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TransUnion's Standing Analysis and Class Certification: Practical Defense Strategies for Attacking Standing Early

THURSDAY, FEBRUARY 2, 2023

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Geoffrey M. Wyatt, Partner, **Skadden, Arps, Slate, Meagher & Flom LLP**, Washington, D.C.

Jordan M. Schwartz, Counsel, **Skadden, Arps, Slate, Meagher & Flom LLP**, Washington, D.C.

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Contents

1 *TransUnion LLC v. Ramirez*

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)

Key Facts

- Alert tying credit report files of 8,185 individuals to terrorist watch list.
- Alleged violations of Fair Credit Reporting Act:
  - 1) failure to follow reasonable procedures regarding accuracy;
  - 2) omission of the "potential match" alert from the consumer-accessible version of the credit report; and
  - 3) omission of summary of rights to consumers with each written disclosure
- Only ***1,853 of the 8,185 potential class members*** had reports sent to third parties.

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)

Procedural History

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- Class of 8,185 individuals with a "potential match" alert certified.
- The district court also ruled that all 8,185 individuals had Article III standing.
- Plaintiff verdict: $60 million to class members, including those whose reports were not sent to third parties.
- The Ninth Circuit affirmed in part, holding that:
- (1) each class member must have standing at "***final judgment stage***";
  - *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020) (emphasis added).
- (2) all 8,185 members satisfied the Article III standing requirements to recover on all three claims.

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)

Holding – "No concrete harm, no standing."

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- The Supreme Court reversed: more than 6,300 class members lacked standing.
- Agreed with Ninth Circuit on the need to have standing at ***final judgment stage*** (i.e., "[e]very class member must have Article III standing in order to recover individual damages"). *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).
- Court declined to "address the distinct question whether every class member must demonstrate standing ***before*** a court certifies a class." *Id.* at 2208 n.4 (emphasis added).
- Suggestion that showing for standing varies according to stage of the case.
  - Standing must be demonstrated "with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)

Holding – "No concrete harm, no standing."

- Reasonable procedures claim: mere existence of a misleading OFAC alert in a credit report does not constitutes a concrete injury.
  - "[I]f inaccurate information falls into a consumer's credit file, does it make a sound?" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2209 (2021).
  - Majority likened unsent misleading alerts to "someone wr[iting] a defamatory letter and then stor[ing] it in her desk drawer." *Id.* at 2210.
- Summary-of-rights claim: non-receipt of summary of rights was not a concrete injury.
  - Court concluded that without evidence of injury, the claims were nothing more than "bare procedural violation[s], divorced from any concrete harm." *Id.* at 2213.
- Risk of future harm: alleged risk of future harm was speculative.

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)

Dissenting Opinions

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- Justice Thomas: injuries based on a statutorily created private right are enough to create a case or controversy under Article III, regardless of whether plaintiff could show loss.
- Majority failed to define the "degree of risk" that is "sufficient to meet the concreteness requirement," and "all but eliminat[ed] the risk-of-harm analysis." *Id.* at 2222.
  - 25% of the class had false reports sent to creditors.
- Justice Thomas also noted that this may only be a "pyrrhic victory for TransUnion." *Id.* at 2224 n.9 (J. Thomas, dissenting).
- Justice Kagan, dissenting: "[W]hy is it so speculative that a company in the business of selling credit reports to third parties will in fact sell a credit report to a third party?" *Id.* at 2225.

2 The Import of *TransUnion*

The Import of *TransUnion*

- Did *TransUnion* break new ground/is it a watershed moment in class certification jurisprudence?
- Supreme Court explicitly declined to address applicability of its holding to class certification:
  - "We do not here address the distinct question whether every class member must demonstrate standing before a court certifies a class." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 n.4 (2021).
- Early returns are that *TransUnion* is ***not*** a watershed opinion.
- However, some courts have disagreed.
- These decisions provide support for challenging class certification.

Setting the Stage
The Law Before *TransUnion*

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- Pre-*TransUnion*, differing approaches:
  - **First, Third & Seventh Circuits** – Absent class member standing not a prerequisite to certification.
  - **Fifth Circuit** – Only look at absent class member standing if Rule 23 requirements satisfied.
  - **Ninth Circuit** – Absent class member standing not required for certification but required to recover damages.
  - **Eleventh Circuit** – Issues related to Article III injury-in-fact are relevant to whether Rule 23 requirements are met.
  - **Second & Eighth Circuit** – Absent class member standing a prerequisite to certification.

Setting the Stage
No Absent Class Member Showing of Standing

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- *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009)
  - Investors brought class action against investment firms. N.D. Ill. court certified class.
  - Seventh Circuit affirmed, rejecting defendants' standing arguments:
    - "PIMCO argues that before certifying a class the district judge was required to determine which class members had suffered damages. But putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede the certification. It is true that injury is a prerequisite to standing. But as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Id.* at 676.
    - "What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification." *Id.* at 677.

Setting the Stage
Article III Not Relevant if Class Fails Rule 23

- *Flecha v. Medicredit*, 946 F.3d 762 (5th Cir. 2020)
  - Debtor brought class action under Fair Debt Collection Practices Act against debt collector and bondholder. W.D. Tex. court certified class.
  - Fifth Circuit concluded that Rule 23 was not satisfied and thus there was no reason to reach Article III arguments:
    - "There are undoubtedly many unnamed class members here who lack the requisite injury to establish Article III standing . . . That said, we do not reach the issue. That is because the Supreme Court has repeatedly instructed that we should first decide whether a proposed class satisfies Rule 23, before deciding whether it satisfies Article III." *Id.* at 768.

Setting the Stage
No Absent Class Members Without Standing

- *Avritt v. Reliastar Life Ins.*, 615 F.3d 1023 (8th Cir. 2010)
  - Purchasers of deferred annuities brought class action against seller alleging breach of contract and consumer fraud. D. Minn. court denied class cert.
  - Eighth Circuit affirmed, noting that the constitutional requirement of standing does not allow a named plaintiff to represent people who lack the ability to bring a suit themselves:
    - "Although federal courts 'do not require that each member of a class submit evidence of personal standing,' a class cannot be certified if it contains members who lack standing." *Id.* at 1033 (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006)).

Setting the Stage
Article III Standing Relevant to Rule 23

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- *Cordoba v. DirecTV*, 942 F.3d 1259 (11th Cir. 2019)
  - Consumer brought class action raising TCPA claims. N. D. Ga. court certified class.
  - Eleventh Circuit reversed. The court acknowledged that only class representatives need to establish Article III standing at the class certification stage but explained that all class members must have standing to recover.
  - Eleventh Circuit thus reasoned that district courts should consider Article III standing as part of the Rule 23 analysis:
    - "If many or most of the putative class members could not show that they suffered an injury fairly traceable to the defendant's misconduct, then they would not be able to recover, and that is assuredly a relevant factor that a district court must consider when deciding whether and how to certify a class." *Id.* at 1273.
- Court in *TransUnion* specifically cited the Eleventh Circuit's analysis in declining to answer the question of how standing applies at class certification. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 n.4 (2021).

Courts Holding That *TransUnion* Does Not Affect Class Certification

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- Most courts have found that *TransUnion* does not affect the class certification analysis, defaulting to circuit precedent:
  - *Butela v. Midland Credit Mgmt. Inc.*, 341 F.R.D. 581 (W.D. Pa. 2022)
    - Court rejected argument that plaintiff's failure to show Article III standing for each class member doomed the class.
    - "*TransUnion* did not abrogate the Court of Appeals for the Third Circuit's prior decisions in *Neale* and *Mielo*." *Id.* at 588.
  - *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig*., 341 F.R.D. 128 (D. Md. 2022)
    - Court rejected argument that inclusion of absent class members without standing makes certification improper.
    - Cited *TransUnion* footnote 4 and held that Fourth Circuit precedent declining to create this requirement still governed this question.
- These decisions represent the current prevailing view of *TransUnion*'s applicability at the class certification stage.

Courts Holding That *TransUnion* Does Not Affect Class Certification

- Some courts have found that *TransUnion* did not change the game without defaulting to circuit precedent:
  - *Stemmelin v. Matterport, Inc.*, No. C 20-04168 WHA, 2022 WL 783206 (N.D. Cal. Mar. 14, 2022)
    - Proposed class of individuals enrolled in defendants' free 3D camera partner program.
    - Plaintiff alleged that he relied on program's deceptive advertising before deciding to purchase his 3D camera.
      - Class members who did not rely on program advertising could not have been induced by advertising to purchase camera.
    - Court rejected defendants' argument that *TransUnion* required plaintiff to demonstrate standing for all class members:
      - "Here, we are at the class certification stage, and not addressing the merits in post-trial motions like *TransUnion*. Class certification ensures that the named plaintiff is an adequate representative for the absent class. So, at this point, only the named plaintiff must demonstrate standing through evidentiary proof." *Id.* at *3.

Narrowing Classes Under *TransUnion*

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- *TransUnion* has supported arguments against overly broad classes:
  - *Shields v. State Farm Mut. Auto. Ins. Co.*, No. 6:19-CV-01359, 2022 WL 37347 (W.D. La. Jan. 3, 2022)
    - Alleged undervaluation of vehicles.
    - Defendant relied on *TransUnion* to challenge class certification.
    - Although *TransUnion* "was decided after a trial on the merits," court agreed with defendant. *Id.* at *6.
      - Supreme Court was "clear in its pronouncements on standing." *Id.*
    - But result was modification of class definition, not denial of class certification.
  - *Iannone v. AutoZone, Inc.,* No. 19-CV-2779-MSN-TMP, 2022 WL 5432740 (W.D. Tenn. Aug. 12, 2022)
    - Alleged failure to properly monitor plaintiffs' retirement investments.
    - Some class members "undisputedly did not suffer any harm from defendants' alleged conduct." *Id.* at *10.
    - Court limited the class to exclude those who could not have been injured:
      - "[B]ecause 'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not,' each class member must have standing." *Id.*

TransUnion Strengthens Predominance Arguments

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- *TransUnion* and predominance:
  - *Weiner v. Ocwen Fin. Corp.,* 342 F.R.D. 136 (E.D. Cal. 2022)
    - Motion to decertify class of borrowers allegedly assessed default-related service fees improperly.
      - Court had previously noted a "factual dispute . . . about whether numerous class members ever paid any of the fees at issue . . . and therefore whether they suffered concrete harm." *Id.* at 140.
    - Defendant filed motion to decertify class, relying on *TransUnion*.
    - Defendant argued that plaintiff must provide evidence that each borrower paid the fee and suffered harm.
    - Court agreed and decertified class:
      - "Pursuant to *TransUnion*, every class member must have suffered this monetary harm in order to establish Article III standing to proceed before this Court. Because Plaintiff cannot definitively establish at this juncture that each class member . . . has suffered this concrete harm, the Court finds 'that the questions of law and fact common to class members' does not 'predominate over any questions affecting only individual members' under Rule 23(b)(3)." *Id.* at 143.

TransUnion Strengthens Predominance Arguments

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- *TransUnion* and predominance:
  - *Nguyen v. Raymond James & Assocs., Inc*., No. 8:20-CV-195-CEH-AAS, 2022 WL 4553068 (M.D. Fla. Aug. 12, 2022)
    - Allegations that broker-dealer breached its fiduciary duty to class members.
    - Court noted that Eleventh Circuit had, after *TransUnion*, "emphasized its prior instruction to district courts to consider whether the individualized issue of standing will predominate over the common issues in the case before certifying a class." *Id.* at *6.
    - Class certification denied, in part because plaintiff failed to prove predominance with respect to standing:
      - "Plaintiff has not established that all class members have suffered an injury in fact such that they have standing, or whether the individual issue of standing would predominate over the common issues in the case." *Id.* at *13.

Impact of *TransUnion* on Settlements

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- Concern that *TransUnion* may help keep plaintiffs out of federal court, making large-scale settlements more difficult and less beneficial.
  - Is there less "peace" to be bought?
- Does the same requirement that every class member have an injury apply at the settlement stage?
  - *Compare Drazen v. Pinto*, 41 F.4th 1354 (11th Cir. 2022) (decertifying a TCPA settlement class because it included members who could never have had Article III standing), *with*
  - *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 782 (9th Cir. 2022) (fact that "[a]t the time the parties settled, prior to class certification or summary judgment, plaintiffs alleged that all putative class members experienced throttling from Apple's allegedly unlawful intrusion into their phones . . . sufficed to establish standing").

Applying *TransUnion* at Class Certification
The Arguments For and Against

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- Why not apply it? Arguments made by plaintiffs:
  - Supreme Court declined to require it:
    - "A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." *TransUnion LLC v. Ramirez*, 210 L. Ed. 2d 568, 141 S. Ct. 2190, 2208 (2021).
  - Asking too much of plaintiffs early on.
  - Courts could improperly intrude into merits issues.
- Why apply it? Arguments made by defendants:
  - Proving standing is part of a plaintiff's burden to show classwide adjudication is possible.
    - Putting off inquiry is akin to conditional certification.
  - Punting guarantees it will never be analyzed.
    - Class trials are almost unheard of.
  - Overlap with merits is no reason to avoid after *Wal-Mart Stores v. Dukes.*

Defense – Practice Considerations

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- Effective framing/packaging standing and *TransUnion*
- Overbreadth
  - Can help narrow class, even if class is certified.
- Predominance/individualized issues
- Be aware of *TransUnion*'s implication for class settlements.

3 The Disputed Implications of *TransUnion*

TransUnion LLC v. Ramirez

Disputed Implications

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- Two other key issues were left open by *TransUnion*:
  - First, how many potentially uninjured class members can be present before a court must reject certification?
  - Second, how should courts evaluate conflicting evidence of standing at the class certification stage?
- Both issues were fully on display in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022).

Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC

The District Court and Ninth Circuit Panel's Decisions

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- Three classes of tuna purchasers alleging that tuna suppliers had violated antitrust laws by price-fixing.
- Competing expert testimony on class-wide antitrust impact.
- A Ninth Circuit panel vacated the decision.
  - The district court should have resolved the expert dispute:
    - "Despite admirably and thoroughly marshaling the evidence in this difficult case, the district court needed to go further by resolving the parties' dispute over whether the representative evidence swept in only 5.5% or as much as 28% uninjured DPP Class members. The district court also needed to make a similar determination for the other putative classes. Deciding this preliminary question is necessary to determine whether Plaintiffs have established predominance." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 794 (9th Cir.)
- Ninth Circuit granted rehearing en banc and disagreed with the panel decision, affirming certification of the classes.
  - *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc).

Potentially Uninjured Class Members at Class Certification

The Discussion in *Olean*

- The first issue: presence of uninjured class members in a certified class.
- *Olean* Majority:
  - Class can include more than a "*de minimis*" number of uninjured class members.
  - Treatment of *TransUnion* limited to a footnote:
    - "Because the Supreme Court has clarified that '[e]very class member must have Article III standing in order to recover individual damages,' *TransUnion LLC v. Ramirez*, —— U.S. ——, 141 S. Ct. 2190, 2208, 210 L.Ed.2d 568 (2021), Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions, *see Cordoba*, 942 F.3d at 1277." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668 n.12 (9th Cir.).
  - All that is required is ensuring individualized standing questions do not predominate under Rule 23(b)(3).

Potentially Uninjured Class Members at Class Certification

The Discussion in *Olean*

- Vigorous dissenting opinion:
  - Dissent embraced *de minimis* rule:
    - "To be sure, a plaintiff need not show that every single putative class member has suffered an injury. But the number of uninjured class members should be *de minimis* – based on Rule 23's language, common sense, and precedent from other circuits." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 691 (9th Cir.) (J. Lee, dissenting).
  - *De minimis* rule supported by Rule 23:
    - "[T]he words 'common' and 'predominate' in Rule 23(b)(3) suggest that the class should include only (or mostly only) people who have suffered an injury. If one-third – or half or two-thirds – of the class members suffered no injury, it follows that 'common' issues would not 'predominate,' as required under the text of Rule 23, because those uninjured class members have little in common with those who have been harmed." *Id.* at 692.
  - Other circuits embrace the *de minimis* rule.

Potentially Uninjured Class Members at Class Certification

The *De Minimis* Rule

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- The *Olean* dissent relied on D.C. and First Circuit authority in support of a *de minimis* rule:
  - *In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d 619 (D.C. Cir. 2019)
    - Class of 16,000 shippers allegedly harmed by price-fixing conspiracy.
    - Court affirmed denial of class certification because more than 12.7% of class members were uninjured under plaintiffs' damages model.
    - "[T]he 'few reported decisions' involving uninjured class members 'suggest that 5% to 6% constitutes the outer limits of a de minimis number.'" *Id.* at 625.
  - *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018)
    - Class of drug purchasers alleging violations of consumer protection and antitrust laws. Approximately 10% of class had suffered no injury.
    - First Circuit reversed decision certifying class:
      - "[T]his is not a case in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial." *Id.* at 53.

Potentially Uninjured Class Members at Class Certification

The Discussion in *Olean*

- Dissent: Separating out uninjured class members at the back end is not a solution.
  - Certification of no-injury class action "will allow plaintiffs to weaponize Rule 23 to impose an in terrorem effect on defendants." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 691 (9th Cir.) (J. Lee, dissenting).
  - Any rule besides *de minimis* rule would "tilt[] the playing field in favor of plaintiffs" and allow them to extract higher settlements, even if the merits of their claims are questionable. *Id.* at 692
  - Class trials are the exception:
    - "The opportunity at trial to jettison uninjured members from the certified class is a phantom solution because defendants will have little choice but to settle before then." *Id.* at 691.

Potentially Uninjured Class Members at Class Certification

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- District courts have split along the spectrum.
- No standing inquiry at all:
  - *Stemmelin v. Matterport, Inc.,* No. C 20-04168 WHA, 2022 WL 783206, at *3 (N.D. Cal. Mar. 14, 2022) (noting that *TransUnion* does not change the requirement that "only the named plaintiff must demonstrate standing through evidentiary proof" at the class certification stage).
- No uninjured class members at all:
  - *Iannone v. AutoZone, Inc.*, No. 19-CV-2779-MSN-TMP, 2022 WL 5432740, at *10 (W.D. Tenn. Aug. 12, 2022) ("Because Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not, each class member must have standing.")

Potentially Uninjured Class Members at Class Certification

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- Some courts have agreed with the *Olean* majority regarding the amount of uninjured class members:
  - *Utne v. Home Depot U.S.A., Inc.*, No. 16-CV-01854-RS, 2022 WL 1443338 (N.D. Cal. May 6, 2022)
    - Decertification motion in light of *TransUnion.*
    - Agreed with *Olean* that even "more than a *de minimis* number" of uninjured class members does not defeat certification. *Id.* at *8.
  - *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-MD-2785-DDC-TJJ, 2021 WL 5918912 (D. Kan. Dec. 15, 2021)
    - Another decertification motion following *TransUnion*.
    - Plaintiffs' expert (if believed) could prove to a jury that the whole class suffered concrete harm, which was sufficient:
      - "*TransUnion* deals with the standing requirement in the context of a class member's ability to recover damages. *TransUnion* never holds or even implies that class certification requires every class member to demonstrate standing. To the contrary, the Supreme Court said explicitly that it wasn't addressing that question." *Id*. at *9.
    - To the extent class members are uninjured, court would "require a specific jury finding addressing" that argument. *Id.* at *6.

Potentially Uninjured Class Members at Class Certification

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- Some courts do not permit a "large" or "great" number of uninjured persons in a class, but have not elaborated on what that means:
  - *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 341 F.R.D. 128 (D. Md. 2022)
    - Data breach involving 100 million hotel guests.
    - Some class members were reimbursed by someone else for their hotel stay.
    - Court rejected defendants' argument that ***all*** class members must have standing.
    - But predominance does ***not*** permit "a large number of uninjured persons." *Id.* at 141.
    - Although it was a "near certainty" that proposed class included many uninjured class members, court addressed the problem by modifying class. *Id.* at 142.

Potentially Uninjured Class Members at Class Certification

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- *Cox v. Spirit Airlines, Inc.*, 341 F.R.D. 349 (E.D.N.Y. 2022)
  - First-time Spirit flyers allegedly improperly charged for carry-on bags.
  - Defendant: certain members of the class may have had actual notice of Spirit's practices and, therefore, were uninjured.
  - Court: when there are not "a great many persons" who suffered no injury – which there likely were not in this case – a class can still be certified. *Id.* at 369.
  - But what does "a great many persons" mean?
    - Court offered no guiding principles.

Potentially Uninjured Class Members at Class Certification

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- Courts requiring all class members to have an injury:
  - *Thornburg v. Ford Motor Co*., No. 4:19-CV-01025-NKL, 2022 WL 4348475 (W.D. Mo. Sept. 19, 2022)
    - "Although the Eighth Circuit does not require evidence that every member of a class has standing, nonetheless it has held that a class may not be certified if it is known to contain members who lack standing."
  - *Iannone v. AutoZone, Inc.*, No. 19-CV-2779-MSN-TMP, 2022 WL 5432740 (W.D. Tenn. Aug. 12, 2022)
    - Court limited the class to exclude those who invested exclusively in the Vanguard funds, quoting a case which relied on *TransUnion* in finding that "[b]ecause 'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not,' each class member must have standing."
  - *Weiner v. Ocwen Fin. Corp.*, 342 F.R.D. 136 (E.D. Cal. 2022)
    - "Pursuant to *TransUnion*, every class member must have suffered this monetary harm in order to establish Article III standing to proceed before this Court. Because Plaintiff cannot definitively establish at this juncture that each class member . . . has suffered this concrete harm, the Court finds 'that the questions of law and fact common to class members' does not 'predominate over any questions affecting only individual members' under Rule 23(b)(3)."

Potentially Uninjured Class Members at Class Certification

Why the Dispute?

- Does the raw number or percentage of uninjured class members really matter?
  - *Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 9497214 (N.D. Tex. Oct. 14, 2022)
    - Split between circuits as to who needs to establish standing at certification:
      - "Some courts have held only the named plaintiff needs to establish standing to seek relief on behalf of the class. Other courts have held Rule 23(b)(3)'s predominance requirement demands a class cannot contain any uninjured class members." *Id.* at *8.
    - Court concluded that decisions were using "different terminology to address what is essentially a '***predominance***' issue." *Id.* at *9.
      - "The correct answer has little to do with how many uninjured class members there are; it has everything to do with how hard it is to identify them." *Id.*

Weighing Evidence of Standing After *TransUnion*

The Discussion in *Olean*

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- What level of scrutiny do courts apply to standing at class certification?
- *Olean* majority rejected the idea of judges weighing competing expert evidence on standing at class certification.
- Battle of the experts on "common impact" – a statutory requirement for antitrust claims.
  - Defendants' expert: 28% of the class members suffered no antitrust impact or injury.
  - Plaintiffs' expert: only 5.5% of the class members may not have suffered an injury.

Weighing Evidence of Standing After *TransUnion*

The Discussion in *Olean*

- *Olean* Majority:
  - Defendants were really challenging the reliability (i.e., admissibility) of the evidence.
  - Refusal to weigh the competing evidence "did not improperly shift the burden" of satisfying Rule 23. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 681 (9th Cir. 2022).
  - Judge's role is relatively modest and limited at the class certification stage.

Weighing Evidence of Standing After *TransUnion*

The Discussion in *Olean*

- *Olean* Dissent:
  - Majority's hands-off approach = abdication of judicial role.
    - » "Punting this key question until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 686 (9th Cir. 2022) (J. Lee, dissenting).
  - Majority conflated "rigorous" review required by Rule 23 and Rule 702/*Daubert* for admissibility of evidence*:*
    - » "The district court ultimately held that resolving this 'battle of the experts' was a merits issue. But the dispute over the number of uninjured class members overlaps with Rule 23(b)(3)'s predominance requirement as well as Rule 23(a)'s lower threshold commonality requirement. Simply put, a plaintiff cannot prove that common issues predominate if one out of three putative class members suffered no harm." *Id.* at 688.
- Courts have dealt with similar issues in analogous or similar contexts with split results.

Weighing Evidence of Standing After *TransUnion*

Skadden

- Following *Olean*'s approach to weighing evidence:
  - *Utne v. Home Depot U.S.A., Inc.*, No. 16-CV-01854-RS, 2022 WL 1443338 (N.D. Cal. May 6, 2022)
    - Plaintiff's expert's survey suggested "a small percentage of the class never" suffered injury. *Id.* at *8.
    - Court assumed that evidence – which passed *Daubert* – was sufficient to satisfy predominance.
  - *Millwood v. State Farm Life Ins. Co.*, No. 7:19-CV-01445-DCC, 2022 WL 4396199 (D.S.C. Sept. 23, 2022)
    - Class of life insurance purchasers who were allegedly charged inappropriate rates.
    - Plaintiffs' damages expert used an averaging technique.
      - State Farm contended that "averaging" was impermissible as it would "obscure[] a large number of uninjured class members who do not have standing." *Id.* at *5 n.3.
    - Court rejected that argument.
      - Even if defendant were correct, uninjured class members could "be identified and excluded from any damages award" later. *Id.*

Weighing Evidence of Standing After *TransUnion*

Skadden

- Some courts have also rejected similar standing arguments as going to the merits of liability issues rather than presenting a true question of standing:
  - *Nat'l ATM Council, Inc. v. Visa Inc.*, No. CV 11-1803 (RJL), 2021 WL 4099451 (D.D.C. Aug. 4, 2021)
    - Classes of ATM users and operators seeking certification in antitrust case.
    - Defendants argued there was insufficient common evidence of injuries.
    - Court concluded, after reviewing expert reports, plaintiffs had satisfied Rule 23(b)(3):
      - "Plaintiffs, at this stage in the proceedings, need only demonstrate a colorable method by which they intend to prove class-wide impact . . . . [T]he fact that plaintiffs can point to significant scholarship and precedent in support of their claims is sufficient at this stage – this is not an adjudication of the merits." *Id.* at *6.
    - Currently on appeal.

Weighing Evidence of Standing After *TransUnion*

Skadden

- Some courts have followed *Olean* dissent's rationale:
  - *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 14-02567-MD-W-GAF, 2021 WL 5632089 (W.D. Mo. Nov. 9, 2021)
    - Alleged price-fixing conspiracy among two propane tank sellers.
    - Plaintiffs' expert provided an analysis of a common impact across all potential class members.
    - Judge carefully weighed the evidence.
      - "Plaintiffs insist that the Court need not weigh Professor Ackerberg's economic evidence. That is incorrect. The law requires the Court to rigorously scrutinize Plaintiffs' proffered evidence in support of class certification, and to resolve contested issues and economic evidence to make findings as to whether Plaintiffs have met their burden of demonstrating Rule 23's requirements by a preponderance of the evidence."
    - Plaintiffs were essentially trying to use the expert testimony to paper over individual issues of injury.

Weighing Evidence of Standing After *TransUnion*
The Importance of a "Rigorous" Analysis

Skadden

- *Olean* dissent's approach and Supreme Court's "rigorous analysis" requirement
  - Supreme Court has touched briefly on competing expert evidence at class certification:
    - *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (Court reaffirmed that class certification requires a "rigorous analysis" and concluded that it was erroneous to "refus[e] to entertain arguments against [the plaintiffs'] damages model that bore on the propriety of class certification simply because those arguments would also be pertinent to the merits determination").
  - The Third Circuit similarly has recognized the importance of a rigorous analysis that resolves expert disputes bearing on propriety of class treatment:
    - *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305 (3d Cir. 2008)
      - "Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis. It follows that opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason." *Id.* at 323.

Defense Strategies For Handling Disputed Standing Questions

Skadden

- Competing judicial approaches to these issues.
- Reasons justifying a *de minimis* – or stricter – standard:
  - Federal courts cannot issue relief to uninjured people.
  - Unfairly tilts the playing field and allows weaponizing of Rule 23.
  - Class trials are the exception.
- Reasons justifying careful weighing of competing evidence:
  - Punting is inherently wasteful.
  - Results in an abdication of judicial role.
  - Again, class trials are largely a fiction.

Defense Strategies For Handling Disputed Standing Questions

Skadden

- Defense counsel should consider certain steps for challenging plaintiffs' expert class certification evidence:
  - Work with experts early.
    - Ask whether plaintiffs' certification experts meet *Daubert*.
    - Identify flaws in plaintiffs' experts' analyses.
    - Mount your own analysis.
  - Consider a *Daubert* challenge at class certification.
    - No expert can often mean no certification.
  - Even if a *Daubert* challenge fails/is not possible, argue for a careful weighing of expert evidence.
    - Reliance on *Olean*, *In re Hydrogen Peroxide* and Supreme Court precedent.
    - Highlight policy reasons for doing so.

4 *TransUnion*'s Application in Consumer Litigation

Consumer Class Actions and *TransUnion*

- How does *TransUnion* apply in consumer cases?
- Consumer cases are often a prime example of no-injury class actions.
- How has *TransUnion* been applied in those types of cases, and how can it be leveraged to defeat them?

Consumer Class Actions and *TransUnion*

Skadden

- Example of case denying certification – even despite *Olean*:
  - *Silva v. B&G Foods, Inc.*, No. 20-CV-00137-JST, 2022 WL 4596615 (N.D. Cal. Aug. 26, 2022)
    - Allegation that defendant's taco shells contained partially hydrogenated oil despite the fact that the packaging said "0g Trans Fat! per serving."
    - Plaintiffs alleged that no class member would have purchased the taco shells without the misleading label.
    - Defendant lodged several objections, one of which was dispositive:
      - "The Court reaches only one argument that it finds dispositive: that Plaintiffs have not met their burden of showing that common issues predominate over individualized issues regarding injury to class members." *Id.* at *2.

Consumer Class Actions and *TransUnion*

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- *Silva v. B&G Foods, Inc.*, No. 20-CV-00137-JST, 2022 WL 4596615 (N.D. Cal. Aug. 26, 2022) (cont.):
  - Court recognized *Olean*'s holding regarding uninjured class members:
    - "The Ninth Circuit has recently rejected the 'argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members.' *Olean*, 31 F.4th at 669." *Silva*, 2022 WL 4596615, at *2.
  - But the court rejected that *Olean* meant it need not consider whether absent class members have standing in relation to Rule 23(b)(3) analysis.
  - Court considered the competing evidence of injury:
    - Plaintiffs presented no evidence that other consumers would not have purchased the taco shells, only their testimony about their own purchases.
    - Defendants presented an expert survey finding that "approximately 85%" of consumers "would definitely or probably buy the taco shells with or without" the statement. *Id.* at *3.
  - Court rejected that claims were saved because materiality and reliance under consumer protection laws were subject to classwide proof:
    - "[T]hose are different questions from whether class members suffered the economic injury that forms the basis of Plaintiffs' claims. Uninjured class members cannot recover individual damages, even if there has been a statutory violation. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207-08 (2021)." *Id.*

Consumer Class Actions and *TransUnion*

Skadden

- What constitutes a concrete injury in consumer actions?
- Many courts have accepted overpayment as sufficiently concrete:
  - *Morris v. Walmart Inc.*, 2022 WL 1590474, at *4 (N.D. Ala. Mar. 23, 2022) ("Unlike the group of *TransUnion* plaintiffs who were merely flagged in an internal filing system, Morris is not complaining just that misleading labels exist; she is complaining that Walmart took her money but did not deliver the product it promised.").
  - *In re Evenflo Co., Inc., Mktg., Sales Pracs. & Prod. Liab. Litig.,* 54 F.4th 28, 39 (1st Cir. 2022) (alleged overpayment resulting from defendant's misrepresentations about the safety and testing of its booster seats was a concrete harm, as "monetary harms" are "traditional tangible harms")

Consumer Class Actions and *TransUnion*

Skadden

- But mere overpayment has not always been enough:
  - *Wheeler v. Panini Am., Inc.,* 2022 WL 17039208, at *7 (D.D.C. Nov. 17, 2022) (defendant's failure to include "No Purchase Necessary" instruction regarding a promotional competition on the outside of the trading card box did not cause plaintiff a harm sufficient to satisfy *TransUnion,* since plaintiff suffered "bare informational and procedural violations of D.C. law devoid of any concrete harm").
  - *In re Coca-Cola Prod. Mktg. & Sales Pracs. Litig. (No. II),* 2021 WL 3878654, at *2 (9th Cir. Aug. 31, 2021) (plaintiffs did not satisfy standing requirement where they would still consider buying Coke products as-is with more truthful labelling since their "desire for Coca-Cola to truthfully label its products, without more, is insufficient to demonstrate that they have suffered any particularized adverse effects").
  - *Caudel v. Amazon.com, Inc.,* 2021 WL 4819602, at *3 (E.D. Cal. Oct. 15, 2021) (allegations that defendant fraudulently represented videos as "for sale" when access could be revoked was not an injury in fact when plaintiff had "not demonstrated she has overpaid for the videos she purchased nor . . . [that she was] in imminent danger of losing a video from her library").

Consumer Class Actions and *TransUnion*

Skadden

- What about standing to represent purchasers of different products?
- Does *TransUnion* affect substantial similarity doctrine?
- District courts are saying no
  - *Hill v. AQ Textiles LLC*, 582 F. Supp. 3d 297, 311 (M.D.N.C. 2022) (“The mere fact that the products purchased by class members had different names and were of different sizes is immaterial, since the alleged injury and challenged conduct is uniform across the classes.”)
  - *Gold v. Eva Nats*., Inc., 586 F. Supp. 3d 158, 162 (E.D.N.Y. 2022) (“even though the plaintiff did not purchase each of the products at issue, the ‘nature and content of the specific misrepresentation[s] alleged’ are sufficiently similar because they all arise from the same "Eva Naturals’ branding.”)
  - *Clevenger v. Welch Foods Inc.,* 2022 WL 16964009, at *4 (C.D. Cal. Feb. 25, 2022) (“*TransUnio*n did not discuss the Ninth Circuit's “substantial similarity” test and is not helpful to the inquiry here.

Defense Strategies in Consumer Class Actions

Skadden

- Removal under CAFA to get benefit of *TransUnion*?
  - Maybe, but only in certain situations.
    - » Uninjured class members vs. uninjured named plaintiff.
- Challenge named plaintiff's injury allegations on concreteness grounds.
- Develop expert evidence (e.g., consumer survey).
- Challenge plaintiff's expert's evidence.

Q&A