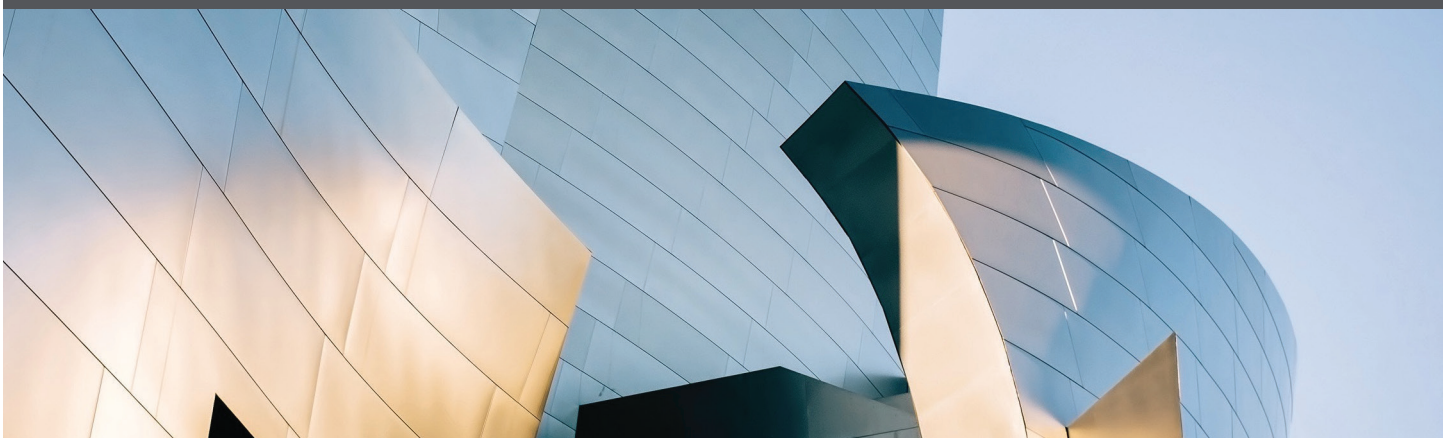
BLANKROME

Financial Institutions Litigation and Regulatory Compliance ("FILARC")



AUGUST 18, 2022 • NO. 4

Fifth Circuit Holds Mere Statutory Violation of the FDCPA, Future Risk of Harm, Confusion, and Lost Time Are Insufficient to Establish Article III Standing

Financial institutions, debt collectors, debt collection law firms, and consumer-facing businesses should take note that the Fifth Circuit Court of Appeals has ruled that merely asserting a statutory violation of the Fair Debt Collection Practices Act ("FDCPA"), confusion, lost time, and/or a future risk of harm are insufficient to establish Article III standing. The Fifth Circuit's application and clarification of the United States Supreme Court's 2021 decision in TransUnion LLC v. Ramirez, ---U.S.---, 141 S. Ct. 2190, 2200 (2021) ("TransUnion") should result in the dismissal of other pending actions and prevent future actions based on allegations of a mere statutory violation of the FDCPA, future risk of harm, lost time, and/or confusion resulting from debt collection communications.

In *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*,---F.4th---, No. 21-50958, 2022 WL 3355249, at *1 (5th Cir. Aug. 15, 2022), the Fifth Circuit Court of Appeals ("Fifth Circuit") vacated a class certification order and remanded the case to be dismissed for lack of jurisdiction, holding that a statutory violation of the FDCPA, alone, is insufficient to confer Article III standing.[1] Further, the Fifth Circuit held that a purported future risk of harm, experiencing confusion, and/or lost time are insufficient to allege the required injury-in-fact for Article III standing to maintain a lawsuit in federal court.

SUMMARY OF FACTS AND BACKGROUND

Mariela Perez ("Plaintiff") received a debt collection letter from McCreary, Veselka, Bragg & Allen, P.C. ("Defendant"), a debt collection law firm specializing in the collection of debts owed to Texas local governments. The letter demanded that she pay a delinquent utility debt owed to the City of College Station. However, the statute of limitations had expired on said debt,[2] which was ***not*** disclosed in the letter. Plaintiff sued Defendant in the U.S. District Court for the Western District of Texas ("District Court") for violating section 1692e of the FDCPA.[3]

Plaintiff's complaint alleged three injuries resulting from Defendant's letter: (1) "created a significant risk of harm," since Plaintiff might have paid her time-barred debt; (2) misled and confused her about the enforceability of her debt; and (3) lost time due to consultation with an attorney to determine the enforceability of the debt. Plaintiff sought to certify a class of Texans who had received the same form letter from Defendant attempting to collect a time-barred debt.

Both Plaintiff and Defendant moved for summary judgment, and Plaintiff also moved for class certification. Defendant argued Plaintiff lacked standing to bring the lawsuit because she had not suffered a concrete injury-in-fact. While these motions were pending, the Supreme Court of the United States ("SCOTUS") decided *TransUnion.* Defendant moved for leave to file supplemental authority and pointed to *TransUnion* to support its position that Plaintiff had not suffered an injury-in-fact.

The District Court granted class certification and held that the violation of Plaintiff's statutory rights under the FDCPA constituted a concrete injury-in-fact because those rights were substantive, ***not*** procedural. In addition, the District Court held that Plaintiff's confusion qualified as a concrete injury-in-fact and that Defendant's letter had violated the FDCPA but factual disputes concerning an affirmative defense precluded summary judgment. Defendant appealed the class-certification order but did ***not*** appeal the portion of the District Court's order holding that Plaintiff had standing.

FIFTH CIRCUIT'S DECISION

Although Defendant did not challenge Plaintiff's standing on appeal, the Fifth Circuit noted its independent obligation to assure itself that standing exists.[4] Thus, the Fifth Circuit directed the parties to discuss at oral argument whether Plaintiff had suffered a concrete injury-in-fact under *TransUnion.*[5]

Plaintiff claimed that (i) the violation of her statutory rights under the FDCPA itself qualified as an injury-in-fact, (ii) the letter subjected her to material risk of financial harm, (iii) the letter confused or misled her, (iv) the letter required her to waste her time by consulting with an attorney, and (v) receiving the unwanted letter was analogous to the tort of intrusion upon seclusion.[6] The Fifth Circuit analyzed each of these theories under *TransUnion* and held that none of these purported harms satisfied the injury-in-fact requirement for Article III standing.[7]

In reaching its decision, the Fifth Circuit applied SCOTUS's analysis in *TransUnion,* which held that a plaintiff is required to "show (1) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[8]

First, the Fifth Circuit noted that *TransUnion* explicitly held that "Article III standing requires a concrete injury ***even in the context of a statutory violation***" and that "under Article III, an injury in law is ***not*** an injury in fact."[9] (emphasis added). As such, Plaintiff's allegation of a statutory violation of the FDCPA was insufficient to establish standing to bring suit.[10]

Second, the Fifth Circuit rejected Plaintiff's contention that she established standing based on the purported material risk of financial harm, as she might have accidentally paid her time-barred debt upon reading the letter. The Fifth Circuit held that "if a risk hasn't materialized, the plaintiff hasn't yet been injured."[11] Thus, "the unmaterialized risk Perez experienced can't support her suit for damages."[12]

Third, the Fifth Circuit disagreed with the District Court and held that experiencing confusion, absent more, is ***not*** a concrete injury under Article III.[13] Specifically, the Fifth Circuit was not persuaded by Plaintiff's analogy of her confusion to the tort of fraudulent misrepresentation, finding that her confusion is not similar "in kind" to the harm recognized by fraudulent misrepresentation since here there is no tangible, pecuniary loss resulting from the misrepresentation.[14]

Fourth, the Fifth Circuit held that Plaintiff failed to establish that lost time was a concrete harm sufficient to sustain her claims.[15] The Fifth Circuit noted that since Plaintiff merely alleged that the purported injury was lost time and ***not*** payment to her attorney for the consultation after receiving the debt collection letter, lost time did not establish an injury in fact.[16] However, the Fifth Circuit declined to "conclusively decide whether such injuries are closely related to traditional harms, permitting future parties to develop the question further."[17]

Finally, the Fifth Circuit rejected Plaintiff's claim that the letter caused her to suffer a concrete injury analogous to the tort of intrusion upon seclusion since Congress did not elevate the receipt of ***a single, unwanted communication*** to the status of a legally cognizable injury or concrete harm in the FDCPA.[18] As a result, without standing, the Fifth Circuit could not grant Plaintiff's requested relief for a declaratory judgment that Defendant violated the FDCPA.[19]

CONCLUSION

The Fifth Circuit is the latest to interpret and apply SCOTUS' decision in *TransUnion. Perez* is a significant win for financial institutions, debt collectors, and any debt collection law firms, as it clarifies that a mere statutory violation, future risk of harm, confusion, and/or lost time are ***not*** sufficient harms to satisfy the injury-in-fact requirement to maintain Article III standing in federal court. This decision should reduce the number of FDCPA actions filed and result in the early-stage dismissal of pending federal actions alleging such insufficient harms and will likely cause the plaintiff's bar to become more creative with their allegations of injury.

For additional information or assistance, contact Wayne Streibich, Diana M. Eng, or Alina Levi, or a member of Blank Rome's Financial Institutions Litigation and Regulatory Compliance ("FILARC") group.

Wayne Streibich
215.569.5776 | wayne.streibich@blankrome.com

Diana M. Eng
212.885.5572 | diana.eng@blankrome.com

Alina Levi
212.885.5195 | alina.levi@blankrome.com

1. See *id.* (citing *TransUnion LLC v. Ramirez,* ---U.S.---, 141 S. Ct. 2190, 2205 (2021)).
2. Under TEX. CIV. PRAC. & REM. CODE § 16.004(a), the statute of limitations period for bring an action to collect a debt is four years. Defendant's letter was sent one day after the four-year statute of limitations had expired.
3. 15 U.S.C. § 1692e, entitled "False or Misleading Representations," states that a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Further, section 1692e(2)(A) prohibits the false representation of "the character, amount, or legal status of any debt," and section 1692e(5) prohibits the "threat to take any action that cannot legally be taken or that is not intended to be taken."
4. See *Perez,* 2022 WL 3355249, at *3.
5. See *id.*
6. See *id.*
7. See *id.*
8. *Id.* at *2 (quoting *TransUnion,* 141 S. Ct. at 2203).
9. *Id.* at *4 (citing *TransUnion,* 141 S. Ct. at 2197)
10. See *id.*
11. *Id.* (citing *TransUnion,* 141 S. Ct. at 2210-11).
12. *Id.*
13. See *id.* at *5.
14. See *id.*
15. See *id.* at *6.
16. See *id.*
17. *Id.*
18. See *id.* at *6-7.
19. See *id.* at *7.