Ramirez, Faux-Federalism, and the Futility of Consumer Disclosure Protections

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How the Supreme Court Abetted the Abuses of the Credit Bureaus in TransUnion v. Ramirez

Credit bureaus are some of the most problematic and justly vilified companies in this country. For several years, Equifax, Experian, TransUnion and their cohorts have been the top source of complaints to the Consumer Financial Protection Bureau (CFPB). In 2020, the CFPB received over 319,000 complaints about credit or consumer reporting, over twice as many as in 2019 and constituting 59% of the overall complaints received by that agency last year.

Credit bureaus are notorious for having excessive errors, with an often-cited 2012 Federal Trade Commission (FTC) study having found that 1 in 5 consumers have verified errors in their credit reports. One in 20 consumers have errors so serious that they would be denied credit or need to pay more for it.

Despite their numerous and intractable problems, the Supreme Court provided an enormous get-out-of-jail-free pass to credit bureaus in a recent case, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (*Ramirez*). The *Ramire*z decision significantly impacts the ability of consumers to protect themselves and their financial reputations under the Fair Credit Reporting Act (FCRA). At issue in the case was a class of 8,184 consumers who were wrongfully identified by TransUnion as potential terrorists or drug dealers based solely on matching their first and last names to a list maintained by the federal Office of Foreign Asset Control. TransUnion failed to check any other identifying features such as middle initial, date of birth, or address.

The Supreme Court agreed that TransUnion had violated the FCRA by failing to use reasonable procedures to ensure the accuracy of the credit reports for these 8,184 consumers, but in a 5-4 decision, the Court held that 6,332 of these class members whose credit reports had supposedly not been viewed by a third party did not suffer any concrete harm, and thus had no "standing" to bring an FCRA action in federal court. To the average consumer, it might be a bit surreal to suggest that a false accusation that a consumer might be a terrorist or drug dealer, made by a major American corporation that is a keeper of our financial reputations, does not cause enough concrete harm to simply keep open the courthouse doors to them.

TransUnion also violated the FCRA by, in response to the lead plaintiff Sergio Ramirez's request for a copy of his credit file, sending him an incomplete version of his file that included a summary of his FCRA rights but did not mention the terrorist alert. A day later, it sent him a second mailing that informed him of the terrorist match but did not include the required summary of his FCRA rights. The Supreme Court held that the class members—other than Ramirez himself—did not have standing to raise these claims because they did not identify any "downstream consequences" that they suffered from failing to receive the required information.

The Futility of Disclosure as Consumer Protection after Ramirez

Despite the egregiousness of the inaccurate information in the *Ramirez* case, the most consequential result may be its impact on disclosure violations. The decision may make it difficult to establish standing in federal court for violations of disclosure requirements in consumer protection disclosure laws such as the FCRA or the Truth in Lending Act (TILA). The Supreme Court seems to have created a requirement that disclosure violations must result in subsequent additional harm, *i.e.* "downstream consequence," before a consumer can seek remedy in federal court. The *Ramirez* decision could be interpreted to mean that the failure of a credit card lender to mail cardholders their monthly statements by itself is not redressable in federal court unless the cardholders can show some other harm besides being deprived of this familiar and critical disclosure - *e.g.*, that they missed a payment deadline or failed to catch a fraudulent charge because they didn't receive the statement. The *Ramirez* decision could seriously hamper the ability of private consumer litigants to enforce disclosure requirements, leaving enforcement to already overburdened public agencies.

The *Ramirez* decision also reinforces the reality that disclosures are simply inadequate to protect consumers from abuse and exploitation, an argument that consumer advocates have been making for many decades before the decision. Disclosures are often ineffective in preventing companies from exploiting consumers – after all, we don't protect bank tellers by requiring bank robbers to disclose that they intend to commit armed robbery–we make armed robbery illegal. Now disclosures are both ineffective *and* unenforceable. Unfortunately, Congress and state legislatures often end up passing laws that require disclosures precisely because they are such a weak form of protection and thus palatable to the industries supposedly being regulated.

Ironically, while Congress and state legislatures are quick to adopt disclosure requirements, courts are much less eager to enforce them, a trend that may have culminated with the Ramirez decision. For example, courts had already deemed that actual damages were unavailable for certain disclosure violations under TILA, unless the consumer could show something additional, such as detrimental reliance. National Consumer Law Center, Truth in Lending § 11.5.4.1 (10th ed. 2019), updated at www.nclc.org/library. Earlier, the Supreme Court in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 66 (2007), had noted that commonplace notices "take on the character of formalities, and formalities tend to be ignored," and that they "mean just about nothing and go the way of junk mail." The *Ramirez* decision may be an extension of the Court's contempt for commonplace notices, but it also may be an ironic recognition that disclosures have very little impact.

The *Ramirez* decision means that it is now doubly true that lawmakers must stop relying on disclosures to protect consumers and adopt substantive, meaningful protections, because disclosure requirements are not only ineffective but they are now much more difficult to enforce.

The Toxic Poison of Federal Preemption after the Ramirez Decision

Conservative scholars have embraced *Ramirez* by characterizing it as a return to historical federalism, constraining the power of Congress to create novel and innovative rights not rooted in the ancient common law. For example, in a recent Hill article, Jim Harper of the American Enterprise Institute hailed *Ramirez* by stating:

> "It was never thought that Congress would be in the business of defining and defending private parties' rights against each other or designing intricate regulatory systems. Those things were the province of the states, according to the original design of the Constitution. States run by far more accessible legislators were supposed to be our national centers of gravity. Think of *Ramirez* as an improvisation required by the distended state of federal power."

There is a huge hole, however, in the acclaim of Mr. Harper and others that the *Ramirez* decision represents some sort of blissful return to states' rights – federal preemption. At least with respect to the FCRA, states are significantly handicapped from passing laws that fill in the hole left by the *Ramirez* decision because of the oppressive preemption provisions in the FCRA.

The FCRA has a messy, complicated preemption scheme. There are three different types of preemption that govern individual sections, and even subsections, of the Act. Such convoluted statutory language has inevitably generated a plethora of court decisions, some of which unfortunately take extreme positions on preemption. For example, in Consumer Data Indus. Ass'n v. Frey, 495 F. Supp. 3d 10 (D. Me. 2020), the federal district court interpreted the limited preemption for the FCRA's obsolescence limits for negative information and other discrete, specific provisions of section 1681c of the Act as preempting *any* state law regulating the contents of consumer reports. (This case is on appeal; NCLC has filed an amicus brief.)

Thus, the premise that Ramirez will return power to the states is highly questionable at best. Indeed, in providing technical assistance to legislative staff and advocates in several states, I've witnessed how the industry uses preemption as a cudgel to prevent the passage of state laws that attempt to provide even modest assistance to consumers. In the early days of COVID-19, a number of states attempted to pass protections simply to allow consumers to include an alert or personal statement in credit reports that they had been economically impacted by the pandemic, but faced menacing threats of preemption by industry – threats that ultimately blocked state laws to help pandemic-affected consumers except in D.C.

Conservatives may sing the praises of Ramirez in making states the "national centers of gravity" but their words ring hollow in the face of how the FCRA's federal preemption has been weaponized by the credit reporting industry. Apparently, federalism prevails for nullifying consumer rights but not for passing them in the states. We urge states to fight back against this weaponization given how Congress's ability to protect consumers has been weakened by the Supreme Court's *Ramirez* decision.

The FCRA's grand bargain has been nullified

Another consequence of the *Ramirez* decision is that the legislative bargain at the heart of the original FCRA has been annulled. When the FCRA was passed in 1970, consumers gained the protections of disclosure, accuracy and dispute resolution protections; in exchange, they gave up the ability to bring tort claims such as defamation and libel unless they could show actual malice or willfulness. See National Consumer Law Center, Fair Credit Reporting § 10.4.1.2 (9th ed. 2018) (discussing legislative history of the FCRA). The trade gave consumers a handful of protections that were more comprehensive than traditional tort claims, but at the price of severely curtailing such claims.

Now those same protections have been seriously weakened by Ramirez. The irony is that the Supreme Court's decision in Ramirez limits standing to those protections that are analogous to common law claims – the very claims that the FCRA severely restricted as part of the legislative bargain in 1970.

Thus, the FCRA's grand legislative bargain has been nullified. As with the breaking of treaties with Native American tribes, the nullification of this agreement means that all the benefit has gone to the more powerful party - the credit bureaus - while the less powerful party – the American consumer – is left with nothing but broken promises.

Solutions

1. Injunctive Relief

The Supreme Court's decision in *Ramirez* was based on a Constitutional issue, but Congress is not powerless to act to remedy the situation. In fact, the majority opinion points to the solution – establishing the right of consumers to seek injunctive relief under consumer protection statutes like the FCRA. The opinion states that standing is available in that "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2197 (2021)

Congress should explicitly authorize injunctive relief for all federal consumer protection laws with a private remedy, including the FCRA, TILA, the Real Estate Settlement and Procedures Act, the Fair Debt Collection Practices Act, the Electronic Funds Transfer Act, the Equal Credit Opportunity Act, and many others.

2. Removal of Preemption

If the federal government cannot create new consumer protections to respond to new threats and emerging technology, the states are our only hope to do so. But they cannot fulfill this critical role if their ability to protect consumers is gutted by federal preemption. It is a grotesque and undemocratic proposition for the Supreme Court to essentially say Congress cannot adopt new protections enforceable in federal courts that deviate too much from the common law, but it can preempt the ability of the states to adopt such new rights, leaving consumers defenseless in the face of abuse by big businesses.

In terms of the FCRA, the *Ramirez* decision leaves consumers with even fewer tools to defend themselves against the already-arrogant oligopoly of credit bureaus. The federal preemption in the FCRA and other statutes affecting consumers, both the consumer protection laws listed above as well as banking laws such as the National Bank Act, should be lowered to constitute floors rather than ceilings.

And if confronted by the credit reporting industry's hair trigger threats of preemption, states must be bold and undeterred in their efforts to protect consumers. While Congress should act to authorize injunctive relief for all federal consumer protection laws, the states just might be the best hope of reining in the terrible abuses that the credit bureaus can inflict on consumers.

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