11.2.1.3.1 Standing generally

Prior to the recent Supreme Court decision in *Spokeo, Inc. v. Robins,*[1] most courts had held that an individual whose rights under the FCRA have been violated has suffered an injury in fact, and had Article III standing to sue in federal court[2] regardless of whether the plaintiff sought actual damages.[3] In circumstances where the plaintiff does not seek actual damages, but instead seeks statutory damages for willful violations,[4] practitioners should be ready to address the issue of Article III standing. Many pre-*Spokeo* decisions on the issue of standing remain good law. Yet, practitioners wishing to rely on them should consider them in light of *Spokeo*, as explained below.

Article III standing has three elements, as reiterated in *Spokeo*: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The party invoking federal jurisdiction, bears the burden of establishing these elements. At the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element."[5] The point of contention in *Spokeo* was the first of these three elements—injury in fact. The Court stated that "to establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized'

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1 ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447 (May 16, 2016).

2 Article III does not apply in state courts. Standing requirements vary from state to state.

3 *See e.g.* Robins v. Spokeo, Inc., 742 F.3d 409, 410 (9th Cir. 2014) (holding that an individual has Article III standing to sue a website's operator under the Fair Credit Reporting Act for publishing inaccurate personal information about himself), *vacated and remanded sub nom*, Spokeo v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447 (May 16, 2016); Beaudry v. TeleCheck Services, Inc. 579 F.3d 702, 707 (6th Cir. 2009) (allegation that defendants were generating credit reports based on inaccurate information due to their failure to update their databases to accommodate the new Tennessee driver's license numbering system sufficient to create standing); Dreher v. Experian Info. Solutions, Inc., 2014 WL 6834867, at *3–4 (E.D. Va. Dec. 3, 2014) (analogizing legal rights under FCRA to informational injuries the Supreme Court has recognized as creating standing); Jones v. Experian Info. Solutions, Inc., 982 F. Supp. 2d 268, 271–72 (S.D.N.Y. 2013) (CRA's alleged failure to conduct a reasonable reinvestigation of disputed item constituted a failure to fulfill statutory obligations that caused plaintiff an actual, concrete injury that may be redressed through statutory and punitive damages); Amason v. Kangaroo Express, 2013 WL 987935 (N.D. Ala. Mar. 11, 2013) (credit card number truncation claims); Henry v. Teletrack, Inc., 2012 WL 769763 (N.D. Ill. Mar. 7, 2012); Brittingham v. Cerasimo, Inc., 621 F. Supp. 2d 646, 648 (N.D. Ind. 2009). *See also* § 11.2.3.3.5, *infra* (discussing standing of the class representative). However, in a line of security or data breach cases, some of which included FCRA claims, the majority of courts have held plaintiffs alleging an increased risk of identity theft and costs to monitor credit activity lacked Article III standing. *Compare* Owens v. Rodale, 2015 WL 575004 (E.D. Mich. Feb. 11, 2015) (finding Article III standing in common law data mining claims), *with* Reilly v. Ceridian Corp. 664 F.3d 38 (3d Cir. 2011) (common law claims); Peters v. St. Joseph Services Corp., 74 F. Supp. 3d 847 (S.D. Tex. 2015); Green v. Ebay Inc., 2015 WL 2066531 (E.D. La. May 4, 2015); In re Horizon Healthcare Services Inc. Data Breach Litigation, 2015 WL 1472483 (D.N.J. Mar. 31, 2015).

4 *See* § 11.11.4.1.2, *infra*.

5 Spokeo, Inc. v. Robins, Inc., ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *5 (May 16, 2016) (citing Friends of the Earth, Inc. v. Laidlaw Envt'l Services (TOC), Inc., 528 U.S. 167, 180–81 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130 (1992)).

and 'actual or imminent, not conjectural or hypothetical.'"[6] For an injury to be particularized, it "must affect the plaintiff in a personal and individual way."[7] The Court found the particularity part of the injury-in-fact element was easily satisfied in the case before it. This left open the question whether the Ninth Circuit had properly considered the concreteness requirement.

The Court held that the Ninth Circuit had "elided" the particularity requirement of injury in fact with the concreteness requirement, and had therefore failed to determine whether a website operator's alleged violations of what the Court viewed as procedural requirements caused concrete injury.[8] The Court, however, did not reverse the holding of the Ninth Circuit that plaintiff Robins had adequately alleged standing. While noting that a bare procedural violation of the FCRA is not always enough, without more, to establish a concrete injury, it vacated and remanded so that the Ninth Circuit could consider in the first instance a question that it had not addressed: Did the allegations of procedural violations show a material risk of "concrete" injury?

The Court held that, for standing purposes, concrete injuries include intangible harms. Concrete means "real," not " abstract," but "it is not necessarily synonymous with 'tangible.' ... Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."[9] The Court also held that harm need not have already manifested itself in order to count as concrete. Rather, a "risk of real harm" can satisfy the requirement for concreteness for purposes of Article III.[10]

The Court noted: "Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, 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."[11] An example mentioned by the Court is slander, which is actionable because it is inherently damaging without showing actual damage to reputation, an intangible interest. Similarly, the Court observed that "Many traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right."[12] The harm can be actionable even if it is "difficult to

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6 *Id.* at *6.
7 *Id.*
8 *Id.* at *1.
9 *Id.* at *7.
10 *Id.* at *8.
11 *Id.*
12 *Id.* at *10.

prove or measure."[13]

Apart from intangible harms that have "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," *Spokeo* also recognized that Congress "may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.' "[14] The Court stated: "Congress is well positioned to identify intangible harms that meet minimum Article III requirements, [and] its judgment is also instructive and important."[15] The Court observed that Congress identified such intangible harms in enacting the FCRA: "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk."[16] Although "Article III standing requires a concrete injury even in the context of a statutory violation," "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."[17] The Court gave as examples of circumstances in which a plaintiff need not allege anything beyond a statutory violation the right to information that Congress had decided should be made public.[18]

How *Spokeo* affects the analysis of claims for willful violations of a host of specific FCRA rights and prohibitions is the subject of the remainder of this subsection on standing.

11.2.1.3.2 Obtaining or using a consumer report without a permissible purpose

One of the primary protections of the FCRA is the requirement that users have a permissible purpose when they obtain or use a consumer report,[19] discussed in depth in Chapter 7, *infra*. Claims for accessing or using a consumer report without a permissible purpose are classic invasion of privacy claims. Obtaining a report without a permissible purpose constitutes an invasion of a legally protected interest in the confidentiality of the consumer's sensitive personal information. The harm may be intangible, but is it is very real and concrete. The prohibition is also a substantive provision, not procedural, in that it is a direct protection for the privacy of a consumer's information.

The harm created by impermissible access to a consumer report has a "close relationship to a

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13 *Id.* at *8.
14 *Id.* at *7 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992)).
15 *Id.* at *2.
16 *Id.* at *8.
17 *Id.* at *8 (emphasis in the original).
18 *Id.* (citing to Federal Election Comm'n v. Akins, 524 U.S. 11, 20–25 (1998); Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989)).
19 15 U.S.C. § 1681b(a) and (f).

[common law] harm."[20] Accessing a consumer report without a permissible purpose would be similar to several common law torts that fall under the umbrella of invasion of privacy, such as the public disclosure of private facts[21] or intrusion upon seclusion (in this case, intrusion on financial information).[22] The tort of public disclosure of private facts has been applied to the publication of lists of debtors[23] and the disclosure of information for purposes of solicitation.[24] The tort of intrusion has been applied to cases where the defendant has illegitimately accessed personal or confidential information.[25]

Invasion of privacy is a quintessential "harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," and thus is a legally cognizable injury for standing purposes.[26] For more than a century, American courts have recognized that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other."[27] Because harms to an individual's privacy have traditionally been regarded as a cognizable basis for

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20 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *7 (May 16, 2016).

21 *See* § 16.3.3, *infra* (discussion of public disclosure of private facts). *See also* National Consumer Law Center, Fair Debt Collection § 9.3.4 (8th ed. 2014), *updated at* www.nclc.org/library

22 *See* § 16.3.4, *infra* (discussion of tort of intrusion). *See also* National Consumer Law Center, Fair Debt Collection § 9.3.2 (8th ed. 2014), *updated at* www.nclc.org/library; Restatement (Second) of Torts §§ 652A, 652B (setting forth elements), 652F, 652G (privileges) (1977).

23 *See, e.g.*, Trammell v. Citizens News Co., 148 S.W.2d 708 (Ky. 1941) (notice posted in store and published in newspaper); Brents v. Morgan, 299 S.W. 967 (Ky. 1927) (five by eight foot sign listing debtors in a store window); Mason v. Williams Discount Ctr., Inc., 639 S.W.2d 836 (Mo. Ct. App. 1982) (listing plaintiff's name under a list headed "NO CHECKS" in plain view of customers at checkout counter states claim).

24 *See, e.g.*, Biddle v. Warren Gen. Hosp., 698 N.E.2d 1007 (Ohio 1999) (patients stated claim against hospital and law firm, where hospital passed all patient registration forms to law firm, which sought out patients eligible for SSI or other benefits and offered to represent them in applying for these benefits).

25 *See, e.g.*, Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (improperly accessing bank records); Kausch v. Wilmore, 2009 WL 481346, at *4 (C.D. Cal. Feb. 24, 2009) (denying defendant's motion for summary judgment on an invasion of privacy claim arising from allegations that defendant had an impermissible purpose in obtaining plaintiff's credit report in relation to litigation); Capitol Records, Inc. v. Weed, 2008 WL 1820667 (D. Ariz. Apr. 27, 2008) (accessing hard disk and copying files without authorization is highly offensive; fact issue whether right to privacy waived by file-sharing); Rodgers v. McCullough, 296 F. Supp. 2d 895 (W.D. Tenn. 2003) (jury question whether conduct highly offensive where lawyer representing father in child custody matter improperly obtained mother's credit report in attempt to show she was irresponsible, untruthful, and financially unstable); Smith v. Bob Smith Chevrolet, 275 F. Supp. 2d 808 (W.D. Ky. 2003) (unable to rule as matter of law that accessing credit report for improper purpose not highly offensive); Pulla v. Amoco Oil Co., 882 F. Supp. 836 (S.D. Iowa 1994) (employer gained access to employee's credit card records, copied them, and put them in plaintiff's personnel file), aff'd in part, rev'd in part on other grounds, 72 F.3d 648 (8th Cir. 1995).

26 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *7 (May 16, 2016).

27 Restatement (Second) of Torts § 652A (1977); *see id.* cmt. a (noting that "the existence of a right of privacy is now recognized in the great majority of the American jurisdictions"). In his seminal 1890 article on the right to privacy, Justice Brandeis explained even then that "what is ordinarily termed the common-law right to intellectual and artistic property are . . . but instances and applications of a general right to privacy." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890). And American courts at the turn of the century identified the right of privacy as "derived from natural law," and traced the concept back to Roman and early English legal traditions. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905).

suit, a consumer's privacy injury would be sufficiently concrete "to constitute injury in fact."[28]

Note that the FCRA's protection against impermissible access or use does not mirror the elements of the torts of public disclosure of private facts or intrusion upon seclusion. However, the fact that statutory claims are not exactly the same as their common law analogs should not be a problem, as Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[29] In *Spokeo*, the Court's focus was on the type of harm that provides the standing, not the specific elements of the torts. The FCRA protection represents an adaptation and modernization of common law torts. Indeed, one of the legislative compromises that underlies the heart of the FCRA is a quid pro quo that, in exchange for its protections, the FCRA limits the common law tort liability of credit reporting agencies (CRAs), users, and furnishers if the consumer acquired knowledge of the information through an FCRA-required disclosure.[30]

Thus, even if impermissible access or use is not a harm redressable through a common law tort claim, it would meet the requirement of concreteness as interpreted by *Spokeo* because Congress so clearly identified it as a legally cognizable harm. One of the key purposes of the FCRA is "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and *a respect for the consumer's right to privacy*."[31] Congress made a determination when it passed the FCRA that the information within a consumer report should only be disseminated and used for specific purposes. The lead Senate sponsor, William Proxmire, stated in his opening statement when he chaired the hearings on the bill that would become the FCRA that:

> The aim of the Fair Credit Reporting Act is to see that the credit reporting system serves the consumer as well as the industry. The consumer has a right to information which is accurate; he has a right to correct inaccurate or misleading information; he has a right to know when inaccurate information is entered into his file; *he has a right to see that the information is kept confidential and is used for the purpose for which it is collected; and he has a right to be free from unwarranted invasions of his personal privacy*. The Fair Credit Reporting Act seeks to secure these rights."[32]

Senator Proxmire also stated:

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28 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *8 (May 16, 2016).
29 *Id.* at *7.
30 15 U.S.C. § 1681h(e). *See* § 10.4.1.2, *supra* (legislative history of immunity provisions).
31 15 U.S.C. § 1681(a)(4).
32 *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the S. Comm. on Banking and Currency*, 91st Cong. 2 (1969) (emphasis added).

> The fact that credit reporting agencies maintain files on millions of Americans, including their employment, income, bill paying record, marital status, habits, character and morals is not in and of itself so disturbing. What is disturbing is that this practice will continue, and will have to continue, if we continue to have an insurance system and a consumer credit system of the kind we have. What is disturbing is the lack of any public standards to ensure that the information is kept confidential and used only for its intended purpose. The growing accessibility of this information through computer- and data-transmission techniques makes the problem of confidentiality even more important.[33]

Thus, impermissible access or use of a consumer report presents very real and immediate concrete harms to the privacy interests of the individual consumer whose report has been accessed.

11.2.1.3.3 Claim for failure to follow reasonable procedures to assure maximum possible accuracy

The primary claim at issue in *Spokeo v. Robins* was a violation of section 1681e(b)'s requirement that CRAs "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. This is a typical claim brought when a consumer's report contains an inaccuracy. In most cases, the inaccuracy is obviously harmful on its face (e.g., late payment, defaulted credit account, debt in collection, criminal history, eviction).

Where there might be a standing challenge based on lack of concrete harm is if the failure to follow reasonable procedures either (1) does not result in any inaccuracies to the specific consumer bringing the case or (2) results in inaccuracies to that consumer that are supposedly not harmful. In terms of the first situation, there are actually no viable claims under the FCRA for such a violation. FCRA case law has consistently held that an actual inaccuracy is required for liability under section 1681e(b).[34] Thus, a violation of section 1681e(b) should never be about a bare procedural violation divorced from the concrete harm of the existence an item of information that is inaccurate on a consumer report.

In the second situation, the failure to follow reasonable procedures may result in an inaccuracy that is arguably not harmful because the inaccuracy consists of either positive or "neutral" information. *Spokeo v. Robins* itself presented such a scenario, in that Robins was a single and unemployed, but was portrayed as older, married with children, employed, relatively affluent, and having graduate degree.

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33 115 Cong. Rec. 2413 (1969).
34 *See* § 4.4.2, *supra* (citing numerous cases requiring an inaccuracy for liability under § 1681e(b)).

Robins had argued that this seemingly "positive" error could be harmful because it could portray him as overqualified for job prospects or as unwilling to move for employment. While the majority did not hold this was an adequate allegation, it did not hold it was inadequate, but remanded the case to the Ninth Circuit to conduct this analysis. In contrast, the dissent thought it was an adequate allegation of harm, noting that "Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market. ... The FCRA's procedural requirements aimed to prevent such harm."[35]

In terms of a supposedly "neutral" inaccuracy, the court presented an example of an incorrect zip code. At first glance, an incorrect zip code might not seem to present any harm. Note however, the court specifically stated that "It is difficult to imagine how dissemination of an incorrect zip code, without more, could work any concrete harm."[36] This language, of course, leaves open the possibility that there could be situations in which there is "more," where an erroneous zip code could result in harm to a consumer. Various commentators have pointed out that an incorrect zip code can result in a consumer becoming the victim of insurance redlining or being viewed as lying about his address.[37]

Refuting the lack of claimed harm from a positive or neutral inaccuracy depends on showing that these errors are either actually harmful or present a "risk of real harm." Practitioners who bring FCRA cases over "technical" errors or errors that portray the consumer in a positive light should always plead why that error is actually harmful, or presents a risk of real harm. For example, consider an error that shows a consumer more creditworthy than she actually is. In order to bring a section 1681e(b) claim, the consumer could argue that this error places her at risk of being improvidently granted credit, which could result in unmanageable debt—a "risk of real harm."

Note that the harm must be "actual and imminent, not conjectural or hypothetical."[38] Thus, where a report contains an incorrect zip code, it may be helpful to assert more than that there is a risk of harm because there is a theoretical chance that the consumer will pay a higher insurance rate. For example, plaintiff may wish to allege that there are certain insurers that actually engage in such

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35 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *16 (May 16, 2016) (J. Ginsburg, dissenting) (citations omitted).

36 *Id.* at *8 (emphasis added).

37 G.S. Hans, Center for Democracy & Technology, Spokeo Ruling Gives Few "Concrete" Answers on Privacy Rights (May 17, 2016), *available at* https://cdt.org/blog/spokeo-ruling-gives-few-concrete-answers-on-privacy-rights/; Daniel Solove, When Is a Person Harmed by a Privacy Violation? Thoughts on Spokeo v. Robins, Geo. Wash. L. Rev. On the Docket (May 19, 2016), *available at* https://www.linkedin.com/pulse/when-person-harmed-privacy-violation-thoughts-spokeo-v-daniel-solove.

38 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *6 (May 16, 2016) (citing *Lujan*, 504 U.S., at 560, 112 S. Ct. 2130).

redlining, that these insurers charge more for consumers who live in the zip code that is incorrectly listed on the plaintiff's report, and that these insurers use the type of reports at issue to determine residence or rates.

11.2.1.3.4 FACTA credit and debit card number truncation requirement

The FCRA, as amended by the Fair and Accurate Credit Transactions Act of 2003 (FACTA) requires merchants to truncate credit and debit card numbers on electronically printed receipts and prohibits them from printing the expiration date.[39] Congress enacted this provision to reduce the risk of identity theft, based on its determination that including the expiration date and more than the last five digits of a credit or debit card number on transaction receipts created an unacceptable the risk of theft. It is a substantive provision, in that it is a bright-line prohibition against disclosure of certain information that Congress thought should not be disclosed.[40] Every court prior to *Spokeo* that considered the issue has held that a consumer whose information was exposed in violation of the FACTA truncation requirement had standing under Article III.[41]

Identity theft was a major concern of Congress in passing FACTA. When Congressman Oxley, Chair of the House Financial Services Committee, made his opening statement in the legislative hearing for FACTA, he specifically noted:

> The FACT Act incorporates a number of provisions … aimed to reduce the incidence of identify theft and protect those who are victimized by this increasingly common form of criminal activity. The bill prohibits the printing of complete account numbers and expiration dates on credit and debit card receipts and requires verification of certain address changes so that consumers are less likely to have their accounts stolen. …. With these targeted reforms, the FACT Act will strike a serious blow against the identity theft criminals who have succeeded in victimizing millions of innocent

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39 15 U.S.C. § 1681c(g). *See* § 9.2.5.1, *supra.*

40 *See* Amason v. Kangaroo Exp., 2013 WL 987935, at *4 (N.D. Ala. Mar. 11, 2013) (FACTA creates "a ***substantive*** right to have one's financial information protected through truncation") (emphasis added).

41 Hammer v. Sam's East, Inc., 754 F.3d 492 (8th. Cir. 2014) (failing to truncate a credit card number violates a legal right, which results in an injury-in-fact sufficient to confer standing); Armes v. Sogro, Inc., 932 F. Supp. 2d 931 (E.D. Wis. 2013) (receiving a receipt that fails to truncate a credit card number violates a legal right, which results in an injury sufficient to confer standing); Amason v. Kangaroo Exp., 2013 WL 987935 (N.D. Ala. Mar. 11, 2013); Engel v. Scully & Scully, Inc., 279 F.R.D. 117, 124 (S.D.N.Y. 2011); Hammer v. JP's Sw. Foods, L.L.C., 739 F. Supp. 2d 1155, 1162–63 (W.D. Mo. 2010); Brittingham v. Cerasimo, Inc., 621 F. Supp. 2d 646, 650 (N.D. Ind. 2009); Miller v. Sunoco, Inc., 2008 WL 623806, at *2 (E.D. Pa. Mar. 4, 2008); Ramirez v. MGM Mirage, Inc., 524 F. Supp. 2d 1226 (D. Nev. 2007); Korman v. Walking Co., 503 F. Supp. 2d 755 (E.D. Pa. 2007); Ehrheart v. Lifetime Brands, Inc., 498 F. Supp. 2d 753 (E.D. Pa. 2007).

Americans over the years.[42]

In an earlier hearing on FACTA, Congressman Pat Toomey specifically noted the risk of untruncated credit card numbers, stating: "Someone can grab a credit card carbon out of a wastebasket and identify my credit card number and perhaps run up some charges. That is a terrible thing, obviously."[43]

On the Senate side, the Senate Report for the bill that was to become FACTA noted that "[t]he bill contains numerous measures which protect consumers from identity thieves. The legislation requires the truncation of credit and debit card account numbers on electronically printed receipts to prevent criminals from obtaining easy access to such key information."[44] Courts have also noted Congress's focus on identity theft in enacting the FACTA truncation requirement. The Seventh Circuit noted "identity theft is a serious problem, and FACTA is a serious congressional effort to combat it ... the less information the receipt contains the less likely is an identity thief who happens to come upon the receipt to be able to figure out the cardholder's full account information."[45]

Identity theft is a real harm and serious risk. It is a massive problem. In 2014, 12.7 million consumers were victims of identity thieves who collectively stole $16 billion.[46] The FTC reported that 2014 was the fifteenth consecutive year in which identity theft complaints outpaced all other types of consumer problems reported to the agency, numbering 332,646 for the year.[47] Thus, a violation of the FACTA truncation requirement presents a significant risk of this very harm that Congress intended to prevent—the unwanted dissemination of sensitive information that could be exploited by an identity thief. This type of risk is the very type of "risk of real harm" that the *Spokeo* court stated could satisfy

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42 *H.R. 2622—Fair and Accurate Credit Transactions Act of 2003: Hearing Before the House Comm. on Fin. Serv.* 2, 108th Cong. (2003) (statement of Congressman Oxley).

43 *Fighting Identity Theft—The Role Of FCRA, Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the House Comm. on Fin. Serv.* 29, 108th Cong. (2003) (statement of Congressman Toomey).

44 Senate Report 108-166, at 3 (Oct. 17, 2003).

45 Redman v. Radioshack Corp., 768 F.3d 622, 626 (7th Cir. 2014). *See also* Ehrheart v. Verizon Wireless, 547 F. Supp. 2d 463, 464 (W.D. Pa. 2007) ("Congress enacted FACTA, which amended the Fair Credit Reporting Act ('FCRA'), in part to assist victims of identity theft. See H.R.Rep. No. 108-267 at 66 (2003) (statement of the Committee of the Conference). Consistent with that intent, FACTA amended § 1681c of the FCRA so as to preclude a person that accepts credit cards or debit cards for the transaction of business, from printing more than the last 5 digits of the card numbers or the expiration date, upon any electronically printed receipt provided to the cardholder at the point of sale.").

46 Javelin Strategy & Research, $16 Billion Stolen from 12.7 Million Identity Fraud Victims in 2014, According to Javelin Strategy & Research (2014), *available at* https://www.javelinstrategy.com/news/1556/92/16-Billion-Stolen-from-12-7-Million-Identity-Fraud-Victims-in-2014-According-to-Javelin-Strategy-Research/d,pressRoomDetail.

47 Fed. Trade Comm'n, Consumer Sentinel Network Data Book for January—December 2014 5 (2014), *available at* https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2014/sentinel-cy2014-1.pdf.

the concreteness requirement.[48] Pre-*Spokeo* decisions that have that have analyzed the "actual injury" requirement in this same light, specifically noting the risk of identity theft created by a violation is sufficient to confer standing, appear to remain good law.[49]

11.2.1.3.5 Failure to conduct a reasonable reinvestigation of a dispute

Another of the key protections of the FCRA is the requirement for a credit reporting agency (CRA) to conduct a reasonable investigation if the consumer disputes an item in his credit file.[50] The classic case under this provision involves the failure of a CRA to conduct a reasonable investigation where the dispute involves an error consisting of adverse information. In such cases, there should be little doubt that there is a concrete injury.

However, there could be cases in which a CRA fails to conduct a reasonable investigation, but it turns out there is no inaccuracy. Such claims could be viewed as "divorced of concrete harms." The wrinkle regarding such a case is that most of the courts to consider the issue have held that there is no claim at all under the FCRA if there is no inaccuracy.[51]

Given this adverse case law and *Spokeo v Robins*, it appears that the safest course is to bring reinvestigation cases only when there is an actual inaccuracy. If the inaccuracy could be viewed as positive or neutral, an argument should be made as to why it actually presents a risk of real harm that is not theoretical.[52]

In select circumstances, there could be an argument made that a failure to reinvestigate can cause harm in circumstances where a consumer is challenging or seeking clarification of a mysterious entry on her credit report that turns out to be accurate. The lack of information from a failure to reinvestigate and to provide clarification to which the consumer is entitled is a type of informational injury. Practitioners considering bringing claims in such circumstances should consider requesting a description of the reinvestigation procedures that the CRA used pursuant to section 1681i(a)(6) and

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48 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *8 (May 16, 2016).

49 *See* Hammer v. Sam's E., Inc., 754 F.3d 492, 498 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1175, 191 L. Ed. 2d 132 (2015) ("Our reading is consistent with the purpose of FACTA's receipt requirement. Congress enacted FACTA 'to prevent identity theft,' ... , and the restriction on printing more than the last five digits of a card number is specifically intended "to limit the number of opportunities for identity thieves to 'pick off' key card account information,"); Brittingham v. Cerasimo, Inc., 621 F. Supp. 2d 646, 650 (N.D. Ind. 2009) ("The alleged failure of the Defendants to truncate the Plaintiffs' card information means that the Defendant failed to significantly limit the Plaintiffs' risk of identity theft. These allegations satisfy the Pisciotta injury-in-fact standard of alleging 'an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions.' Pisciotta, 499 F.3d at 634.")

50 15 U.S.C. § 1681i(a). *See* § 4.5, *supra*

51 *See* § 4.5.3.2, *supra*.

52 *See* § 11.2.1.3.3, *supra* (discussing why some positive or neutral errors could arguably be harmful).

(7). Of the handful of courts that have not required an actual inaccuracy for section 1681i(a) liability, one court gave an example of such a situation, asking rhetorically "If a debtor's account is purchased by another entity and the name of the account changes such that it is unrecognizable by the debtor, is the debtor within his rights to ask the credit reporting agency to investigate the account?"[53] In such a case, the reinvestigation should result in an explanation or clarification rather than a correction, but the explanation will be a specific response to the consumer and will be valuable to the consumer. In bringing such cases, a complaint should make clear the exact nature of the injury was the plaintiff's deprivation of this information.

Another argument as to why a reinvestigation claim should not require an actual inaccuracy is that the deprivation of the procedure itself creates a concrete injury in the denial of a forum that Congress provided for the consumer to seek redress. By analogy, imagine if the courthouse doors were illegitimately barred to a litigant; that person has suffered an actual injury even if it were absolutely certain that she would have lost her case. On the other hand, the Supreme Court has held that the failure of a federal agency to provide another sort of forum, a required comment period for a federal regulation, did not constitute an injury for standing purposes.[54] However, in that case, the regulatory proceeding had been mooted by settlement and there were serious issues about the "particularized injury" prong of standing,[55] which do not exist for FCRA reinvestigation cases.

11.2.1.3.6 Failing to provide required notices to the consumer

The FCRA contains a number of requirements for CRAs, furnishers, and users to provide notices to consumers. Note that for many of these notices, there is no private right of action for failure to provide them.[56] Furthermore, the vast majority of courts have held that the adverse action notice requirement established by section 1681m is not privately enforceable.[57]

Of those FCRA notices that are privately enforceable, some notices must contain information that is specific to the consumer, such as the mortgage score[58] and the "pre-adverse action" employment

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53 Back v. Trans Union, L.L.C., 2008 WL 2444682 (N.D. Ind. June 13, 2008). *See also* Modica v. Am. Suzuki Fin. Serv., 2013 WL 656495 (D. Ariz. Feb. 22, 2013) ("Under the statute Defendant had a duty to reasonably investigate the dispute charge even if it happened to be correct"); Williams v. LexisNexis Risk Mgmt. Inc., 2007 WL 2439463 (E.D. Va. Aug. 23, 2007) ("[section] 1681i imposes obligations on CRAs even where the report is accurate").

54 Summers v. Earth Island Institute, 555 U.S. 488, 496–497, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009).

55 *Id.*

56 *See, e.g.,* §§ 8.7.5 (risk-based pricing notice, 8.9 (negative information notice), *supra.*

57 *See* § 8.5.5, *supra*.

58 15 U.S.C. § 1681g(g)(1)(A). *See* § 8.4.3, *supra*.

notices.[59] Other notices are the same for each consumer, e.g., the summary of consumer rights.[60] However, all notices are "particularized" in that consumers only have the right to receive them when their own personal situation warrants it. For example, the summary of rights is a standardized form as promulgated by the CFPB, but a consumer is only entitled to receive it in an individualized situation, i.e., when the consumer obtains his or her consumer file disclosure under section 1681g(a).

Such "notice" or disclosure violations present concrete harm in the form of "informational injury." Failure to provide a notice required by the FCRA results in concrete injury in the form of the failure to receive information that Congress thought the consumer should receive. In *Spokeo*, the Court specifically noted that information injuries can present concrete harm, citing *Public Citizen v. U.S. Department of Justice*, which held that the plaintiff had standing to challenge the Justice Department's failure to provide access to information, the disclosure of which was required by the Federal Advisory Committee Act, because the inability to obtain such information "constitutes a sufficiently distinct injury to provide standing to sue."[61] It also cited *Federal Election Commission v. Akins* for a similar point, "confirming that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury in fact to satisfy Article III."[62]

These cases illustrate that an informational injury (i.e., being denied access to information to which an individual is entitled by statute) is a concrete injury under Article III.[63] The right to such information in the form and manner Congress required creates a right akin to a property interest in the information mandated. Furthermore, in *Spokeo*, the Court cited the *Public Citizen v. U.S. Department of Justice* and *Federal Election Commission v. Akins* cases to illustrate instances in which "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury," when "[i]n other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified."[64] In a number of FCRA cases, courts have found substantive "informational injury" beyond simply a violation of a procedural right, and these cases appear to remain good law after *Spokeo*.[65]

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59 15 U.S.C. § 1681b(b)(3) (requiring employers to provide copy of report used for employment purpose before taking adverse action). *See* § 11.3, *supra*.

60 15 U.S.C. § 1681g(c). *See* § 3.5.4.1, *supra*.

61 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *8 (May 16, 2016) (citing Public Citizen v. U.S. Department of Justice, 491 U.S. 440) (1989)).

62 *Id.* (citing Federal Election Commission v. Akins, 524 U.S. 11, 20–25 (1998)).

63 *See* Cass R. Sunstein, Informational Regulation and Informational Standing: Akins and Beyond, 147 U. Penn. L. Rev. 613 (1999).

64 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *8 (May 16, 2016).

65 *See e.g.* Manuel v. Wells Fargo Bank, Nat'l Ass'n, 123 F. Supp. 3d 810, 818 (E.D. Va. 2015) ("Wholly apart from

In addition to the informational injury, the failure to give any required disclosure creates the risk of real harm because the absence of the necessary information deprives the consumer of the ability to take actions based on that information. Thus, for example, if a consumer does not receive the Summary of Consumer Rights, he might not receive information about his right to obtain a credit score for a fee. As a result, he may be deprived of his ability under the FCRA to purchase the score.

11.2.1.3.7 Stand-alone disclosure and authorization to procure consumer reports for employment

Failure to provide the stand-alone disclosure required by section 1681b(b)(2) should confer standing on the plaintiff because the notice, delivered in the manner required by Congress, is integral to protecting plaintiff's right to privacy, right to information, and, in many instances, ability to take the necessary steps to obtain employment.

As the *Spokeo* Court observed, Congress identified such intangible harms in enacting the FCRA.[66] Before 1996, employers did not need to provide notice or obtain prior authorization to obtain background checks for employment purposes. Responding to concerns that allowing employers to obtain background checks "may create an improper invasion of privacy," Congress amended the FCRA in 1996 to require that employers provide a written disclosure that a consumer report may be obtained for employment purposes and obtain written authorization before procuring a background check.[67] The disclosure may not be buried in a multi-page job application or employee handbook or surrounded by confusing or unnecessary verbiage.

Instead, Congress required that "person may not procure a consumer report" unless "a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer

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the foregoing, Manuel has demonstrated an injury-in-fact through his allegations that he was deprived of the appropriate type of information under § 1681b (b)(2)(A)); Panzer v. Swiftships, L.L.C., 2015 WL 6442565, at *5 (E.D. La. Oct. 23, 2015) ("In the instant case, Plaintiff claims that he suffered an "informational injury" because he was deprived of information to which he was entitled. In [*FEC*] *v. Akins*, the Supreme Court held that Congress, by statute, could create a right to information and that the denial of such information was an injury sufficient to satisfy the injury-in-fact requirement of standing."); Dreher v. Experian Info. Sols., Inc., 71 F. Supp. 3d 572, 577 (E.D. Va. 2014) ("This conclusion also makes sense when considered alongside the recognition of informational injuries. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 22, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (holding that a plaintiff may satisfy the injury-in-fact requirement by alleging the violation of a statute that provides a right to receive particular information); Salt Inst. v. Leavitt, 440 F.3d 156, 159 (4th Cir. 2006) (recognizing that standing exists when a plaintiff alleges the violation of a legal right to certain information)").

66 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *8 (May 16, 2016).

67 S. Rep. 104-185 at 35 (1995); Pub. L. No. 104-208, div. A, tit. II, § 2403, 110 Stat. 3009–3430 (Sept. 30, 1996) (codified at 15 U.S.C. § 1681b(b)).

report may be obtained for employment purposes."[68] The only item that can be combined with the disclosure is the authorization.[69] The FTC has consistently explained that it was the "intent of the drafters to assure that the required disclosure appear conspicuously in a document unencumbered by any other information. The reason for specifying a stand-alone disclosure was so that consumers will not be distracted by additional information at the time the disclosure is given."[70]

Congress's judgment that a person's private credit and background information is worthy of protection is consistent with and constitutes a codification of common law causes of action that protect against improper invasions of privacy. Accessing private information without a legal basis to do so is a classic example of a modern-day analog to well-recognized common law torts.[71] At common law, plaintiffs were able to recover nominal damages for invasions of privacy "in recognition of a legal wrong."[72]

Requiring disclosures in the employment context as a prerequisite to accessing a consumer report is a vital part of fulfilling the FCRA's purpose of protecting privacy. The disclosure and authorization provisions are contained in section 1681b, which defines the circumstances in which a user has a "permissible purpose" for procuring a consumer report. Absent compliance with the requirements, an employer may not access a consumer report. An applicant has a right to keep personal credit and background information private until he or she signs "a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured."[73] An employer who obtains a consumer report without providing the legal disclosures has done so illegally, and obtaining a consumer report without legal permission violates the applicant's right to privacy.

The requirement that certain procedures be followed before an individual's privacy can be invaded is one of the most fundamental principles of American law. The Fourth Amendment of the

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68 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis added).

69 15 U.S.C. § 1681b(b)(2)(A)(ii).

70 FTC Staff Summary § 604(b)(2), item 3B, *reproduced at* Appx. D, *infra*. Steer, FTC Informal Staff Opinion Letter (Oct. 21, 1997), *available online as companion material to this treatise*. *See also* Coffey, FTC Informal Staff Opinion Letter (Feb. 11, 1998), *available online as companion material to this treatise*.

71 *See* Intrusion Upon Seclusion, Restatement (Second) of Torts § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy"); Snakenberg v. Hartford Cas. Ins. Co., 383 S.E.2d 2, 5 (S.C. Ct. App. 1989) ("The law recognizes that each person has an interest in keeping certain facets of personal life from exposure to others. This interest in "privacy" is a distinct aspect of human dignity and moral autonomy.").

72 Sabrina W. v. Willman, 540 N.W.2d 364, 371 (Neb. Ct. App. 1995). This was so even when there was "no proof of damages." LeCrone v. Ohio Bell Tel. Co., 201 N.E.2d 533, 536 (Ohio Ct. App. 1963) ("Proof of the unjustified invasion entitles the plaintiff to at least nominal damages").

73 15 U.S.C. § 1681b(b)(2)(A)(i).

Constitution sets forth the procedural requirement that a warrant be obtained before an individual's person or property may be searched. The procedural requirement that a warrant "particularly describ[e] the place to be searched" protects an interest in privacy."[74] Just as the Fourth Amendment prohibits state invasion of privacy by conducting a search without a warrant upon probable cause, so too does the FCRA protect consumers' privacy by requiring that employers provide proper disclosures and obtain written consent before obtaining a background report. In light of the common law on privacy, the intangible harm of not having received a legally compliant disclosure "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts,"[75] and therefore for purposes of standing, plaintiffs' have suffered a concrete deprivation.

When an employer procures a consumer report without making required disclosures, the employer also causes an informational injury. Under the FCRA, applicants "have the right to specific information at specific times"—and where that applicant "receive[s] a type of information, [but] not the type of information that he was entitled to under the FCRA," he has suffered an "informational injury."[76] Furthermore, failing to provide the required disclosure creates the risk that applicants will not know that reports are being generated about them. Without this knowledge, employees cannot exercise control over who will have access to those reports, take steps to correct inaccuracies in those reports or explain the expected contents of such reports to prospective employers. The disclosure provision is especially important for those applicants who may have been the subject of previous erroneous reports as the job applicant could warn the employer in advance that erroneous information may appear in the report.

An employer's failure to provide an applicant or employee with required disclosures prior to procuring a report on them creates an informational injury akin to those that were at issue in *Akins* and *Public Citizen*. In both *Akins* and *Public Citizen*, the Court held that the allegations that the defendants had violated the plaintiff's congressionally mandated right to receive information was sufficient to confer standing, even without "more." In other words, the deprivation of information constitutes both the violation and the injury, and the plaintiff need not demonstrate any additional harm or imminent risk of harm which flows from the deprivation.

Prior to *Spokeo*, all courts to consider the question had concluded that the deprivation of the stand-alone disclosure required under section 1681b(b)(2) created an informational injury sufficient to

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74 Horton v. California, 496 U.S. 128, 143, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).
75 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *7 (May 16, 2016).
76 Manuel v. Wells Fargo Bank, Nat'l. Ass'n, 123 F. Supp. 3d 810, 818 (E.D. Va. 2015).

confer standing.[77] Notably, none of these cases engaged in the truncated analysis that the Ninth Circuit conducted in *Spokeo* which necessitated remand. Rather, they analyzed injury from the standpoint of both particularity and concreteness, and they draw upon and cite to the informational injury cases cited by the Court in *Spokeo*. District courts addressing other deprivations of information required to be disclosed under the FCRA have reached the same conclusion.[78]

In *Spokeo*, the Court recognized that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'"[79] Thus, violations as to congressional requirements as to the manner, form, and method by which a disclosure is to be made also present concrete harms. Congress has determined as a matter of law that a consumer should "have the right to specific information at specific times."[80] Where that consumer "receive[s] a type of information, [but] not the type of information that he was entitled to under the FCRA," he has suffered an "informational injury."[81]

Although an analysis of plaintiffs' standing to bring claims related to the stand-alone disclosure claim need not necessarily include a discussion of the consequences of the deprivation of information, there are numerous additional concrete interests that these disclosures protect. For example, the disclosure requirement works to protect both the accuracy of consumer reports and the fairness of the hiring process. As a practical matter, after a report is procured,[82] in the time it takes to resolve a dispute, the job is often filled by another applicant and therefore no longer available to the

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77 *See, e.g.*, Panzer v. Swiftships, L.L.C., 2015 WL 6442565, at *5 (E.D. La. Oct. 23, 2015) ("Under the FCRA, Plaintiff and other consumers have the right to specific information at specific times. Here, Plaintiff is alleging that Defendants failed to provide the required disclosure before they obtained a consumer report on Plaintiff for employment purposes. The allegation that Defendants failed to provide that information is sufficient to show an invasion of a legally protected interest that is concrete and particularized and actual or imminent." (quotations omitted)); Manuel v. Wells Fargo Bank, Nat'l Ass'n, 2015 WL 4994538, at *6 (E.D. Va. Aug. 19, 2015) ("The allegations that Defendant failed to provide that information, or that they provided the information after it was required are sufficient to posit 'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'") (*quoting* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1991)).

78 *See, e.g.*, Ryals v. Strategic Screening Sols., Inc., 117 F. Supp. 3d 746, 753 (E.D. Va. 2015) ("Under the FCRA, Ryals and other consumers have the right to specific information at specific times. The allegations that Defendants failed to provide that information, or that they provided the information after it was required are sufficient to posit an invasion of a legally protected interest which is (a) accurate and particularized *and (b) actual or imminent, not conjectural or hypothetical."* (quotation omitted)); Dreher v. Experian Info. Sols., Inc., 71 F. Supp. 3d 572, 577 (E.D. Va. 2014) (finding standing for claim under §1681b(b)(3): "Here, under the [FCRA], consumers have the right to receive certain information from consumer reporting agencies, including the sources of information on their credit reports. The alleged failure of Experian to provide the sources of information violated that right. That is enough to satisfy the injury-in-fact requirement of constitutional standing.").

79 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *7 (May 16, 2016).

80 Manuel v. Wells Fargo Bank, Nat'l Ass'n, 123 F. Supp. 3d 810, 818 (E.D. Va. 2015).

81 *Id*.

82 15 U.S.C. § 1681b(b)(3).

wrongfully accused applicant. The disclosure provision informs the job applicant or employee that a background check will be procured beforehand, and therefore provides the applicant with the opportunity to take preventive measures to ameliorate the harms caused by inaccurate background checks.

Certain ways of violating the stand-alone disclosure requirement are especially clear examples of concrete harm. A particularly common violation of the stand-alone disclosure requirement is to include a release of liability.[83] Congress's prohibition on including this information in a disclosure constitutes Congress's finding that adding legal releases to the disclosure is both distracting and confusing, as a matter of law. Combining those two pieces of information increases the chances that the consumer will not observe or understand either the disclosure allowing the employer to procure a consumer report or the release of liability.

In such a circumstance, in addition to unwittingly authorizing the employer to obtain private and potentially invasive personal information, a consumer could also unknowingly waive important legal rights. Moreover, the consumer is left without the choice to make independent decisions about whether to allow a consumer report and whether to sign a liability release. Thus, when an employer includes a legal release in a section 1681b(b)(2) disclosure, there is a real risk that an applicant could suffer an invasion of privacy, lose the ability to take preventative measure to ameliorate the harms caused by inaccurate background checks, or lose important legal rights by signing a liability release. This real risk of harm should be sufficient to confer standing to an applicant receiving such a disclosure.

11.2.1.3.8 CRA notices to users and furnishers

The FCRA requires credit reporting agencies (CRAs) to provide notices to users and to furnishers.[84] It requires the CFPB to prescribe the content of these notices, which it has done. The notice to users was one of the claims in *Spokeo v. Robins*, and the majority specifically referenced it by

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83 *See, e.g.*, Lengel v. HomeAdvisor, Inc., 102 F. Supp. 3d 1202, 1209–1210 (D. Kan. 2015) (declining to dismiss willful violation claim arising from combining disclosure form with release); Speer v. Whole Foods Market Group, Inc., 2015 WL 1456981, at *3–4 (M.D. Fla. Mar. 30, 2015) (declining to dismiss claims of negligence and willfulness for combining disclosure form with release); Miller v. Quest Diagnostics, 85 F. Supp. 3d 1058, 1061 (W.D. Mo. 2015) (declining to dismiss claim that defendant willfully violated FCRA by including waiver or release language with disclosure); Dunford v. Am. DataBank, L.L.C., 64 F. Supp. 3d 1378, 1388 (N.D. Cal. 2014) (form violated FCRA by including release); Singleton v. Domino's Pizza, L.L.C., 2012 WL 245965, at *9 (D. Md. Jan. 25, 2012) (including liability release in the authorization form violated requirement that form consist solely of the disclosure).

84 15 U.S.C. § 1681e(d). *See* § 8.17, *supra*

stating: "A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate."[85]

This statement is perplexing, because notice to the user has very little to do with accuracy. The purpose of the notice is to tell the user of its responsibilities under the FCRA to consumers. The failure to provide this notice can present a risk of real harm, in the form of a deprivation of something that Congress intended that the consumer receive from the user.

One of the most critical user responsibilities that is spelled out in the user notice is the requirement to provide the consumer with an adverse action or risk-based pricing notice if the consumer is denied something or pays more for credit based on the consumer report or score. Thus, the risk of harm when a CRA fails to give the user notice is that the user fails to provide the consumer with the adverse action or risk-based pricing notice. That, in turn, results in a significant informational injury, in that the consumer is being deprived of important information that Congress wanted her to receive under the FCRA.

The informational injury presented by a failure to provide an adverse action or risk based pricing notice is concrete and significant. For example, users that are creditors are required to provide a credit score in these notices if they used one. A consumer who does not receive an adverse action notice will not receive that score. She also will not learn about her right to obtain the free report that she is entitled to under the FCRA, and to dispute any errors. She will be deprived of her ability to review her free report, so as to check for errors or learn information that will enable her modify her behavior to improve her credit score.

Nonetheless, given the Court's discussion in *Spokeo* of user notices, it is unlikely that the failure to give a user notice by itself will give rise to standing. Plaintiffs must be carefully plead the risk of real harm, and the harm must be imminent and not hypothetical. For example, there might not be concrete harm for the failure to give the user notice if there was no adverse action or the consumer actually did receive the adverse action notice or was likely to. One can imagine that a CRA's failure to provide a large bank such as Bank of America with a user notice is not likely to lead to a risk of real harm, since one would assume that Bank of America is familiar with its user responsibilities. A small employer or landlord, on the other hand, would likely not be familiar with these responsibilities and thus the failure to provide it with the user notice could very well lead to the informational injury of the consumer being deprived of an adverse action notice. Since most courts have held there is no private

85 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *8 (May 16, 2016).

remedy for failure to provide the adverse action notice, only the failure to provide the user notice would be actionable.[86]

11.2.1.3.9 User certification requirements for consumer reports used for employment purposes

One of the claims at issue in *Spokeo v Robins* involved the violation of the requirement that a CRA obtain a certain certification from the user if the report is being provided for employment purposes.[87] The certification states: that the user has complied with the FCRA's requirements to provide a stand-alone disclosure and to obtain the consumer's authorization; that it will comply, if applicable, with the FCRA's requirements to provide a "pre-adverse action notice" which includes a copy of the report; and that it will not use the report to violate any employment discrimination laws.

Like the user notice required by section 1681e(d), the purpose of this employer certification is to ensure that the user fulfills its responsibilities under the FCRA to consumers. The failure to obtain the certification can present a risk of real harm, in that if the employer is not informed of its responsibilities and required by the CRA to make signed commitment to undertake them, there is a significant possibility it will fail to fulfill them. Thus, the absence of an employer certification could result in the consumer not being given critical disclosures or having the opportunity to decide whether to provide consent for a report to be accessed.

In addition, as with the stand-alone disclosure required by section 1681b(b)(2),[88] requiring an employer certification as a prerequisite to accessing a consumer report is a vital part of fulfilling the FCRA's purpose of protecting privacy. The certification sets a precondition that must be fulfilled before there can be a "permissible purpose" for the CRA to provide and the user to procure a consumer report. Absent compliance with the certification, the CRA cannot provide, and the employer may not access, the consumer report. An applicant has a right to keep personal credit and background information private until the employer certifies that it will provide the applicable disclosures and comply with the applicable provisions. A CRA that provides and an employer who obtains a consumer report without the required certifications has done so illegally, and obtaining a consumer report without legal permission violates the applicant's right to privacy.

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86 *See* § 9.5.5, *supra*
87 15 U.S.C. § 1681b(b)(1). *See* § 7.2.4.3.2, *supra*
88 *See* § 11.2.1.3.7, *supra* (discussing privacy interests protected by stand-alone disclosure).

11.2.1.3.9a Pre-adverse action notice required to take adverse employment action based on a consumer report

The FCRA contains certain specific requirements at section 1681b(b)(3) before a user, such as an employer, may take an adverse employment action based in whole or in part on a consumer report. Before an employer can do so, the employer must provide to the consumer a copy of the report that it intends to use to take the action and a copy of the "Summary of Consumer Rights"; together these are often referred to as the "pre-adverse action notice".[89] Failure to provide this pre-adverse action notice results in three distinct types of concrete harm to the consumer: (1) an informational injury; (2) invasion of the consumer's privacy in the impermissible use of a consumer report to take an adverse action; and (3) deprivation of the opportunity that Congress provided for the consumer to address or explain negative information or an error in a consumer report. The stakes are high in the employment context, because a properly provided pre-adverse action notice can mean the difference between getting or keeping a job and unemployment.

First, failure to provide any notice required by the FCRA results in concrete injury in the form of the failure to receive information that Congress considered important for the consumer to receive. As discussed in § 11.2.1.3.6, *supra*, the Court specifically noted that such informational injuries present concrete harm. In the case of the pre-adverse action notice, the deprivation is even more pronounced than in the examples given in *Spokeo*. Unlike the information at issue in the cases mentioned there, *Public Citizen v. U.S. Department of Justice* and *Federal Election Commission v. Akins*, the pre-adverse action notice directly bears upon the individual consumer entitled to it—it is information about that specific consumer that a CRA is disseminating to others, including potential employers—and thus is especially valuable to that consumer.

In some cases, defendants have argued that there is no concrete harm from the failure to provide a pre-adverse action notice, because the consumer report at issue did not contain any errors. This argument should be unavailing, because the pre-adverse action notice serves important purposes regardless of whether the report is accurate or not. With respect to the informational injury created by deprivation of the notice, the accuracy of information is immaterial. Congress placed a duty on employers to provide those whose jobs are at risk the very report they will rely upon in making a decision because it wanted consumers to have this information, and to have it at a specific point in time in the employment decision process. The deprivation of the information alone, whether or not the

89 *See* § 8.11.3, *supra*.

report is accurate, creates the concrete harm.

Second, failure to provide the pre-adverse action notice results in a concrete and particular injury to the consumer because the employer has impermissibly used the consumer's report to take an adverse action against the consumer. As with the user certification required by section 1681b(b)(1) and the stand alone disclosure required by section 1681b(b)(2), the pre-adverse action notice is a prerequisite to having a permissible purpose to use a consumer report. Recall that the FCRA governs both when a report can be *accessed* and when it can be *used*.[90] Both restrictions are a vital part of fulfilling the FCRA's purpose of protecting the privacy of consumers.[91] The pre-adverse action notice is a precondition that must be fulfilled before there can be a "permissible use" of the consumer report for employment purposes. Absent compliance with the pre-adverse action notice requirement, the employer cannot *use* the consumer report to take an adverse action for employment purposes. An employer who uses a consumer report without the required pre-adverse action has taken the adverse action illegally and also violated the applicant's right to privacy.[92] Furthermore, these limits apply regardless of the content of the report. An employer cannot misuse a consumer report because the report is accurate.

Finally, the absence of a pre-adverse action notice deprives the consumer of a critical opportunity that Congress specifically provided in mandating the pre-adverse action notice.[93] When properly provided with a copy of the report that the employer intends to rely upon to take an adverse action, the consumer has a chance to address negative information in that report. If there is an error, this gives the consumer the ability to inform the employer of the error and tell the employer that she is disputing it. Even when the report is accurate, however, the consumer may be able to explain negative information, e.g., that late payments were due to a death in the family, a job loss, or medical bills that an insurer failed to pay until the consumer filed an appeal. Without a pre-adverse action notice, consumers are deprived of this critical opportunity. Furthermore, this right is critical whether or not

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90 15 U.S.C. § 1681b(f) ("A person shall not use or obtain a consumer report for any purpose unless—(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section."). *See* § 7.1.4, *supra*.

91 *See* §§ 7.1.1 and 11.2.1.3.2, *supra*.

92 The consumer's privacy has been invaded even though he or she may have authorized the access to the report. A breach of privacy is not limited to just the disclosure of the information, but also the purpose to which it is used. For example, consider a healthcare worker who may have legitimate access to consumer's medical records. If she uses those records for an illegitimate purpose, such as to harass the consumer, it would still constitute an invasion of privacy.

93 Goode v. LexisNexis Risk & Info. Analytics Grp., Inc., 848 F. Supp. 2d 532, 537 (E.D. Pa. 2012) ("[t]he 'clear purpose' of this section is to afford employees time to 'discuss reports with employers or otherwise respond before adverse action is taken,'" quoting Lynne B. Barr, *The New FCRA: An Assessment of the First Year*, 54 Bus. Law. 1343, 1348 (1999)).

the report contains any errors. With accurate reports, the opportunity to offer additional information to address negative information could be priceless.

11.2.1.3.10 Toll-free number for annual file disclosures for nationwide specialty CRAs

The fourth claim in *Spokeo v. Robins* involved the defendant's failure to post a toll-free number on its website for consumers to request free annual file disclosures. The FCRA requires "nationwide specialty consumer reporting agencies," which *Spokeo* was alleged to be, to provide for free annual file disclosures.[94] Unlike the "Big Three" nationwide credit reporting agencies (CRAs), specialty CRAs do not participate in the centralized source for free annual consumer reports (www.annualcreditreport.com) but must provide a toll-free number to do so.[95]

The concurrence in *Spokeo* appeared to believe that the violation of the toll-free number requirement would not give rise to standing without some showing of concrete and particular harm, stating:

> Robins has no standing to sue Spokeo, in his own name, for violations of the duties that Spokeo owes to the public collectively, absent some showing that he has suffered concrete and particular harm....These consumer protection requirements include, for example, the requirement to "post a toll-free telephone number on [Spokeo's] website through which consumers can request free annual file disclosures."[96]

Thus, a failure to provide the toll-free number by itself will likely not give rise to standing. In order to bring a claim, the plaintiff must show something more.

One possibility is to show, in a concrete and particularized manner, that the absence of a toll-free number led to the plaintiff being unable to access the free annual file disclosures she is entitled to. Since the harm required for standing must be "actual and imminent, not conjectural or hypothetical,"[97] it would not be enough to allege that the absence of a toll-free number might theoretically prevent the consumer from accessing her report. Instead, plaintiffs must allege that they actually attempted to obtain their free annual report and were in fact unable to do, or faced substantial

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94 15 U.S.C. § 1681j(a). *See* § 3.6.4, *supra.*
95 *Id.*
96 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *13 (May 16, 2016) (J. Thomas, concurring).
97 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *6 (May 16, 2016) (citing Lujan, 504 U.S., at 560, 112 S. Ct. 2130)).

difficulties in doing so, because of their inability to contact the CRA. If the plaintiff was unable to actually obtain his or her report, however, the stronger claim for standing purposes might be the specialty CRAs failure to provide a report in violation of section 1681g(a).