative Procedures Act, and will be applicable to the party that requested it and any "similarly situated parties."

Advisory opinions may provide entities subject to those opinions with a safe harbor against liability. Several statutes administered by the CFPB, including the Fair Debt Collection Practices Act, the Truth in Lending Act, and the Real Estate Settlement Procedures Act, contain provisions that shield acts from liability if they were performed or omitted in good-faith reliance on Bureau opinions. But other statutes administered by the Bureau, including the Fair Credit Reporting Act, Secure and Fair Enforcement for Mortgage Licensing Act, and Home Mortgage Disclosure Act, do not include such provisions, in which case good-faith reliance on Bureau interpretations may not provide a safe harbor against liability. Nevertheless, the Rule says that the Bureau "would not expect" to pursue enforcement actions against persons who "conformed their conduct in good faith to an advisory opinion" because of potential concerns under the Due Process Clause.

## ELEVENTH CIRCUIT AGREES NO FACTA CLAIM FOR RECEIPTS WITH MORE THAN FIVE DIGITS

In *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020), the Eleventh Circuit vacated a class settlement because the only injury alleged—the defendant printed more than five digits of class members' credit cards on their receipts, in violation of the Fair and Accurate Credit Transactions Act (FACTA)—was not sufficient to create Article III standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). In so holding, the Eleventh Circuit joined the Second, Third, and Ninth Circuits in holding that such a violation of FACTA cannot create federal jurisdiction.

Muransky was filed while *Spokeo* was pending before the Supreme Court. The parties knew that a decision in *Spokeo* would likely affect their negotiating positions, and so both desired to settle before *Spokeo* was decided. *Spokeo* was decided just prior to the fairness hearing, where an objector argued that the district court had to determine if the plaintiff had standing under *Spokeo*. The district court granted final approval without addressing *Spokeo* or the plaintiff's standing.

The objector appealed. After a panel initially affirmed final approval, the full Eleventh Circuit vacated the panel's decision and held (voting 7-3) that the settling parties could not "bargain around *Spokeo*," and that "[b]ecause the plaintiff alleged only a statutory violation, and not a concrete injury, he has no standing." In holding that the bare FACTA violation alleged by the plaintiff did not satisfy *Spokeo*, the court referred to the Credit and Debit Card Receipt Clarification Act, which was enacted to eliminate liability under FACTA in some circumstances, as evidence that Congress did not regard every FACTA violation as creating a risk of harm. It then held that while an increased risk of a concrete injury may, under *Spokeo*, itself be sufficient to create standing, such a risk must be "substantial" or "significant," and that a bare statutory violation does not, by itself, imply such a substantial risk to the plaintiff.

The three dissenters rejected the majority's view that at the pleading stage the plaintiff needed to allege specific facts as to how the violation substantially increased his risk of identity theft. They cited *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059 (D.C. Cir. 2019), in which the DC Circuit reversed the dismissal of a FACTA truncation claim and held that standing required only that the plaintiff allege a violation and allege generally that the violation increased her risk of identity theft. But the DC Circuit is the only Court of Appeals to have held that a FACTA violation is a concrete injury, and did so under very different circumstances in which all the digits of the plaintiff's credit card were printed on the receipt, and so clearly created an increased risk of identity theft.

## NINTH AND SEVENTH CIRCUITS HOLD THAT CONSUMER "CONFUSION" IS NOT AN INJURY IN FACT

In *Adams v. Skagit Bonded Collectors, LLC*, 2020 WL 7055395 (9th Cir. Dec. 2, 2020), the Ninth Circuit held that a debtor who brought a Fair Debt Collection Practices Act claim based on the debt collector's failure to identify clearly his current creditor in a collection letter had not suffered a concrete injury sufficient to confer Article III standing. The plaintiff in this case claimed to have been injured by a violation of Section

1692e of the Act, which prohibits false or misleading representations, because "upon reading the letter, [he] was unsure of who the current creditor was." The Ninth Circuit, which raised the jurisdictional question *sua sponte*, held that such a "bare allegation of confusion" "d[id] not constitute an actual harm to [plaintiff]'s concrete interests" and did not suggest a material risk of harm to his interests. The Court vacated the judgment on the pleadings and remanded the case to be dismissed without prejudice for lack of jurisdiction.

In a similar case two weeks later, the Seventh Circuit in *Brunett v. Convergent Outsourcing, Inc.*, 2020 WL 7350277 (7th Cir. Dec. 15, 2020), remanded an FDCPA claim with instructions that the district court dismiss it for lack of subject-matter jurisdiction. The plaintiff there received a dunning letter, but admitted that she did not pay anything or suffer any negative effect on her credit report because of the letter. Instead, she claims she was confused by the letter, in which the debt collector offered to forgive a portion of her debt, but stated that if more than $600 was forgiven, it would be required to inform the IRS about the release of indebtedness because that is taxable income. The court held that the consumer's confusion itself was not a concrete injury. The plaintiff therefore lacked standing, and the district court lacked subject-matter jurisdiction. The court further held that the plaintiff's allegation that the letter was "intimidating" was similarly insufficient to create subject-matter jurisdiction. See also *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, 2020 WL 7350278, at *2 (7th Cir. Dec. 15, 2020) (allegation that dunning letter "annoyed or intimidated" debtor does not allege a concrete injury sufficient to create subject-matter jurisdiction).

## ELEVENTH CIRCUIT RESOLVES INTRA-CIRCUIT SPLIT CONCERNING FCRA ACCURACY STANDARD

In *Erickson v. First Advantage Background Servs. Corp.*, 2020 WL 7086059 (11th Cir. Dec. 4, 2020), the Eleventh Circuit construed the Fair Credit Reporting Act's "maximum possible accuracy" standard to require that a consumer report be both "technically accurate" (i.e., not false) and "not misleading." *Erickson* thus resolves a division among district courts in the Eleventh Circuit between those holding that FCRA is satisfied as long as the report is merely technically accurate and those requiring that the report also not be misleading.

Erickson agreed to a background check for sex offenders performed by First Advantage as part of his application to coach Little League baseball. The notice First Advantage sent to Little League baseball stated that Erickson's name matched an entry in the sex-offender database and that "further review of the State Sex Offender Website is required in order to determine if this is your subject." It turned out that the individual in the database was not Erickson, who then sued First Advantage for violating FCRA by failing to follow reasonable procedures to assure maximum possible accuracy. First Advantage was granted judgment as a matter of law after a jury trial.

On appeal, the Eleventh Circuit held that because FCRA requires "maximum possible accuracy," the statute requires not just that reports be factually true, but that they also be unlikely to lead to a misunderstanding. *Id*. at *4. The court further held that in order to balance the interests of consumers and potential creditors, the relevant sense of misunderstanding must be applied objectively and from the perspective of a reasonable user of the report. *Id*. The court then held that First Advantage's report satisfied FCRA's requirement of "maximum possible accuracy" because the report was true—Erickson's name was in fact on the list of sex offenders—and not objectively misleading, since the caveats included in the report ensured that a reasonable user of the report would not take adverse action against Erickson. It therefore affirmed the dismissal of Erickson's claim.

## EIGHTH CIRCUIT: DEBT BUYERS ARE DEBT COLLECTORS

In *Reygadas v. DNF Assocs., LLC*, 2020 WL 7329111 (8th Cir. Dec. 14, 2020), the Court held that a person is a debt collector for purposes of the FDCPA as long as the principal purpose of that person's business involves the collection of debts, even if it does not involve direct interaction with consumers.

The defendant, DNF bought the plaintiff's defaulted debt and retained a third party to collect it. When the debt collector sent the plaintiff, rather than her attorney, a letter offering to settle, she sued DNF for violation of the FDCPA. DNF argued that it was not a "debt collector," which the statute defines as (1) "any person… in any business the principal purpose of which is the collection of any debts" or (2) "any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Regarding prong (1), DNF argued that as a "passive" debt buyer that did not itself attempt to collect the debts it purchased, its "principal purpose" was debt *purchasing*, not debt *collection*.

The district court rejected DNF's claim regarding prong (1), holding that the plain text of the definition meant that a business is a "debt collector" if its "primary objective is to ensure that debts it is owed are collected," no matter who collects them. The Eighth Circuit affirmed that decision, rejecting DNF's argument that "collection" in the statute requires an interaction with debtors, and held instead that it refers to any "act whose purpose is collection." The "foreseeable and logical consequence" of DNF's purchasing a debt and hiring an agency to collect that debt is collection, and so DNF satisfied the statutory definition of "debt collector."

Following the US Supreme Court's decision in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017)—which rejected the argument that buyers of defaulted debt were automatically debt collectors, and so narrowed the definition of "debt collector" under the FDCPA—debt buyers may have seen a possible exemption from the statute's requirements. With its decision in *Reygadas*, however, the Eighth Circuit joins the Third and Ninth Circuits in closing the exemption suggested by *Henson*, holding that the statute is still applicable to debt buyers, not because they purchase defaulted debt, but because the "principal purpose" of their business is debt collection.

## SUPREME COURT TO ADDRESS STANDING FOR ABSENT CLASS MEMBERS

Since 2016, federal courts have often been asked to apply the principles laid out in the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), to determine when statutory violations are sufficient to create Article III standing issues and have often come to different conclusions. The Supreme Court now has the chance to clarify those principles, having agreed on December 16, 2020, to hear TransUnion's appeal of the Ninth Circuit's February 27, 2020 decision in *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), in which the Ninth Circuit held that absent class members had Article III standing to recover money damages for Fair Credit Reporting Act (FCRA) violations that increased their risk of injury but did not cause any actual concrete injury to them.

In Ramirez, a jury found that TransUnion was liable for FCRA violations by incorrectly placing alerts in class members' credit reports saying their names matched names of persons on the Office of Foreign Assets Control's (OFAC) list of terrorists and drug traffickers and sending class members letters saying they were "potential matches" to OFAC's list.

On appeal, TransUnion argued that only the class representative, Mr. Ramirez, had shown he suffered an injury sufficient to create Article III standing. It noted that three-quarters of the class never had a credit report containing the false OFAC alert sent to a third party and that only Mr. Ramirez submitted evidence of actual harm resulting from the false alert.

The Ninth Circuit agreed that every class member had to have Article III standing to recover monetary damages. However, it held that even those class members whose reports had not been shared with third parties suffered a "material risk of harm" to interests protected by FCRA because TransUnion failed to follow reasonable procedures to assure maximum possible accuracy of their reports, and so under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), suffered injuries sufficient for Article III standing. Moreover, it held that the letters class members received from TransUnion notifying them that they were "considered a potential match" to OFAC's list were "inherently shocking and confusing," and so caused a concrete injury.

The Supreme Court granted certiorari on the question of "[w]hether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." In its petition, TransUnion argued that whatever risk was raised was too attenuated to satisfy the Supreme Court's requirement in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), that an injury that is merely "threatened," but not actual, "must be certainly impending to constitute injury in fact." It also argued that any "shock" and "confusion" caused by the letters from TransUnion could not confer standing because that "shock" and "confusion" would not have been caused by the complained-of FCRA violation (i.e., the inaccurate OFAC alert), and so would not satisfy the requirement that an injury be "fairly traceable" to the alleged wrong.

TransUnion also noted that the Ninth Circuit's holding that inaccurate credit reports confer Article III standing, even if they are not disclosed to third parties, contradicts decisions by the DC, Seventh, and Eighth Circuits, and that the Fourth, Fifth, Sixth, and Seventh Circuits have held that the mere receipt of a deficient credit report cannot confer Article III standing.

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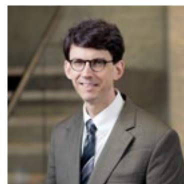

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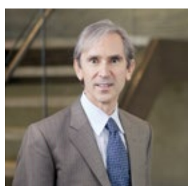

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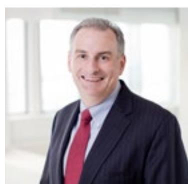

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