Mixed Emotions: How Lower Courts Misconstrue TransUnion and Have Since Created a New Judicially Cognizable Injury for Stand-Alone Emotional Distress

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Abstract

In TransUnion, LLC v. Ramirez, the United States Supreme Court held that "in a suit for damages, mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm."[1] *Notably, the Court failed to take a position on what common law analog would suffice as a "separate concrete harm," and instead, affirmed that an emotional distress injury caused by the risk of future harm may be a sufficient concrete injury. Resultingly, lower courts have construed TransUnion to stand for the proposition that an emotional distress injury plus a risk of future harm satisfies the concrete harm requirement for Article III standing. However, this Article argues that lower courts are improperly applying Supreme Court precedent regarding Article III standing, regarding the misapplication of TransUnion—and Spokeo, Inc. v. Robins before it—by failing to identify a suitable common law analogy for this type of emotional distress injury. This Article provides proper guidance as to the concreteness inquiry post-TransUnion, guidance that remains loyal to Article III standing precedent.*

Introduction

Consider the following hypothetical scenario. A credit reporting agency fails to maintain accurate credit files for consumers by labeling a U.S. citizen as a known drug trafficker. This citizen, a single mom, obtains her dream job which provides her with the health insurance she

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[1] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210–11 (2021).

needs to care for her child. As part of its onboarding procedures, her new employer subjects her to preemployment verification of her background. In her efforts to prepare for her background check, she reaches out to the credit reporting agency to obtain her report. Lo and behold, she learns that the report erroneously labeled her as a known drug trafficker. Her employer will run her report within the next week. However, it will take her weeks to correct the report. Therefore, she must suffer the embarrassment of explaining the confusion to her new employer—not to mention the potential delay in her start date because of the issue, or worse still, denial of her employment. As a result, she begins to suffer from anxiety, sleeplessness, and panic at the prospect of her dream job being denied to her because of the erroneous report that is soon to be disseminated to her employer. She files a suit alleging that the credit reporting agency violated federal credit reporting law and that it created a sufficiently likely risk of future harm vis a vis denied employment and that this risk caused her emotional distress in the form of anxiety, sleeplessness, and panic. Does this potential plaintiff have standing to sue?

This is likely the situation contemplated by Justice Kavanaugh when he rendered his opinion in *TransUnion*.[2] The Court made clear that "in a suit for damages, mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm."[3] However, because the situation described above does not align with the facts in TransUnion, the Court did not address whether such a plaintiff would have suffered a "separate concrete harm" for the purposes of Article III standing.[4]

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[2] *See generally id.* at 2210–12 (suggesting that, when there is a sufficient likelihood that a plaintiff's information would be requested by a third party and provided by the credit reporting agency within a relevant time period—as with the potential plaintiff—the risk of future harm may qualify as a concrete harm).

[3] *Id.* at 2210–11.

[4] *Id.* at 2211 n.7 ("For example, a plaintiff 's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm. We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress.").

By using the words "separate *concrete* harm," the Court suggested that a common law analog was necessary.[5] However, without first establishing a common law analog, the Court indicated that if the plaintiffs in *TransUnion* had alleged that they suffered an emotional distress injury from the risk of future dissemination of their inaccurate consumer file then plaintiffs may have survived the attack on their Article III standing.[6]

Following this limited carve out from *TransUnion*, some lower courts do not look for common law analogs when dealing with plaintiffs who allege emotional distress injuries caused by a risk of future harm.[7] In fact, as discussed further below, some lower courts appear to believe that *TransUnion* stands for the proposition that, in a damages case for stand-alone emotional distress injuries caused by a risk of future harm, such an injury is sufficiently concrete if the risk is sufficiently likely and the plaintiff suffered a severe enough emotional distress injury caused by that risk.[8] For example, instead of analogizing a plaintiff's case to intentional infliction of emotional distress (IIED) for the purposes of determining concreteness, lower courts improperly consider the likelihood of the risk and the type of emotional distress injury to determine

[5] *See id.* at 2204 (stating that concrete harm is determined by asking "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury"); Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).
[6] *TransUnion*, 141 S. Ct. at 2211 ("Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses.").
[7] *See e.g., In re* Mednax Serv., Inc., Customer Data Sec. Breach Litig., No. 21-MD-02994-RAR, 2022 WL 1468057, at *8 (S.D. Fla. May 10, 2022) ("Thus, the question in this case is not whether Plaintiffs' allegations of emotional distress, on their own, are sufficiently concrete to establish injuries in fact. Instead, it is whether allegations of emotional distress, coupled with the substantial risk of future harm, are sufficiently concrete to establish standing in a claim for damages.") (citing *Transunion*, 141 S. Ct. at 2211); *see also* Desue v. 20/20 Eye Care Network, Inc., No. 21-CIV-61275-RAR, slip op. at 4 (S.D. Fla. Mar. 15, 2022) ("Prior to *TransUnion*, the Court had recognized only that a material risk of future harm could satisfy the concreteness requirement in a claim for injunctive relief. In *TransUnion*, the Court held that the material risk of future harm, without more, was not sufficiently concrete for purposes of Article III standing in a suit for damages. That holding leaves this Court to answer the question—what is more? Contrary to Defendants' desires, the Court in *TransUnion* gave us an emotional injury sized clue.")
[8] *See e.g.,* C.C. v. Med-Data Inc., No. 21-2301-DDC-GEB, slip op. at 8 n.4 (D. Kan. Mar. 31, 2022) ("*TransUnion* contemplates that allegations of emotional distress plus a risk of future harm may suffice to confer standing.").

concreteness.[9] This treatment conflates concreteness with imminence, which appear to be analytically distinct elements of standing.

This Article proceeds in two parts. In Part I, the Article provides a brief background regarding Article III standing and its principles. This then turns to a discussion of the Court's recent decisions in *Spokeo* and *TransUnion*, each of which added unique parameters to standing doctrine. Part II discusses how lower courts are misconstruing the concreteness inquiry post-*TransUnion* when dealing with stand-alone emotional distress injuries caused by a risk of future harm. It then offers perhaps a better reading of *TransUnion* in the hopes that lower courts will reorient their rationales to one that is more loyal to Article III precedent.[10]

I. Article III Standing and the Additions of *Spokeo* and *TransUnion*

Articles I through III of the Constitution limit the authority of the respective branches—a concept known as separation of powers.[11] Article III limits the power of the Judicial Branch of government to prevent it from intruding upon the functions and powers of the other two branches (the Legislative and Executive Branches).[12] Article III states that the Judiciary's power is limited to "Cases" and "Controversies."[13] Among the requirements for a case or controversy is standing.[14]

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[9] *See e.g.,* Vazzano v. Receivable Mgmt. Serv., LLC, No. 3:21-CV-0825-D, 2022 WL 3349149, at *5 (N.D. Tex. Aug. 12, 2022) (suggesting a split, post-*TransUnion*, among Circuits regarding the sufficiency of the emotional injury pled and collecting cases; the court stated, "This court notes, however, that this split does not appear to be on whether emotional harm can qualify at all but whether certain types of emotional harms—such as stress and confusion, which are seen as relatively insignificant—have a suitable common law analogue."); *see also* DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, THE LAW OF TORTS § 385 (2d ed. 2022)(indicating that the severity of the emotional distress is an element of IIED).

[10] Because this Article pertains to stand-alone emotional distress injuries, IIED and negligent infliction of emotional distress (NIED) are suitable common law analogs for willful or negligent defendant conduct. *See* DOBBS, *supra* note 9, at § 385, 390 (2d ed. 2022). However, this Article will mostly refer to IIED because the Court in *TransUnion* contemplated IIED as an analog in that case. *TransUnion*, 141 S. Ct. at 2211 n.7.

[11] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016).

[12] *See id.* at 337 (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–560 (1992)).

[13] Clapper v. Amnesty Int'l. USA, 568 U.S. 398, 408 (2013) (citing *DaimlerChrysler*, 547 U.S. at 341; Raines v. Byrd, 521 U.S. 811, 818 (1997)).

[14] *Clapper*, 568 U.S. at 408.

To have proper standing, a plaintiff must have a "personal stake" in the matter.[15] Court precedent indicates that standing has three requirements: (1) injury-in-fact that is (a) concrete and particularized, and (b) actual or imminent; (2) traceability to defendant's conduct; and (3) redressability.[16]

In *Spokeo*, the issue was whether plaintiff had standing to bring a Fair Credit Reporting Act (FCRA) claim for defendant's failure to "follow reasonable procedures to assure maximum possible accuracy of" plaintiff's consumer report.[17] The Court held that plaintiffs do not have standing when they allege "a bare procedural violation, divorced from any concrete harm" because such claim does not satisfy the injury-in-fact requirement of Article III standing.[18] The Court first stated that to be "concrete," the injury must be real, not abstract—although the Court has previously recognized both tangible and intangible harms.[19] However, to determine whether intangible harms confer Article III standing, "both history and the judgment of Congress play important roles."[20] In particular, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[21] Additionally, Congress may "elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[22] However, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a

[15] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).
[16] *Id.* at 2203 (citing *Lujan*, 504 U.S. at 560–61).
[17] Spokeo, Inc. v. Robins, 578 U.S. 330, 333–35 (2016).
[18] *Id.* at 341 (citing Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . . is insufficient to create Article III standing")).
[19] *Id.* at 340–41.
[20] *Id.*
[21] *Id.* at 341.
[22] *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992))

statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation."[23]

Additionally, in *TransUnion*, the issue was whether 6,332 of 8,185 class members had Article III standing to bring a FCRA violation for defendant's failure to "follow reasonable procedures to assure maximum possible accuracy of" their credit files that were *not* provided to third parties.[24] First, the Court stated that 1,853 class members had standing under the common law analog inquiry provided in *Spokeo* because their allegations regarding dissemination of false information by defendant to third parties sounded in the common law analog of defamation; therefore, they successfully pled a concrete injury.[25] However, because the element of publication is a touchstone inquiry in a defamation case and because defendant had not disseminated the inaccurate credit files of the 6,332 class members, the Court determined those class members did not suffer a concrete harm for the purposes of conferring Article III standing.[26]

However, the plaintiffs asserted an alternative argument; the plaintiff claimed that the inaccurate credit files presented a risk of future harm to them, relying on the Court's prior interpretations of *Clapper*, "where the Court said that 'the risk of real harm' (or as the Court otherwise stated, a 'material risk of harm') can sometimes 'satisfy the requirement of concreteness.'"[27] Nevertheless, the Court in *TransUnion* noted that *Clapper* was a case for injunctive relief, while the plaintiffs in this case sought retrospective damages.[28] The Court, therefore, held that "in a suit for damages, mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate

[23] *Id.*
[24] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).
[25] *See id.* at 2208–09.
[26] *See id.* at 2209–10.
[27] *Id.* at 2210 (quoting *Spokeo*, 578 U.S. at 341–42).
[28] *Id.*

concrete harm."[29] Accordingly, the Court held that the 6,332 plaintiffs did not have standing because they did not "present evidence that the class members were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses."[30]

II. Proper Guidance for Lower Courts Misconstruing *TransUnion*

Lower courts misconstrue *TransUnion* as creating a carve out from the common law analog inquiry when facing a damages suit for stand-alone emotional distress injuries caused by a risk of future harm. This carve out, albeit improper, is being applied by lower courts, resulting in confusion to the injury-in-fact elements. Instead, the interpretation of *TransUnion* should be refocused to find a suitable common law analog for these types of claims.

In *TransUnion*, with respect to plaintiffs' standing for the risk of future injuries, the Court drew a distinction from its decision in *Clapper* and stated, "that in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm."[31] In the accompanying footnote, the Court stated:

> For example, a plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm. We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress.[32]

By failing to analogize the circumstances presented in *TransUnion* to IIED, and instead contemplating that the plaintiffs might have prevailed had they alleged that they suffered emotional

[29] *Id.* at 2210–11.
[30] *Id.* at 2211.
[31] *Id.* at 2210–11.
[32] *Id.* at 2211 n.7 (stating that the Court declined to take a position because the plaintiff had not relied on such a theory of harm).

distress injuries from the risk of their credit file being disseminated, the Court in effect gave license to lower courts to forgo the common law analog inquiry to determine concreteness, as provided in *Spokeo*. Instead, when facing damages claims for stand-alone emotional distress injuries caused by a risk of future harm post-*TransUnion*, lower courts appear to be concerned with whether the risk of future harm was sufficient[33] and whether the emotional distress injury was sufficient[34] to determine concreteness. The inquiry regarding emotional distress would appear to be sound because lower courts can determine whether the emotional distress injury is severe enough to make an analogy to IIED.[35] However, in making their determinations, lower courts do not cite to analogous IIED cases where a similar emotional distress injury was found to be sufficiently severe for the purposes of IIED.[36] Further, in conducting the inquiry regarding whether the risk of future harm is sufficient, lower courts appear to be conflating the "imminent" element of the injury-in-fact inquiry with the concreteness element. In determining whether a risk of future harm is

[33] *Compare* C.C. v. Med-Data Inc., No. 21-2301-DDC-GEB, slip op. at 7-8 (D. Kan. Mar. 31, 2022) (reasoning that 19% risk of future identity theft after a data breach based on a 2011 Javelin Report was not sufficient to satisfy *TransUnion*), *and* I.C. v. Zynga, Inc., 20-CV-01539-YGR, 2022 WL 2252636, at *10–11 (N.D. Cal. Apr. 29, 2022) (reasoning that stolen email addresses, Zynga usernames and passwords, Facebook usernames, phone numbers, and dates of births without names and social security numbers the risk of future identity theft was not sufficient to satisfy *TransUnion*), *with also* Desue v. 20/20 Eye Care Network, Inc., No. 21-CIV-61275-RAR, slip op. at 5 (S.D. Fla. Mar. 15, 2022) (stating that demonstrable misuse and access to data, including but not limited to names and social security numbers, evidenced through access to, deletion of, and in some instances use for fraudulent banking activity was sufficient to satisfy *TransUnion*).

[34] *Compare Desue,* No. 21-CIV-61275-RAR, slip op. at 5 (S.D. Fla. Mar. 15, 2022) (allegations of "emotional distress" was sufficient to satisfy *TransUnion*), *and In re* Mednax Serv., Inc., Customer Data Sec. Breach Litig., No. 21-MD-02994-RAR, 2022 WL 1468057, at *8 (S.D. Fla. May 10, 2022) (same), *with* Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 939 (7th Cir. 2022) (allegations of confusion and worry were not sufficient to satisfy *TransUnion*).

[35] *See* DOBBS, *supra* note 9, at § 385, 388; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. L. INST. 2012) ("With regard to the threshold of severity, courts frequently quote and rely on a sentence in the Restatement Second of Torts § 46, Comment j, to express the extent of harm required: 'The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it.' The intensity and the duration of the harm are factors to be considered in determining its severity.")(alteration in original).

[36] *But cf.* RESTATEMENT (THIRD) OF TORTS, *supra* note 35 ("Severe harm must be proved, but in many cases the extreme and outrageous character of the defendant's conduct is itself important evidence bearing on whether the requisite degree of harm resulted"). However, courts do not determine whether conduct is extreme and outrageous to excuse the failure to determine the severity of the emotional distress.

"certainly impending," lower courts view this as a determination of concreteness.[37] However, concreteness and imminence are analytically distinct elements of the injury-in-fact inquiry.[38]

Instead, the key questions to determining concreteness of a stand-alone emotional distress injury caused by a risk of future harm (in a case for damages) is to ask is whether the alleged conduct that causes the risk of future harm is conduct that is extreme and outrageous and whether the emotional distress injury is sufficiently severe such that a common law analogy to IIED may be found. [39] This standard finds support within *TransUnion;* the risk in *TransUnion* was that the plaintiffs' erroneous credit files labeling them as either a known terrorist or drug trafficker would be provided to a third-party business.[40] The Court reasoned that the plaintiffs did not "present evidence that the class members were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk that

[37] *See e.g.,* C.C. v. Med-Data Inc., No. 21-2301-DDC-GEB, slip op. at 8 (stating that to show a concrete injury requires that the risk of future harm is "certainly impending") (citing Clapper v. Amnesty Intl. USA, 568 U.S. 398, 409 (2013)); *but see Clapper*, 568 U.S. at 409 (discussing the "certainly impending" standard in relation to the "imminent" element of the injury-in-fact inquiry for standing, stating, "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending. Thus, we have repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact' . . . ") (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564–65 n.2 (1992); Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

[38] *See Lujan*, 504 U.S. at 560 (1992) (defining injury-in-fact in a manner to suggest that "concrete" and "actual or imminent" are separate elements, stating, "[f]irst, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.") (internal quotations omitted); *see also* James Hannaway, *Standing on Shaky Ground: How Circuit Courts Reconcile Legal Rights and Injuries in Fact After* Spokeo v. Robins, 87 GEO. WASH. L. REV. 706, 716–17 (2019) (suggesting that "actual or imminent" is analytically distinct from "concrete" for the purposes of injury-in-fact).

[39] *Cf.* Garland v. Orlans, PC, 999 F.3d 432, 439–441 (6th Cir. 2021) (discussing that, pre-*TransUnion*, *Spokeo* suggested that an emotional distress injury must be linked to conduct that is extreme and outrageous in nature which "severely curtails the harms cognizable at common law" to "a very small slice of human behavior. And a 'bare procedural violation' does not fit on that small slice" and that "a general allegation of emotional harm like anxiety or distress falls 'short of cognizable injury as a matter of general tort law' because 'liability [for emotional harm] arises 'only where it is extreme'")(alterations in original); Laufer v. Arpan LLC, 29 F.4th 1268, 1270–72 (11th Cir. 2022) (following *TransUnion*, although in a disability case for injunctive relief, and finding that a website omitting "accessibility-related information required by federal regulation" was not extreme and outrageous conduct, the court contemplated NIED as an analog but held that plaintiff was not "subject to physical contact within the zone of physical danger, as negligent infliction requires.").

[40] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2209 (2021).

their credit reports would be provided to third-party businesses."[41] Plaintiffs had not shown that they suffered emotional distress from the possibility that a third-party business would be told erroneously that the plaintiff was a known terrorist or drug trafficker—it is uncertain whether this constitutes extreme and outrageous conduct. Although the court in *TransUnion* did not directly address this issue, it appears that the Court suggested that the act of a defendant falsely telling a third party that a plaintiff is a known terrorist or drug trafficker is likely extreme and outrageous conduct for the purposes of analogizing to IIED. In fact, IIED case law contemplates circumstances where certain kinds of falsehoods alleged by a defendant about a plaintiff to a third party rise to the level of extreme and outrageous behavior by the defendant like the alleged conduct in *TransUnion*.[42]

Conclusion

This reinterpretation of *TransUnion* potentially gives lower courts proper guidance in handling the concreteness inquiry in suits for damages involving stand-alone emotional distress injuries caused by a risk of future harm. What appears to be animating lower courts' liberal (and perhaps exploitive) reading of *TransUnion* is that the law in the past few decades has begun to recognize that mental health issues are real and are a matter of public and popular concern and thus new judicially cognizable injuries are being developed.[43] However, unless and until the Court

[41] *Id.* at 2211 (alterations in original).
[42] *Compare* Moss v. Camp Pemigewassett, Inc., 312 F.3d 503, 510–11 (1st Cir. 2002) (holding that defendant's false allegations that the plaintiff was a child molester was not extreme and outrageous), *and* Kerr v. Marshall Univ. Bd. of Governors, 824 F.3d 62, 78 (4th Cir. 2016) (holding that allegations that defendant placed false and misleading statements in plaintiff's academic record resulting in the denial of her academic credit, degree, and certification was not extreme or outrageous conduct), *with* Osuagwu v. Gila Reg'l. Med. Ctr., 938 F.Supp.2d 1180, 1196 (D.N.M. 2013) (holding that defendant's false statements about plaintiff to state medical board, resulting in the destruction of his career and reputation, was extreme and outrageous), *and* McFarland v. McFarland, 684 F.Supp.2d 1073, 1090–92 (N.D. Iowa 2010) (holding that an email sent to over 300 recipients falsely accusing plaintiff of being an abusive parent and a false report of sexual molestation to Iowa Child Protective Services was extreme and outrageous conduct).
[43] *See* DOBBS, *supra* note 9, at § 383 ("[S]tand-alone claims for infliction of distress have expanded significantly over the last fifty years . . . .").

decides to expressly create a new judicially cognizable injury, *TransUnion* must be narrowly followed for the purposes of maintaining Article III precedent.