TransUnion Ruling Should Help Curb DC Consumer Claims

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While courts in New York and California host most of the nation's class action litigation targeting food and beverage marketing, one increasingly popular jurisdiction for similar litigation remains under the radar: Washington, D.C.

The U.S. Supreme Court's June decision in TransUnion LLC v. Ramirez[1] has the potential to either slow or attract more of this litigation in the local courts in the nation's capital.

As explored in a new research paper we wrote with Adriana Paris, published by the U.S. Chamber Institute for Legal Reform,[2] advocacy groups are increasingly using a unique provision of the D.C.'s consumer law to advance their policy goals in the courts.

D.C.'s Consumer Protection Procedures Act, or CPPA, allows individuals and organizations to bring lawsuits as private attorneys general.[3]

The statute authorizes a public interest or nonprofit organization to bring claims on behalf of itself, its members, and the general public.[4] The statute also provides that an organization may purchase a product to test or evaluate for the purpose of bringing a lawsuit.[5]

Taking advantage of these provisions, a handful of advocacy groups have filed dozens of lawsuits targeting food and beverage marketing since 2019. Additional CPPA private attorneys general actions take aim at other consumer products.

A handful of these lawsuits are greenwashing-type claims that challenge whether a company lives up to its labeling, website or social media representations regarding the use of environmentally sustainable practices or humane treatment of animals.[6]

For example, **a complaint filed** in June by the Berkeley, California-based Earth Island Institute alleges that Coca-Cola Co. cannot represent itself as an environmentally friendly company until it completely stops selling single-use plastic bottles.[7]

Other common CPPA private attorneys general claims by advocacy groups target products marketed as "pure," "natural," "clean," or just generally safe, alleging that tests detected traces of a chemical or some other substance.

These lawsuits assert the presence of "quantifiable amounts" of methylene chloride in decaffeinated coffee;[8] glyphosate residue in tea,[9] sandwiches,[10] pet food,[11] and other products[12]; and heavy metals or BPA in prenatal vitamins,[13] infant formula,[14] and honey,[15] for example.

In some instances, plaintiffs lawyers have used the CPPA to target practices with little connection to D.C. For instance, a lawsuit filed by Food & Water Watch relies on the CPPA to challenge working conditions in pork-producer Smithfield's plants in South Dakota and several other states during the COVID-19 pandemic.[16] The complaint is premised on statements made by the company on its website, and through social media and two

newspaper ads regarding its decision to operate during the pandemic to sustain the nation's food supply.

Other organizations that bring these types of lawsuits in D.C. include the Organic Consumer Association, the Clean Label Product Foundation, and GMO Free USA / Toxin Free USA. Filing these CPPA claims provides an opportunity for the organization to issue press releases, generate earned media, show value to their membership, and raise money.

By bringing claims on behalf of organizations, plaintiffs lawyers do not need to locate a local consumer to serve as a plaintiff in the lawsuit who claims to have purchased the product and experienced a financial loss as a result of a company's marketing.

These CPPA private attorneys general actions do not need to fulfill class certification requirements and typically seek changes to labeling or business practices. While the complaints ordinarily do not seek monetary damages, they demand attorneys' fees, expert witness fees, and costs. Those litigation expenses, combined with the potential for intrusive discovery and reputational harm, pressure defendants to settle regardless of the merits of the complaint.

In any CPPA action, a court may grant a motion to dismiss if a plaintiff fails to assert a plausible claim that reasonable consumers would be misled by the challenged representation[17] and that this statement would be material to a decision to purchase the product for a significant number of consumers.[18] Before reaching this question, however, courts must decide the threshold issue of whether an organization has standing to bring the claim.

The statute itself provides constraints. The CPPA requires a "sufficient nexus" between an organization's mission and the consumer interests involved in the lawsuit.[19]

This nexus is absent in some cases, for example, when a group whose mission is to promote organic agriculture such as the Organic Consumers Association targets the marketing of products that do not claim to be organic.

In addition, when cases are premised on an organization's testing a product, there must be some actual testing involved. In Praxis Group v. Coca-Cola Co., the Superior Court of the District of Columbia said in 2019 that a complaint "must provide more than labels and conclusions," i.e., taking issue with the nutritional information printed on the label, without conducting any scientific or physical testing of the product, does not suffice.[20]

Plaintiffs contend that fulfilling the CPPA's minimal statutory requirements is sufficient to permit a nonprofit or public interest organization to file suit. The U.S. Supreme Court's Article III jurisprudence, however, requires more.

Article III standing reserves judicial power for cases in which a plaintiff has experienced a concrete harm caused by the defendant's conduct. An organization can establish Article III standing by showing that it had to divert significant resources from its programs to respond to the practice at issue.[21]

To obtain standing as a tester, as the Supreme Court established in Havens Realty v. Coleman, a groundbreaking 1982 civil rights decision involving housing discrimination, a plaintiff must show that, due to an unlawful misrepresentation, the plaintiff suffered a specific injury "in precisely the form the statute was intended to guard against."[22]

In Spokeo v. Robins, the Supreme Court ruled in 2016 that a statutory violation alone is insufficient to qualify as an injury in fact for Article III standing purposes.[23]

The high court's June decision in TransUnion v. Ramirez reinforces and expands on this holding, emphasizing that a plaintiff is not automatically granted standing to sue a private defendant for violation of a statute, such as the CPPA. The violation must concretely harm the plaintiff to confer standing.[24] "[U]nder Article III, an injury in law is not an injury in fact."[25]

Article III does not grant unharmed plaintiffs "freewheeling power to hold defendants accountable for legal infractions."[26] As Justice Clarence Thomas's dissent recognizes, though, Ramirez "might actually be a pyrrhic victory" for defendants since the decision only holds that federal courts lack jurisdiction to hear cases in which plaintiffs have not experienced a real world injury.[27]

While D.C. courts are not bound by the U.S. Constitution's Article III standing requirements, D.C.'s highest court has specifically ruled in CPPA cases that "this court has followed consistently the constitutional standing requirement embodied in Article III."[28] The District of Columbia Court of Appeals has reaffirmed that principle at least three times since 2015.[29]

These rulings are consistent with the intent of the D.C. Council in providing organizational standing under the CPPA. When the D.C. Legislature amended the CPPA in 2012, it indicated that it intended "to clarify that the CPPA allows for non-profit organizational standing to the fullest extent recognized by the District of Columbia Court of Appeals in its past and future decisions addressing the limits of constitutional standing under Article III."[30]

Some D.C. Superior Court judges have adhered to Article III injury-in-fact requirements in CPPA litigation.[31] Others have taken a more relaxed approach to standing than federal courts, at least at the pleadings stage,[32] or deemed a violation of a statutory right under the CPPA sufficient to confer standing on an organization.[33]

D.C. courts now face a stark choice. If D.C. follows TransUnion and requires plaintiffs to show they experienced a concrete injury from an alleged statutory violation, its courts will help ensure that the CPPA is used in response to actual harm to D.C. consumers.[34]

On the other hand, if D.C. law does not adhere to Article III, its local courts may become politicized and increasingly used by advocacy groups to promote their agendas,[35] accelerating the pace of litigation.

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Disclosure: The authors are co-writers of the U.S. Chamber Institute for Legal Reform paper encouraging courts and legislatures to curb consumer class actions targeting food and beverage marketing.

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

[2] Cary Silverman, James Muehlberger and Adriana Paris (Shook, Hardy & Bacon L.L.P.), "The Food Court: Developments in Litigation Targeting Food and Beverage Marketing," Institute for Legal Reform, August 2021, available at https://instituteforlegalreform.com/research/the-food-court-developments-in-litigation-targeting-food-and-beverage-marketing/.

[3] D.C. Code Ann. § 28-3905(k)(1)(B).

[4] D.C. Code Ann. § 28-3905(k)(1)(C), (D).

[5] See id.

[6] See, e.g., GMO Free USA d/b/a Toxin Free USA v. Aldi Inc., No. 2021 CA 001694 (D.C. Super. Ct. filed May 21, 2021) (sustainable salmon); Organic Consumers Ass'n v. D'Artagnan, Inc., No. 2020 CA 003559 B (D.C. Super. Ct. filed Aug. 12, 2020) (foie gras); Organic Consumers Ass'n v. Champion Petfoods USA Inc., No. 2020 CA 003515 B (D.C. Super. Ct. filed Aug 10, 2020) (free-run poultry); Organic Consumers Ass'n v. Mowi ASA, No. 2020 CA 003368 B (D.C. Super. Ct. filed July 30, 2020) (sustainable salmon); Animal Equality v. Champion Petfoods USA, Inc., No. 2020 CA 003279 B (D.C. Super. Ct. filed July 24, 2020) ("wild-caught" fish); Animal Outlook v. Cooke Aquaculture, Inc., No. 2020 CA 002908 B (D.C. Super. Ct. filed June 26, 2020) (sustainable salmon); Organic Consumers Ass'n v. Smithfield Foods, Inc., No. 2020 CA 002566 B (D.C. Super. Ct. filed May 20, 2020) ("safest" pork); Organic Consumers Ass'n v. Noble Foods, Inc. d/b/a The Happy Egg Co. USA, No. 2020 CA 002009 B (D.C. Super. Ct. filed Mar. 24, 2020) (free-range hens); Food & Water Watch, Inc. v. Tyson Foods, Inc., No. 2019 CA 004547 B (D.C. Super. Ct. filed July 10, 2019) (environmentally responsible chickens); Food & Water Watch, Inc. v. Pilgrim's Pride Corp., No. 2019 CA 000730 B (D.C. Super. Ct. filed Feb. 4, 2019) (same).

[7] See Earth Island Inst. v. The Coca-Cola Co., No. 2021 CA 001846 B (D.C. Super. Ct. filed June 4, 2021).

[8] See, e.g., Clean Label Project Found. v. Peets Coffee, Inc., No. 2020 CA 004565 B (filed Oct. 30, 2020); Clean Label Project Found. v. The Kraft Heinz Co., No. 2020 CA 003806 (D.C. Super. Ct. filed Aug. 28, 2020); Clean Label Project Found. v. Keurig Green Mountain Inc., No. 2020 CA 003566 B (D.C. Super. Ct. filed Aug. 12, 2020); Clean Label Project Found. v. Peets Coffee & Tea Holdco, Inc., No. 2020 CA 003199 B (D.C. Super. Ct. filed July 20, 2020); Clean Label Project Found. v. Amazon.com, Inc., No. 2020 CA 003197 B (D.C. Super. Ct. filed July 20, 2020); Clean Label Project Found. v. Rowland Coffee Roasters, Inc., No. 2020 CA 003191 B (D.C. Super. Ct. filed July 20, 2020).

[9] See, e.g., Organic Consumers Ass'n v. Associated British Foods PLC, No. 2019 CA 004412 B (D.C. Super. Ct. filed July 3, 2020) (alleging tests detected glyphosate in "pure" tea).

[10] See, e.g., Clean Label Project Found. v. Panera, LLC, No. 2019 CA 001898 B (D.C. Super. Ct. filed May 22, 2019) (alleging tests detected glyphosate and other pesticide and fungicide residue in bread, sandwiches, cookies, and other goods marketed as "100%

clean").

[11] See, e.g., GMO Free USA v. Nestle Purina Petcare Co., No. 2020 CA 002775 B (D.C. Super. Ct. filed June 12, 2020); Toxin Free USA v. J.M Smucker Co., No. 2019 CA 003192 B (D.C. Super. Ct. filed May 14, 2020).

[12] See, e.g., GMO Free USA d/b/a Toxin Free USA v. Target Corp., No. 2020 CA 004463 B (filed D.C. Super Ct. filed Oct. 23, 2020) (alleging "all natural" raisins contain traces of insecticides and fungicides).

[13] See, e.g., Clean Label Project Found. v. Now Health Group, Inc., No. 2020 CA 004013 B (D.C. Super. Ct. filed Sept. 16, 2020); Clean Label Project Found. v. Pharmavite, LLC, No. 2020 CA 003912 B(D.C. Super. Ct. filed Sept. 4, 2020); Clean Label Project Found. v. Ortho Molecular Products, Inc., No. 2020 CA 003495 B (D.C. Super. Ct. filed Aug. 7, 2020).

[14] See, e.g., Clean Label Project Found. v. Mead Johnson & Co., No. 2020 CA 003713 B (D.C. Super. Ct. filed Aug. 21, 2020); Clean Label Project Found. v. The Hain Celestial Group Inc., No. 2020 CA 003607 B (D.C. Super. Ct. filed Aug. 14, 2020).

[15] See Clean Label Project Found. v. Whole Foods Market Inc., No. 2020 CA 003196 B (D.C. Super. Ct. filed July 20, 2020) (alleging detection of 9% non-sugar honey and a quantifiable amount of lead in "100% pure" honey).

[16] Food & Water Watch v. Smithfield Foods, Inc., No. 2021 CA 002020 B (D.C. Super. Ct. filed June 16, 2021).

[17] Grayson v. AT&T Corp., 15 A.3d 219, 251 (D.C. 2011) (affirming dismissal where plaintiff made "no showing . . . that a reasonable consumer would consider [the omitted] information . . . to be material to the decision to purchase a calling card from that company"); Pearson v. Chung, 961 A.2d 1067, 1075 (D.C. 2008) (recognizing that if "[a]ll statements that [plaintiff] points to as misleading are in fact either accurate, not misleading to a reasonable consumer, or mere puffery," there is no actionable conduct under the CPPA).

[18] D.C. Code Ann. § 28-3904(e), (f), (f-1) (requiring a "material" misrepresentation or omission that has a "tendency to mislead" consumers); see also Floyd v. Bank of Am., 70 A.3d 246, 256 (D.C. 2013) (finding a statement is material "if a significant number of unsophisticated consumers would find that information important in determining a course of action").

[19] D.C. Code Ann. § 28-3905(k)(1)(D).

[20] Praxis Project v. Coca-Cola Co., No. 2017 CA 004801 B, 2019 D.C. Super. LEXIS 17 (Oct. 1, 2019).

[21] Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982); see also D.C. Appleseed Ctr. for Law and Justice, Inc. v. D.C. Dep't of Ins., Sec., & Banking, 54 A.3d 1188, 1206-09 (D.C. 2012) (requiring a "direct conflict" between the defendant's conduct and the organization's mission to establish Article III standing).

[22] Havens Realty, 455 U.S. at 373-74.

[23] Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

[24] Transunion, 141 S. Ct. at 2200 ("No concrete harm, no standing.").

[25] Id. at 2205.

[26] Id.

[27] Id. at 2224 n.9 (Thomas, J., dissenting).

[28] Grayson v. AT&T Corp., 15 A.3d 219, 224 (D.C. 2011).

[29] See Little v. SunTrust Bank, 204 A.3d 1272, 1273-74 (D.C. 2019); Rotunda v. Marriott Int'l, Inc., 123 A.3d 980, 987 (D.C. 2015); Stone v. Landis Constr. Co., 120 A.3d 1287, 1289 (D.C. 2015); see also Vining v. Executive Bd. of Dist of Columbia Health Benefit Exch. Auth., 174 A.3d 272, 278 (D.C. 2017).

[30] Council of the District of Columbia, Committee on Public Service & Consumer Affairs, Report on Bill 19-0581, the "Consumer Protection Amendment Act of 2012," at 5 (Nov. 28, 2012).

[31] See, e.g., Praxis Project, 2019 D.C. Super. LEXIS 17, at *27-28; Animal Legal Def. Fund v. Hormel Foods Corp., 2019 D.C. Super. LEXIS 7, at *15-18 (Apr. 8, 2019).

[32] See, e.g., Organic Consumers Ass'n v. Tysons Foods, Inc., 2021 D.C. Super. LEXIS 7, at *7-8 (Mar. 31, 2021); Organic Consumers Ass'n v. Smithfield Foods, Inc., 2020 D.C. Super. LEXIS 28, at *12-13 (Dec. 14, 2020); Toxin Free USA v. J.M. Smucker Co., 2019 D.C. Super. LEXIS 15, at *9 (Nov. 6, 2019).

[33] See, e.g., Organic Consumers Ass'n v. Noble Foods, Inc., 2020 D.C. Super. LEXIS 13, at *5-6 (Aug. 25, 2020); Clean Label Project Found. v. Panera, LLC, 2019 D.C. Super. LEXIS 14, at *5-8 (Oct. 11, 2019).

[34] Whether D.C. courts require Article III standing also has implications for private attorney general actions filed on behalf of individual plaintiffs. See, e.g., Order Granting Motion to Dismiss, Fahey v. The Bigelow Tea Co., No.2020 CA 004563 B, at 10 (D.C. Super. Ct. Mar. 18, 2021) (finding serial plaintiff who sought to represent the general public did not establish standing as a tester because he "fails to articulate in his Complaint at any point what specific testing, investigating, or evaluating Plaintiff performed" and finding the complaint's conclusory and vague allegations did not sufficiently allege that he, or the general public, experienced an injury).

[35] See Frank Cruz-Alvarez & Britta Stamps Todd, Supreme Court Observations: Transunion v. Ramirez, WLF Legal Pulse, July 9, 2021; Alison Frankel, State Court Will be Next Frontier for Consumer Class Actions under Federal Law, Reuters, June 28, 2021.