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How 2nd Circ. Ruling Fortifies Plaintiff Standing Arguments

By **Raphael Janove, Samantha Holbrook and Andrew Ferich** (September 13, 2023, 4:35 PM EDT)

On Aug. 24, the U.S. Court of Appeals for the Second Circuit issued a precedential decision on Article III standing in *Bohnak v. Marsh & McLennan Companies Inc.*

Bohnak confirms that a plaintiff can have Article III standing to seek damages under the U.S. Supreme Court's 2021 *TransUnion LLC v. Ramirez* ruling based on the risk of future harm, which itself can be a concrete injury.

In *Bohnak*, the plaintiff's personal identifying information, or PII, was exposed in a data breach affecting 7,000 individuals. The plaintiff did not allege that any third party had harmed her by actually using or accessing her PII. But to the Second Circuit, the core injury was the "exposure of ... PII to unauthorized third parties."^[1]

The Second Circuit emphasized that there is no requirement that "third parties used the information in ways that harmed the class members."^[2]

In reaching its conclusion, the Second Circuit did a deep dive on the implications of *TransUnion*'s concreteness analysis, reinforcing and somewhat expanding its prior holding in 2021 on the issue of imminence in *McMorris v. Carlos Lopez & Associates*.

TransUnion and *McMorris* were touchstones of Article III standing. Based on these two cases, *Bohnak* concluded that the plaintiff had "indisputably" established Article III standing.

The Second Circuit closely analyzed *TransUnion*, where the Supreme Court considered whether risk of future injury alone is sufficiently concrete to be an injury in fact for purposes of Article III standing.

There, a car dealer refused to sell the plaintiff a vehicle because a *TransUnion*-prepared credit report erroneously identified the plaintiff as being on a terrorist watchlist.^[3]

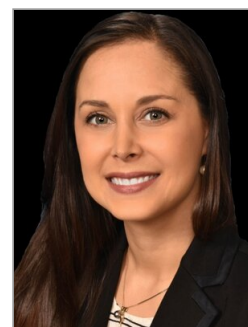
The plaintiff sought to represent a class of all individuals who had been misidentified on such a credit report, regardless of actual dissemination to a third party.^[4]

While *TransUnion* found that individuals whose reports were never disseminated were not injured, it had "no trouble concluding" that all those "class members whose credit reports were provided to third-party businesses suffered a concrete harm and thus have standing."^[5]

In *Bohnak*, extending *TransUnion*'s holding to the facts of this case, the Second Circuit reversed the district court for concluding that "[plaintiff] could only speculate about the extent of any future harm."^[6] Leaning on the Supreme Court's analysis, the Second Circuit explained:



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Significantly, [TransUnion] concluded that the publication of false information about these class members to third parties was itself enough to establish a concrete injury; it did not take further steps to evaluate whether those third parties used the information in ways that harmed the class members.[7]

The core injury here was "the exposure of Bohnak's private PII to unauthorized third parties," much like the publication of misleading information about some of the plaintiffs in TransUnion.

Guided by the principles established in TransUnion, the Second Circuit had "no trouble concluding that Bohnak's alleged harm is sufficiently concrete to support her claims for damages." [8]

As Bohnak concluded, "alleged injury arising from the increased risk of harm is cognizable for standing purposes, and thus could support a claim for damages." [9]

Having established that the injuries were "sufficiently concrete to constitute an injury in fact for purposes of [the plaintiff's] damages claim," the Second Circuit next shifted its focus to the imminence inquiry, guided by its pre-TransUnion holding in McMorris.

TransUnion did not supplant the Second Circuit's holding in McMorris because McMorris focuses its analysis on the issue of whether the future harm is sufficiently "actual or imminent," whereas TransUnion did not purport to address matters beyond concreteness.

In McMorris — also a data breach case, arising out of an inadvertent dissemination of a company-wide email containing sensitive PII of employees — the Second Circuit explained that "a future injury constitutes an Article III injury in fact only if the threatened injury is certainly impending, or there is a substantial risk that the harm will."

Based on TransUnion and McMorris, the Second Circuit in Bohnak concluded that the plaintiff had established standing to seek damages.

The plaintiff in Bohnak alleged that her PII was exposed because of a targeted attempt by a third party to access the dataset. She further alleged that the PII taken by the hackers includes her name and Social Security number, which, the Second Circuit found, is "exactly the kind of information that gives rise to a high risk of identity theft." [10]

That Bohnak had not alleged any misuse of her exposed data did not prevent her from establishing standing. As the Second Circuit had previously emphasized in McMorris, an allegation of actual misuse of data is not necessary to establish that an injury is sufficiently imminent.

The mere allegations of a targeted hack that exposed a name and Social Security number to an unauthorized actor are sufficient to suggest a substantial likelihood of future harm, satisfying the "actual or imminent harm" component of an injury in fact.

Here, the Second Circuit took it a step further than in McMorris and found that Bohnak pleaded additional injuries — the time and money spent trying to mitigate the consequences of the data breach — for which damages are "unquestionably capable of reasonable proof."

The plaintiff thus had Article III standing to bring her claims for damages, and the district court erred in dismissing her claims for failure to plead cognizable damages with reasonable certainty.

Bohnak marries the concepts in TransUnion and McMorris, harmonizing them into a complete standing inquiry, especially for plaintiffs in the data breach context. It is the front of a wave of data breach circuit decisions that have altered the landscape on standing in the context of data and privacy actions.

These decisions recognize that the disclosure of sensitive personal information, particularly Social Security numbers, health information or financial information, can constitute a substantial likelihood of future harm, regardless of whether the information has yet been actually exploited or misused. [11] This expansion of standing will drive further litigation of this sort.

But the implications of Bohnak will not only be felt within the data breach realm. This decision will bolster the standing arguments of plaintiffs who seek damages based on the risk of future harms or

based on intangible types of injuries, such as with reputational, commercial or emotional harm.

Of note, Bohnak followed TransUnion's instruction to look to "history and tradition" to determine where a "[plaintiff's] injuries bore a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." [12]

Whenever a defendant raises standing arguments, plaintiffs can rely on Bohnak and "history and tradition" to argue that the risk of future harm alone gives rise for standing to seek monetary relief, particularly for claims seeking equitable disgorgement or restitution such as in unfair competition and Lanham Act lawsuits.

In sum, TransUnion has been a sharp sword for the defense bar, able to slash standing arguments indiscriminately. But TransUnion's blade has dulled thanks to Bohnak and other decisions that embrace and expand on TransUnion's own holding about standing in the context of increased risk of future harm.

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[1] 2023 WL 5437558, at *7.

[2] *Id.* at *6.

[3] *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2201 (2021).

[4] *Id.* at 2202.

[5] *Id.* at 2209, 2214.

[6] 2023 WL 5437558, at *3.

[7] *Id.* at *6 (emphasis in original).

[8] *Id.* at *7.

[9] 2023 WL 5437558, at *10; see *id.* ("To say that the plaintiffs have standing is to say that they have alleged injury in fact, and if they have suffered an injury then damages are available.") (citation and quotations omitted).

[10] 2023 WL 5437558, at *10.

[11] See *Webb v. Injured Workers Pharmacy*, 72 F.4th 365, 376 (4th Cir. 2023) (concluding that the plaintiff had plausibly alleged a "separate concrete, present harm" caused by the exposure to the risk of future harm); *Clemens v. ExecuPharm Inc.*, 48 F.4th 146 (3d Cir. 2022) ("Following TransUnion's guidance, we hold that in the data breach context, where the asserted theory of injury is a substantial risk of identity theft or fraud, a plaintiff suing for damages can satisfy concreteness as long as [the plaintiff] alleges that the exposure to that substantial risk caused additional, currently felt concrete harms.").

[12] Bohnak, 2023 WL 5437558, at *6 (quoting *TransUnion*, 141 S. Ct. 2190, at 2204).

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