



**State of Wisconsin**  
*Department of Financial Institutions*

Tony Evers, **Governor**

Kathy Blumenfeld, **Secretary**

September 10, 2021

**VIA EMAIL**



Dear Attorney [REDACTED]:

Like the Wisconsin Consumer Act, the federal Fair Credit Reporting Act (FCRA) provides that one who violates its provisions is liable to the affected customer for actual damages and/or statutory penalties.<sup>1</sup> The availability of those statutory penalties helps ensure that consumers can vindicate their legal rights in court, even “[w]here the actual damages are immeasurable or do not adequately provide the incentive to the consumer to bring action or deter violations by the creditor.”<sup>2</sup>

This summer, in *TransUnion LLC v. Ramirez*,<sup>3</sup> a 5-4 majority of the United States Supreme Court found that an FCRA violation alone is insufficient to allow affected consumers to obtain relief in federal courts. It held that Article III of the U.S. Constitution “confines the federal judicial power to the resolution of ‘Cases’ and ‘Controversies’” in which the plaintiff has suffered a “concrete harm”—and that a violation of a consumer’s legal rights, without more, is not necessarily a “concrete harm” for purposes of that analysis.<sup>4</sup>

The *TransUnion* decision speaks to the jurisdiction of federal courts. You’ve asked whether this Department believes that decision, either directly or by implication, impacts the ability of *state* courts to redress violations of the Consumer Act that are not accompanied by “concrete harm” to the consumer.

It does not. State court jurisdiction is determined by state constitutional and statutory law, not federal precedent,<sup>5</sup> and the Wisconsin Constitution extends the state judicial power to

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<sup>1</sup> Compare WIS. STAT. §§ 425.302 to 425.307 with 15 U.S.C. § 1681n. Prevailing consumers are also entitled to reimbursement of their attorney fees. Wis. Stat. § 425.308; 15 U.S.C. § 1681n(c).

<sup>2</sup> THOMAS D. CRANDALL, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334, 377.

<sup>3</sup> 141 S.Ct. 2190 (June 25, 2021).

<sup>4</sup> *TransUnion*, 141 S.Ct. at 2203, 2214.

<sup>5</sup> As the U.S. Supreme Court has recognized, state courts “are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of *federal law*,” such as the right to bring claims under the FCRA. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (cited in *TransUnion*, 141 S.Ct. at 2224 n.9 (Thomas, J., dissenting)) (emphasis added). Those limitations are certainly inapplicable to state courts addressing issues of *state law*, like the Consumer Act.

“all matters civil and criminal within this state.”<sup>6</sup> Unlike their federal counterparts, “no [state] circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.”<sup>7</sup>

That is not to say that Wisconsin courts do not evaluate a litigant’s standing to bring a claim. They do.<sup>8</sup> But unlike federal courts, state courts assess standing as a matter of judicial policy rather than constitutional mandate.<sup>9</sup>

That distinction matters. Whereas the U.S. Constitution invalidates legislative efforts to bestow federal courts with greater jurisdiction than Article III permits, Wisconsin judicial policy cannot override Wisconsin statutory language. Therefore, in state court cases where “substantive statutory or constitutional provisions are at issue,” standing is determined primarily by reference to statutory or constitutional intent—*i.e.*, whether there is an injury to a “legally protectable interest” and “whether the injured interest of the party whose standing is challenged falls within the ambit of the statute or constitutional provision involved.”<sup>10</sup>

The ambit of the relevant provisions of the Consumer Act, which appear primarily in a subchapter entitled “Customer’s Remedies,”<sup>11</sup> is broad. Those provisions state that a person “who commits a violation” of the Act “is liable to the customer” for actual damages, a statutory penalty, or both, depending on the nature of the violation, plus reimbursement of their reasonable attorney fees.<sup>12</sup> A customer seeking actual damages would need to prove actual measurable harm arising from the violation, of course, but the legislature did not make a showing of concrete harm a prerequisite to recovery of the statutory penalty (plus reasonable attorney fees) for a violation of the customer’s rights.

The absence of a “concrete harm” requirement is a critical feature of the overall legislative scheme. The Consumer Act “depends upon private lawsuits for its enforcement,”<sup>13</sup> and effective private enforcement requires that private parties be able to seek statutory penalties for violations “[w]here the actual damages are immeasurable or do not adequately provide the incentive to the consumer to bring action or deter violations by the creditor.”<sup>14</sup> This helps ensure that “important legal questions for both the consumer and the creditor which bear on the public policy of consumer protection”<sup>15</sup> receive answers, “that violations of the [Act] will not go unprosecuted,”<sup>16</sup> and that the “basic purpose” of the Consumer Act’s remedial provisions—“to induce compliance with the [Act] and thereby promote its underlying objects”<sup>17</sup>—is met.

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<sup>6</sup> WIS. CONST. art. VII § 8 (emphasis added).

<sup>7</sup> *Village of Trempeleau v. Mikrut*, 2004 WI 79, ¶ 8, 273 Wis. 2d 76, 681 N.W.2d 190.

<sup>8</sup> *See, e.g., Foley-Ciccantelli v. Bishop’s Grove Condo. Ass’n*, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789.

<sup>9</sup> *Id.* ¶ 40 n.18.

<sup>10</sup> *Id.* ¶ 54.

<sup>11</sup> WIS. STAT. ch. 425, subch. III.

<sup>12</sup> *See* WIS. STAT. §§ 425.302 to 425.308.

<sup>13</sup> *First Wis. Nat’l Bank v. Nicolaou*, 113 Wis. 2d 524, 538-539, 335 N.W.2d 390 (1983).

<sup>14</sup> CRANDALL, *supra* note 2.

<sup>15</sup> *First Wis. Nat’l Bank*, 113 Wis. 2d at 539.

<sup>16</sup> *Suburban State Bank v. Squires*, 145 Wis. 2d 445, 450, 427 N.W.2d 393 (Ct. App. 1988).

<sup>17</sup> *First Wis. Nat’l Bank*, 113 Wis. 2d at 533.

For all these reasons, *TransUnion* and other federal cases concerning the Article III jurisdiction of federal courts have no bearing on Wisconsin state courts' ability to hear claims alleging violations of the Wisconsin Consumer Act.

Sincerely,

/s/ Matthew Lynch

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