More information regarding consumer litigation issues under this federal statute is available at https://library.nclc.org/fdc

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6.11a Article III Constitutional Standing Under *Spokeo* As Applied to the FDCPA

6.11a.1 Introduction; Basic Elements of Standing in Federal Court

Standing is a basic element of any civil action. A plaintiff who fails this basic test will be barred from all relief.

For federal courts, standing has a constitutional foundation. Article III of the United States Constitution limits a federal court to jurisdiction over "cases" or "controversies" between parties.[1]

Article III standing consists of three elements: "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."[2] To establish the first element, an injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[3]

Article III standing is required only in the federal system. It has no application in state courts,[4] although some state courts have incorporated Article III principles into their own state standing doctrines. However, since federal courts have original jurisdiction over FDCPA claims, most FDCPA claims will be litigated there, and every FDCPA plaintiff must be prepared to address Article III standing.

Article III standing goes to subject matter jurisdiction, so it can be raised at any time.[5] For example, it can be raised *sua sponte* by an appellate court, even when it was not raised below.

This section begins by analyzing the Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins*,[6] the key decision on Article III standing for claims under federal consumer protection statutes. Section 6.11a.3, *infra*, then provides a broad overview of the way the law has developed

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1 U.S. Const. art. III, § 2.
2 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (citation omitted).
3 *Id.* at 1548.
4 ASARCO Inc. v. Kadish, 490 U.S. 605, 617, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989).
5 *See, e.g.*, Central States SE & SW Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005).
6 ___U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016).

since *Spokeo*, summarizing strategy issues and cataloging the types of harm that FDCPA violations may cause. Section 6.11a.4, *infra*, provides a general analysis of the application of *Spokeo* to violations of the FDCPA's prohibitions of deception and nondisclosure.

The section then turns to the application of *Spokeo* to specific FDCPA violations:

● Violations of specific FDCPA provisions regarding deception and nondisclosure (§ 6.11a.5, *infra*);

● Violations of requirements regarding the right under section 1692g to dispute a debt (§ 6.11a.6, *infra*);

● Contacts at inconvenient times or places (§ 6.11a.7, *infra*);

● Third-party contacts or public disclosure of facts about the debt (§ 6.11a.8, *infra*);

● Contacts with a represented debtor (§ 6.11a.9, *infra*);

● Conduct serving to harass, oppress, or abuse (§ 6.11a.10, *infra*);

● Unfair or unconscionable collection methods (§ 6.11a.11, *infra*); and

● Lawsuits in distant forums (§ 6.11a.12, *infra*).

6.11a.2 Article III's Requirements As Interpreted by Spokeo

In its 2016 decision *Spokeo, Inc. v. Robins,*[7] the Supreme Court for the first time addressed the issue of constitutional standing in a case under a chapter of the federal Consumer Credit Protection Act, the Act that includes the FDCPA. The primary claim at issue was a violation of a requirement of the Fair Credit Reporting Act (FCRA) that consumer reporting agencies (CRAs) "follow reasonable procedures to assure maximum possible accuracy of" consumers' reports.[8]

The *Spokeo* decision focused on the injury-in-fact element of standing.[9] It held that, although the Ninth Circuit Court of Appeals correctly held that the particularity requirement was met,[10] it "overlooked" the concreteness requirement.[11] As a result, the Court remanded the case to the Ninth Circuit for completion of the standing analysis.

The Supreme Court noted that Robins' allegations "that Spokeo violated *his* statutory rights, not just the statutory rights of other people" and "that personal interests in the handling of his credit information are *individualized rather than collective,*" both concern particularity, not concreteness.[12]

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7 ___U.S. ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).
8 15 U.S.C. § 1681e(b).
9 *See* § 6.11a.1, *supra*.
10 For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." ___U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016).
11 *Id.*
12 *Id.* at 1548 (emphasis in original).

Since the Court did not remand for further analysis of particularity, it must have concluded that these allegations of particularity were sufficient.[13]

In its analysis of the concreteness requirement, the Supreme Court reaffirmed that intangible injuries can be concrete and that history and congressional judgment both play important roles in determining which intangible harms constitute injury in fact.[14] With respect to history, the Court noted that "[b]ecause 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."[15] An example mentioned by the Court is slander,[16] which is actionable because it is inherently damaging without showing actual damage to reputation, an intangible interest. Similarly, Justice Thomas, concurring, observed that, "[m]any 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."[17] A harm can be actionable even if it is "difficult to prove or measure."[18]

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." The Court held that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements, [and] its judgment is also instructive and important."[19] Nevertheless, the Court stated that "Article III standing requires a concrete injury even in the context of a statutory violation."[20] Analogizing to tort law, the Court also confirmed that a "risk of real harm" is sufficient to satisfy concreteness.[21]

The Court added that deprivation of a "bare procedural right, divorced from any concrete harm" would not establish standing.[22] Nonetheless, the Supreme Court noted that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute an injury in

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13 *Id.* at 1554 (Ginsburg dissenting).
14 *Id.* at 1549.
15 *Id.*
16 *Id.*
17 *Id.* at 1551.
18 *Id.* at 1549.
19 *Id.*
20 *Id.* (internal citations and quotations omitted).
21 *Id.* at 1549.
22 *Id. See* § 6.11a.3.3, *infra* (discussion of distinction between procedural and substantive rights for purposes of Article III standing).

fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."[23] The Court gave as examples the right to information that Congress had decided should be made public.[24]

Finally, the Supreme Court gave two examples of cases where statutory violations might not result in concrete harms necessary for standing: (1) a consumer reporting agency's failure to provide a required notice to a user of the agency's consumer information and (2) incorrectly reporting a consumer's zip code. The Court characterized these violations as examples of procedural violations that may not satisfy the concreteness requirements.[25]

Spokeo elevates the importance of establishing standing in federal consumer protection cases. Consumer lawyers should approach standing issues with great caution as the lower courts struggle to interpret *Spokeo* in FDCPA litigation. Viewing this as an opportunity to limit consumer remedies under the FDCPA, the collection industry is likely to seek lower court decisions eliminating FDCPA remedies for certain intangible injuries.

6.11a.3 The Lay of the Land Since Spokeo*: Overview and Strategy Considerations*

6.11a.3.1 Overview of the First Wave of Decisions Applying *Spokeo* to FDCPA Claims

The first year of decisions applying *Spokeo* to FDCPA claims have overwhelmingly found standing.[26] However, several of the favorable circuit-level decisions are unreported, and one of the three reported decisions found a lack of standing. Since the interpretation of *Spokeo* is still evolving, advocates should prepare and present FDCPA cases with an eye to the possibility of an appeal on standing.

The first appellate FDCPA decision addressing constitutional standing after *Spokeo* is the

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23 ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (emphasis in original).

24 *Id.* at 1549–1550 (citing Federal Election Comm'n v. Akins, 524 U.S. 11, 20–25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (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) and Public Citizen v. Department of Justice, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue")). *See generally* § 6.11a.4.4.3, *infra* (standing to assert informational injuries).

25 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1550, 194 L. Ed. 2d 635 (2016). *But cf.* Daniel Solove, When Is a Person Harmed by a Privacy Violation? Thoughts on Spokeo v. Robins (May 17, 2016), *available at* https://www.teachprivacy.com (discussing potential harms from an incorrect zip code).

26 The many post-*Spokeo* decisions on standing are discussed in §§ 6.11a.4 to 6.11a.12, *infra*, in the context of the particular violation alleged in the case.

unpublished opinion by the Eleventh Circuit in *Church v. Accretive Health, Inc.*[27] The court held that the complaint, which alleged a failure to give the consumer the information required by sections 1692e(11) and 1692g, sufficiently alleged a concrete injury:

> The invasion of Church's right to receive the disclosures is not hypothetical or uncertain; Church did not receive information to which she alleges she was entitled. While this injury may not have resulted in tangible economic or physical harm that courts often expect, the Supreme Court has made clear an injury need not be tangible to be concrete. *See Spokeo, Inc.*, 578 U.S. at ___, 136 S. Ct. at 1549; *Havens Realty Corp.*, 455 U.S. at 373. Rather, this injury is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA. Accordingly, Church has sufficiently alleged that she suffered a concrete injury, and thus, satisfies the injury-in-fact requirement.[28]

The Court further distinguished *Spokeo* as involving a procedural right, whereas Church had alleged violation of the substantive right to receive the FDCPA disclosures.[29]

The Second Circuit's first post-*Spokeo* decision on standing, *Papetti v. Does 1-25*,[30] another unpublished decision, takes a similarly strong position—that the violation of FDCPA protections, at least those found in sections 1962e and 1692g, is a concrete injury in and of itself:

> The purpose of the FDCPA is, among other things, to protect debtors from "abusive debt collection practices by debt collectors." Section 1692g furthers that purpose by requiring a debt collector who solicits payment from a consumer to provide that consumer with "a detailed validation notice," which allows a consumer to confirm that he owes the debt sought by the collector before paying it. And, similarly, Section 1692e protects a consumer's ability to fully avail himself of his legal rights by prohibiting debt collectors from deceiving or misleading debtors in the course of collecting a debt. Thus, the FDCPA violations alleged by Papetti, taken as true, "entail the concrete injury necessary for standing."[31]

The Fifth Circuit weighed in with *Sayles v. Advanced Recovery System, Inc.*,[32] holding that a consumer who alleged that a collector failed to report a disputed debt as disputed had Article III standing as interpreted by *Spokeo*. The consumer had not alleged any actual damages.[33] Noting the Supreme Court's holding that standing can be established where a statutory violation creates the risk of real harm, the Fifth Circuit held that this violation of section 1692e(8) "exposed Sayles to a real

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27 654 Fed. Appx. 990 (11th Cir. 2016).
28 *Id.* at 3. The Eleventh Circuit then dismissed the case, finding that the defendant was exempt under § 1692a(6)(F)(iii).
29 *Id.* at n.2.
30 691 Fed. Appx. 24 (2d Cir. 2017).
31 *Id.* at 26 (citations omitted).
32 865 F.3d 246 (5th Cir. 2017).
33 Sayles v. Advanced Recovery Sys., Inc., 206 F. Supp. 3d 1210, 1211 (S.D. Miss. 2016), *aff'd*, 865 F.3d 246 (5th Cir. 2017).

risk of financial harm caused by an inaccurate credit rating."[34]

The Fourth Circuit addressed FDCPA standing in *Moore v. Blibaum & Associates, P.A.*[35] There, the plaintiff alleged that the collector demanded payment of an inflated amount because it had applied an improper interest rate. The court held that this was not a bare procedural violation, divorced from any concrete harm. It noted that the plaintiff had alleged that she had suffered emotional distress, anger, and frustration as a consequence of the FDCPA violations. It therefore vacated the district court decision, which had dismissed the FDCPA claim for lack of standing, and remanded the case for further proceedings. In a footnote, the court stated that neither a settlement offer made to her, nor her non-payment on the state court judgment, were even factors that should be considered in determining whether she had standing.[36]

In a detailed published opinion, *Demarais v. Gurstel Chargo, P.A.*,[37] the Eighth Circuit held that a consumer had standing to assert FDCPA claims based on two wrongful acts by a collection firm. First, it had filed a collection action seeking interest to which it was not entitled. It scheduled the case for trial without having any evidence to present, on the assumption that the consumer would not appear and that it would be able to obtain a default judgment. When the consumer appeared, it asked for a continuance. The consumer alleged that these actions amounted to an attempt to collect a debt not owed in violation of sections 1692e(2) and 1692f(1), and an improper threat to take action that the collector could not and did not intend to take. The court held the consumer's allegations that he had to retain an attorney and serve discovery requests and that he spent time to defend against the meritless claim amounted to concrete injuries.[38] It also held that the collector's false representations about the amount of the debt caused a concrete injury because it created "risks of mental distress traditionally recognized in unjustifiable-litigation torts and that Congress judged sufficient for standing to sue."[39]

Second, after dismissing the collection action with prejudice, the firm served discovery requests on the consumer, falsely stating that responses were due in thirty days, which the consumer alleged was also an attempt to collect a debt not owed. The consumer did not allege any tangible harm resulting from this communication, but the court held that being subjected to attempts to collect

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34 Sayles v. Advanced Recovery Sys., Inc., 865 F.3d 246, 250 (5th Cir. 2017).

35 ___ Fed. Appx. ___, 2017 WL 3049521 (4th Cir. July 19, 2017). *Accord* Ben-Davies v. Blibaum & Assocs., ___ Fed. Appx. ___, 2017 WL 2378920 (4th Cir. June 1, 2017) (seeking interest on judgment debt at unauthorized rate, causing consumer to suffer emotional distress, is concrete injury).

36 ___ Fed. Appx. ___, 2017 WL 3049521, at *2 (4th Cir. July 19, 2017).

37 ___ F.3d ___, 2017 WL 3707437 (8th Cir. Aug. 29, 2017).

38 *Id.* at *4.

39 *Id.*

debts not owed has a close relationship to the harm made actionable by the common law torts of malicious prosecution, wrongful use of civil proceedings, and abuse of process.[40] It also held that Congress had created a statutory right to be free from attempts to collect debts not owed, and that violations created the risk of mental distress, a harm that Congress identified when enacting the FDCPA.[41]

The only circuit decision to date that finds a lack of Article III standing for an FDCPA claim is the Sixth Circuit's decision in *Lyshe v. Levy*.[42] There, the consumer alleged that a collection firm that had sued him failed to comply with a state procedural rule that required an electronic copy of discovery requests to be served simultaneously with the paper copy. (Instead, its cover letter when it sent the paper copy asked the debtor to contact it if he wanted a copy emailed to him or sent to him on a CD or diskette[43]). The consumer also alleged that the discovery requests included a blank "verification" form that falsely stated that requests for admission would be deemed admitted unless the consumer provided sworn responses. The court rejected the position taken by other courts that receiving false information in connection with debt collection activities is a concrete harm in and of itself.[44] It held that the complaint alleged only procedural violations, and that the potential harm of being required to visit a notary or to contact the collection firm to request an electronic copy was "not the type of harm the FDCPA was designed to prevent."[45] The court stressed that the plaintiff had not suffered even this harm and had conceded that he was at no risk of doing so. The court distinguished cases in which the defendants knowingly and intentionally misrepresented facts concerning a debt,[46] thereby suggesting that it might treat the standing issue in such a case differently.

Prior to *Spokeo*, a number of circuit and district court decisions concluded that the plaintiffs had constitutional standing to raise claims under a variety of different sections of the FDCPA.[47]

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40 *Id.* at *3.
41 *Id.* at *3–4.
42 854 F.3d 855 (6th Cir. 2017).
43 Lyshe v. Levy, 2016 WL 8943336, at *2 (S.D. Ohio Aug. 22, 2016).
44 854 F.3d 855, 859 (6th Cir. 2017).
45 *Id.* at 859, 861 (contrasting this violation with that of serving requests on a debtor to admit things the collector knew were not true, which would cause the type of harm the FDCPA was designed to prevent).
46 *Id.* at 861.
47 Pollard v. Law Office of Mandy L. Spaulding, 766 F.3d 98, 103 (1st Cir. 2014) (section 1692g(b) claim); Tourgeman v. Collins Fin. Services, Inc., 755 F.3d 1109, 1117 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014) (section 1692e and section 1692e(3) claims); Muir v. Navy Fed. Credit Union, 529 F.3d 1100, 1105 (D.C. Cir. 2008); Robey v. Shapiro, Marianos & Cejda, L.L.C., 434 F.3d 1208, 1212 (10th Cir. 2006) (section 1692f(1) claim); Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 307 (2d Cir. 2003) (section 1692f(1) claim); Matmanivong v. Nat'l Creditors Connection, Inc., 79 F. Supp. 3d 864 (N.D. Ill. 2015) (section 1692g(a) claim); Brown v. Transurban USA, Inc., 2015 WL 6675088 (E.D. Va. Nov.

Many of these decisions include analysis that is consistent with *Spokeo*. However, some of them conclude that there was injury in fact based on an intangible harm elevated by Congress, without any additional analysis of whether there was concrete harm (including a risk of harm) as a result of the statutory violation, whether there has historically been a similar claim at common law, or whether this is a circumstance where a procedural right can constitute an injury in fact. As such, the analysis in these cases should be regarded as incomplete in light of *Spokeo*. Before citing to these authorities, consumer attorneys should carefully evaluate them in light of *Spokeo*.

6.11a.3.2 Strategic Considerations

Before filing an FDCPA claim, the consumer's attorney must carefully evaluate whether the claim meets the case or controversy requirements of Article III—in particular, whether the consumer has suffered a concrete injury. The attorney should consider not only the intricacies of *Spokeo* and the many decisions interpreting it, which are discussed in detail in the subsections that follow, but also whether the complaint smacks of something serious or something trivial.

Since *Spokeo* requires that an injury in fact be evident from the pleadings, advocates should take care to explain the harm alleged from the FDCPA violation in the complaint. A common theme throughout *Spokeo* opinions is that courts will generally find concrete harm where the alleged injury is the type of harm that Congress was seeking to protect in passing the statute. If the injury alleged does not appear to be within the purposes of the statute or appears to be tangential to those purposes, courts will be more likely to not find concrete harm.

As noted in § 6.11a.4.4, *supra*, many courts take the position that, because the FDCPA so clearly creates substantive rights and provides individual remedies for their violation, any violation is concrete harm in and of itself, and no further allegation of harm is necessary. This position is strongly supported by well-reasoned decisions and many advocates will find it appropriate as a primary line of argument.

2, 2015) (section 1692e(2), section 1692f(1), section 1692g claims); Manno v. Healthcare Revenue Recovery Group, L.L.C., 289 F.R.D. 674 (S.D. Fla. 2013) (section 1692d(6) and section 1692e(11) claims); Thorne v. Accounts Receivable Mgmt., Inc., 2012 WL 3108662 (S.D. Fla. July 24, 2012) (section 1692d(6) and section 1692e(11) claims); Pulsifer v. Prof'l Recovery Personnel, Inc., 2011 WL 5411494 (D. Minn. Nov. 8, 2011) (section 1692d and section 1692e claims); Ehrich v. I.C. Sys. Inc., 681 F. Supp. 2d 265, 269 (E.D.N.Y. 2010) (section 1692e(11) and section 1692g(b) claims); Lemire v. Wolpoff & Abramson, L.L.P., 256 F.R.D. 321, 326 (D. Conn. 2009) (section 1692e and section 1692f claims); Palmer v. Stassinos, 348 F. Supp. 2d 1070 (N.D. Cal. 2004) (section 1692e(2)(A), section 1692e(3), section 1692e(5), section 1692e(14), section 1692f(1), section 1692g claims); Morgan v. Credit Adjustment Bd., Inc., 999 F. Supp. 803 (E.D. Va. 1998) (section 1692e, section 1692e(5), section 1692e(10), and section 1692g claims). *But see* Accent Title, L.L.C. v. Ocwen Loan Servicing, L.L.C., 2015 WL 3862904 (M.D. La. June 22, 2015) (no standing to bring unspecified FDCPA claim); Reed v. Southwest Credit Sys., L.P., 2013 WL 1966973, at *2 (S.D. Tex. May 10, 2013) (no standing to bring §§ 1692g(a) and 1692g(b) claims).

However, advocates should also explore carefully whether the consumer suffered some additional harm beyond experiencing the violation. Any response to the collector's wrongful act, including a phone call, an Internet search, a request for advice, or anxiety, should be developed, and the advocate should strongly consider pleading that harm. In a class action, there is some danger that tying the debtor's claim too closely to some particular harm the debtor has suffered will lead the court to conclude that the class representative's claim is not typical of those of the class, or that there are too many individual issues to allow class certification. Most courts hold, however, that only the class representative must establish Article III standing.[48] If the named plaintiff's particular injuries can be presented in a way that merely illustrates the concreteness of the harm caused to that individual, and not as an integral part of the claim that is asserted on behalf of the class, there will be less danger that they will interfere with class certification. Several courts have dismissed class actions where the named plaintiff's particular facts made them less subject to the risk of harm than other class members might have been.[49]

Evaluating *Spokeo* issues is particularly important before deciding to appeal a case. Article III standing issues can be raised *sua sponte* by an appellate court,[50] so *Spokeo* issues are likely to arise in every appeal of an FDCPA decision. Advocates should pay especially close attention to the *Spokeo* decisions their circuit has issued, both in FDCPA and other cases. Particularly if the circuit has not yet addressed the particular *Spokeo* issues that the appeal will raise, advocates should appeal only strong cases that present easily recognizable substantive wrongs. Before appealing, advocates should obtain at least one second opinion about whether the case presents the *Spokeo* issues in a favorable light.

6.11a.3.3 Distinguishing Between Procedural and Substantive Violations

In framing an FDCPA claim, it will be helpful to present it as a substantive right rather than a

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48 *See, e.g.*, Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 367 (3d Cir. 2015); Bernal v. NRA Group, L.L.C., 318 F.R.D. 64, 72 (N.D. Ill. Aug. 30, 2016). *See generally* National Consumer Law Center, Consumer Class Actions § 10.3.3.2.1 (9th ed. 2016), *updated at* www.nclc.org/library.

49 *See, e.g.*, May v. Consumer Adjustment Co., 2017 WL 227964 (E.D. Mo. Jan. 19, 2017) (not all failures to provide statutorily-mandated information cause harm or risk of harm; statement of amount due that did not specify that interest was accruing did not cause harm to this plaintiff, who called the collector and got an explanation of why the amount due was changing); Wheeler v. Am. Profit Recovery, Inc., 2017 WL 44585 (E.D. Mo. Jan. 3, 2017) (holding that plaintiff lacked standing to assert claim involving flat-rater's misrepresentation that collection agency was involved; noting that material risk of harm may establish standing, but relying on fact that this plaintiff did not allege that he was deceived or took some action because of the letters); Jackson v. Abendroth & Russell, P.C., 207 F. Supp. 3d 945 (S.D. Iowa 2016) (finding no standing for including language that overshadowed the § 1692g notice and failing to disclose the means of requesting verification of original creditor's identity; these errors did not create a risk of harm for this plaintiff, who conceded that the creditor identified in the notice was correct and he was not planning to dispute the debt).

50 *See* § 6.11a.1, *supra*.

procedural right to the extent possible. In *Spokeo*, the Supreme Court drew a distinction between "procedural" rights and "substantive" rights. This distinction is important because the Court stated that, at least in some circumstances, deprivation of a "bare procedural right" without some other concrete harm would not establish standing.[51]

Some courts have concluded from the Supreme Court's opinion that, as long as a right created by the FDCPA can be characterized as substantive, the plaintiff has standing without the need to allege any other concrete harm.[52] Many post-*Spokeo* decisions hold that the rights created by the FDCPA are substantive.[53]

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51 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). The Court hedged this statement by adding that the violation of a procedural right would in some instances be sufficient to constitute injury in fact, without any allegation of additional harm beyond the one Congress identified. *Id.* at 1549.

52 *See, e.g.*, Bock v. Pressler & Pressler, L.L.P., ___ F. Supp. 3d ___, 2017 WL 2304643 (D.N.J. May 25, 2017); Taylor v. Fin. Recovery Services, Inc., ___ F. Supp. 3d ___, 2017 WL 2198980 (S.D.N.Y. May 18, 2017); Prindle v. Carrington Mortg. Services, L.L.C., 2016 WL 4466838 (M.D. Fla. Aug. 24, 2016). *See also* Church v. Accretive Health, Inc., 654 Fed. Appx. 990 (11th Cir. 2016) (finding standing where right is substantive and Congress has elevated its violation to the status of a legally cognizable injury).

53 Church v. Accretive Health, Inc., 654 Fed. Appx. 990 (11th Cir. 2016); Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521, at *6 (D.N.J. July 27, 2017); Matute v. A.A. Action Collection Co., 2017 WL 2573714 (D.N.J. June 13, 2017) (complaint alleging that collector sought amounts not owed and failed to comply with § 1692g asserts rights that are not merely procedural); Pogorzelski v. Patenaude & Felix APC, 2017 WL 2539782 (E.D. Wis. June 12, 2017) (informational injury, here misrepresentation of attorney's involvement, is more than procedural); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (collection letter seeking payment of contingent fees that were not yet incurred, in violation of §§ 16923 and 1692f); Bock v. Pressler & Pressler, L.L.P., ___ F. Supp. 3d ___, 2017 WL 2304643 (D.N.J. May 25, 2017) (deceptive implication that attorney was meaningfully involved in preparation of complaint violates substantive rights and is concrete injury); Taylor v. Fin. Recovery Services, Inc., ___ F. Supp. 3d ___, 2017 WL 2198980, at *3 (S.D.N.Y. May 18, 2017) ("a materially false or misleading statement is not a 'bare procedural violation' but rather an infringement on an individual's substantive right conferred by Congress to receive truthful information in debt collection communications"); Gibson v. US Collections West, Inc., 2017 WL 1833597, at *3–4 (D. Ariz. May 8, 2017) (contacting consumer who sent cease-contact letter is not a procedural violation); Reed v. Receivable Recovery Services, L.L.C., 2017 WL 1399597 (E.D. La. Apr. 19, 2017) (consumer has substantive right to be free from debt collection abuse; claims include repeated calls and failure to make disclosures required by § 1692g), *appeal filed* (5th Cir. May 18, 2017); Garcia v. Law Offices Howard Lee Schiff P.C., 2017 WL 1230847 (D. Conn. Mar. 30, 2017); Guerrero v. GC Services, L.P., 2017 WL 1133358 (E.D.N.Y. Mar. 23, 2017) (mag.); Verdun v. Fidelity Creditor Serv., 2017 WL 1047109, at *5–6 (S.D. Cal. Mar. 20, 2017) (mag.); Remington v. Fin. Recovery Services, Inc., 2017 WL 1014994, at *2 (D. Conn. Mar. 15, 2017) (false statement that settlement may have tax consequences is "impairment of an FDCPA-created substantive right to truthful, non-deceptive information in debt collection communications"); Bautz v. ARS Nat'l Services, Inc., 226 F. Supp. 3d 131 (E.D.N.Y. Dec. 23, 2016) (right to truthful information in debt collection communications is substantive); Hill v. Accounts Receivable Services, L.L.C., 2016 WL 6462119 (D. Minn. Oct. 31, 2016) (right to truthful information and to be free from collection of unauthorized interest are not merely procedural violations), *appeal filed* (8th Cir. Dec. 2, 2016); Sullivan v. Allied Interstate, L.L.C., 2016 WL 7187507 (W.D. Pa. Oct. 18, 2016) (section 1692e provides the consumer with substantive rights, which Congress has elevated to status of legally cognizable injury), *adopted by* 2016 WL 7189859 (W.D. Pa. Dec. 9, 2016); Irvine v. I.C. Sys., Inc., 198 F. Supp. 3d 1232 (D. Colo. 2016). *But see* Brown v. R & B Corp., ___ F. Supp. 3d ___, 2017 WL 3224728 (E.D. Va. July 28, 2017) (finding standing, but stating that requirement that debt be reported as disputed is a procedural requirement intended to protect the substantive right to be free from abusive debt collection practices); Abercrombie v. Rogers, Carter, & Payne, 2016 WL 8201965 (W.D. La. Nov. 22, 2016) (misstatement about whether a writing is required to dispute a debt, and about the extent to which the debt will

The *Spokeo* Court did not define what makes a right "procedural" vs. "substantive." Its discussion of whether an incorrect zip code or failure to provide a notice to a user of a credit report causes concrete harm suggests that it considered those violations to be procedural, but it did not explain its criteria.[54] An earlier decision, *Massachusetts v. EPA*, characterizes the right to challenge an agency's action as an example of a procedural right.[55] It holds that a litigant who has been denied such a right has standing if there is some possibility that the requested relief will prompt the agency to reconsider the decision that harmed the litigant.

An FDCPA decision expresses the distinction as follows:

> A "procedural right" is defined as "[a] right that derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right." On the other hand, a "substantive right" is "[a] right that can be protected or enforced by law; a right of substance rather than form."[56]

This decision also defines a "bare procedural violation" that does not support standing as one that "has no effect on the substantive right."

Even though many courts have placed great weight on the characterization of a violation as procedural or substantive, this view is not universal. For example, the Seventh Circuit, in an opinion about the Fair and Accurate Transactions Act, stated that "whether the right is characterized as 'substantive' or 'procedural,' its violation must be accompanied by an injury-in-fact."[57] Thus, the substantive versus procedural distinction will probably not be successful in the Seventh Circuit.

6.11a.3.4 Types of Harms That FDCPA Violations May Cause

Before filing an FDCPA claim, advocates should inquire about any harms the consumer suffered, and analyze the risk of harm caused by the violation. Even though many courts accept the view that a particular violation of the FDCPA is a concrete harm in and of itself because it impairs a substantive right or denies the consumer information,[58] the application of *Spokeo* to FDCPA cases is still developing, and it is important to be able to articulate and allege the harm or risk of harm that a

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be presumed valid if debtor does not dispute it, affects a procedural right, designed to buttress the substantive right to be free from debt collection abuse), *adopted by* 2017 WL 489426 (W.D. La. Feb. 6, 2017); Perry v. Columbia Recovery Group, L.L.C., 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016) (right to dispute debt is a procedural right; plaintiff who received § 1692g notice does not have standing to assert that it misstated deadline for disputing debt where he did not allege that he was confused, that debt was invalid, or that he intended to dispute it).

54 *See* § 6.11a.2, *supra*.

55 549 U.S. 497, 517–518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

56 Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521, at *6 (D.N.J. July 27, 2017) (citations omitted).

57 Meyers v. Nicolet Rest. of De Pere, L.L.C., 843 F.3d 724, 727 n.2 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2267 (2017).

58 *See* § 6.11a.3.3, *supra*, § 6.11a.4.4, *infra*.

violation causes.

Spokeo makes clear that both tangible and intangible injuries can meet the concreteness requirement, and a "risk of real harm" may be sufficient.[59] Concrete harms that an individual consumer may suffer as a result of nondisclosure or false, deceptive, or misleading statements that would satisfy the injury-in-fact requirement of *Spokeo* include:

- Paying or the risk of paying more than is actually owed;[60]
- Paying or the risk of paying a debt that the consumer would have preferred to contest;[61]
- Paying or the risk of paying a low-priority debt, instead of essential immediate obligations such as rent, commuting expenses, day care, utility costs, and food, because the debt collector imparts a deceptive sense of urgency about paying the old past-due debt;[62]
- Forgoing or the risk of forgoing the opportunity to dispute[63] or settle[64] a debt;

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59 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

60 *See, e.g.*, Ozmun v. Portfolio Recovery Assocs., L.L.C., 2017 WL 3140660, at *6 (W.D. Tex. July 24, 2017) (misstatement of balance due or character or status of debt "could have disastrous financial, legal, and reputational consequences for a consumer"); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (collection letter seeking payment of contingent fees that were not yet incurred, in violation of §§ 1692e and 1692f; overstatement of amount of debt creates risk that consumer will pay more than is owed). *See also* Powell v. Palisades Acquisition XVI, L.L.C., 782 F.3d 119 (4th Cir. 2014) (pre-*Spokeo* decision; debt collector's overstatement of amount of a debt by double-counting attorney fees and failing to give credit for payments is material because it can lead consumer to pay more than she otherwise would).

61 *See, e.g.*, Lox v. CDA, Ltd., 689 F.3d 818, 827 (7th Cir. 2012) (pre-*Spokeo* decision; debt collector's false statement that the court could require the consumer to pay the debt collector's attorney fees in addition to the debt "would have undoubtably been a factor in his decision-making process, and very well could have led to a decision to pay a debt that he would have preferred to contest"). *See also* Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623, 629 (7th Cir. 2009) (pre-*Spokeo* decision; "Confusing language in a dunning letter can have an intimidating effect by making the recipient feel that he is in over his head and had better pay up rather than question the demand for payment.").

62 *See* Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017) (consumer has standing to assert claims under §§ 1692e and 1692f against collector the misrepresented that administrative wage garnishment proceedings had already commenced or were imminent; these misrepresentations "could have materially and adversely affected [plaintiff's] decisions regarding debt repayment"); Martin v. Trott Law, P.C., ___ F. Supp. 3d ___, 2017 WL 2972137 (E.D. Mich. July 12, 2017) (finding standing under *Spokeo*; noting inherent danger that deceptive or harassing debt collection practices will induce consumer to make decisions detrimental to his personal financial position or legal rights, such as uninformed decisions about debt prioritization). *See also* Schwarm v. Craighead, 552 F. Supp. 2d 1056, 1077 (E.D. Cal. 2008) (pre-*Spokeo* decision involving false threat of arrest; "[s]tatements in debt collection letters may constitute threats to take legal action when they are "calculated to intimidate the least sophisticated consumer into believing that legal action against her is imminent" and "that the debtor's only options are either payment or being sued").

63 Macy v. GC Servs. L.P., 2016 WL 5661525 (W.D. Ky. Sept. 29, 2016) (misstatement of the method by which the consumer can exercise the right to dispute a debt creates a risk that the debtor will inadvertently waive this right); Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (pointing out that denial of § 1692g rights deprives debtor not only of information but also of the ability to force a thirty-day cessation of collection activity). *See also* Abramov v. I.C. Sys., Inc., 54 F. Supp. 3d 270, 278 (E.D.N.Y. 2014) (pre-*Spokeo* decision; misstatement of method to dispute debt could "impede the consumer's ability to respond).

64 Tourgeman v. Collins Fin. Servs., Inc., 197 F. Supp. 3d 1205 (S.D. Cal. 2016) (misidentification of creditor in complaint served on debtor caused risk of harm in that it could have affected consumer's litigation strategy, led to lost opportunities to settle the debt, and exposed the consumer to the possibility of a default judgment),

- Paying the wrong person;[65]
- Spending time or money to learn the truth about a matter that was misrepresented or to contest a false claim;[66]
- Waiving a right or a defense;[67] and

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appeal filed (9th Cir. Aug. 19, 2016); Bautz v. ARS Nat'l Services, Inc., 226 F. Supp. 3d 131 (E.D.N.Y. Dec. 23, 2016) (deceptive statement about tax consequences of settling debt presents a material risk of injury, because misinformation about tax consequences could impact whether debtor decides to pay the lesser amount offered as opposed to the full debt or some other option).

65 Janetos v. Fulton Friendman & Gullace, L.L.P., 2016 WL 9446140 (N.D. Ill. Sept. 21, 2016) (denial of statutorily-required information, here disclosure of name of creditor, is concrete harm as a matter of law; noting that this requirement reduces the risk of fraud by scammers who claim falsely to be entitled to collect a debt). *See also* Fritz v. Resurgent Capital Servs., L.P., 955 F. Supp. 2d 163, 171 (E.D.N.Y. 2013) (pre-*Spokeo* decision; noting that misrepresentation about ownership of a debt could lead consumer to pay the wrong person).

66 Demarais v. Gurstel Chargo, P.A., ___ F.3d ___, 2017 WL 3707437, at *4 (8th Cir. Aug. 29, 2017) (spending time and money to defend against meritless suit is an injury); Michael v. HOVG, L.L.C., 232 F. Supp. 3d 1229 (S.D. Fla. 2017) (attempting to collect processing fee that was not owed); Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *5 (W.D. Wash. Mar. 29, 2017) (plaintiff's telephone call to ask counsel to dispute amount of debt is concrete injury); Verdun v. Fidelity Creditor Serv., 2017 WL 1047109 (S.D. Cal. Mar. 20, 2017) (mag.) (plaintiff's expenditure of funds to hire an attorney to clarify his legal obligations after receiving confusing debt collection letter is concrete injury); Horowitz v. GC Servs. L.P., 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016) (non-debtor's expenditure of time to respond to voice mail, his use of a cell phone minute, and collector's recording of his call without telling him); Everett v. Fin. Recovery Servs., Inc., 2016 WL 6948052 (S.D. Ind. Nov. 28, 2016) (finding standing to bring claim regarding letter's misrepresentation of tax consequences of settling claim; citing costs consumer incurred to consult her attorney as one of the harms); Mogg v. Jacobs, 2016 WL 4395899 (S.D. Ill. Aug. 18, 2016) (concrete harm shown where consumer incurred costs to defend against collection action that was filed in violation of automatic stay); Robinson v. JH Portfolio Debt Equities, L.L.C. (*In re* Robinson), 554 B.R. 800 (Bankr. W.D. La. 2016) (attorney fee for contesting time-barred proof of claim is concrete injury). *See also* Tourgeman v. Collins Fin. Servs., Inc., 755 F.3d 1109, 1119–1122 (9th Cir. 2014) (pre-*Spokeo* decision; identifying "American Investment Bank, N.A.," instead of "CIT Online Bank " as the originator of a loan could cause consumer to engage in attempt to investigate the debt that would use up part of the thirty-day period to dispute it); Moran v. Greene & Cooper Attorneys L.L.P., 43 F. Supp. 3d 907, 914 (S.D. Ind. 2014) (pre-*Spokeo* decision; "[u]nsophisticated consumers may lose track of their debts ... and it is plausible that Plaintiff here would reasonably be confused by a letter demanding that he pay a sum of money to 'Unknown'"). *But see* Lyshe v. Levy, 854 F.3d 855 (6th Cir. 2017) (potential harm that debtor might be required to visit a notary or contact the collector to request an electronic copy of discovery requests is not the type of harm FDCPA was enacted to prevent); Johnston v. Midland Credit Mgmt., 229 F. Supp. 3d 625 (W.D. Mich. Jan. 26, 2017) (disregarding without explanation plaintiff's travel expenses and the time he spent consulting with counsel and making telephone calls after receiving settlement offer that collector then refused to implement). *But cf.* Allgire v. HOVG, L.L.C., 2017 WL 1021394 (S.D. Ind. Mar. 16, 2017) (costs of consulting with attorney because of allegedly deceptive demand for payment "is not an injury sought to be avoided by enforcement of the FDCPA" because FDCPA gives court authority to award costs and attorney fees; not clear from opinion whether the consultation was about filing the FDCPA claim or about interpreting the misleading collection letter); Bass v. Blitt & Gaines, P.C., 2016 WL 6877729 (N.D. Ill. Nov. 22, 2016) (fact that consumer hired attorney after receiving deceptive notice from collection firm is not concrete harm where court speculates that he might have hired an attorney even without the deception).

67 Kaiser v. Cascade Capital L.L.C., 2017 WL 2332856, at *5–6 (D. Or. May 25, 2017) (noting that, if plaintiffs had been induced to make a payment on the debt, they would have waived the statute of limitations defense), *rejected on other grounds*, 2017 WL 3841726 (D. Or. Aug. 31, 2017) (referring case to arbitration; denying motion to dismiss as moot); Macy v. GC Servs. L.P., 2016 WL 5661525 (W.D. Ky. Sept. 29, 2016) (misstatement of the method by which the consumer can exercise the right to dispute a debt creates a risk that the debtor will inadvertently waive this right); Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467, at

● The entry of a judgment against the debtor if the false statement is filed in court, with the potential additional harm of credit reports, garnishment, and other methods of judgment execution.[68]

Other kinds of FDCPA violations may cause these same harms. For example, harassment through repeat telephone calls may, like deception, induce a consumer to pay a low-priority debt instead of rent or other essential immediate obligations. Repeat telephone calls waste the consumer's time, just as misrepresentations may cause a consumer to spend time tracking down the truth.

Other types of harm that consumers may suffer due to FDCPA violations include:

● Damage to the consumer's credit rating;[69]

● Damage to the consumer's reputation;[70]

● Interference with the debtor's employment;[71] and

● Travel expenses to get to a court in a distant venue where the collector has filed suit.[72]

Courts also recognize that emotional distress caused by FDCPA violations is a concrete harm.[73] Indeed, emotional distress is widely allowed as an element of actual damages in FDCPA cases.[74] The Supreme Court has held that "[d]istress is a personal injury familiar to the law" and is compensable as an actual injury.[75] In addition, Congress's statement of its purposes in enacting the FDCPA stresses its intent to protect consumers from injuries that are primarily emotional, such as

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*4 (N.D. Ill. July 11, 2016) (pointing out that denial of § 1692g rights deprives debtor not only of information but also of the ability to force a thirty-day cessation of collection activity). *But see* Bass v. Blitt & Gaines, P.C., 2016 WL 6877729 (N.D. Ill. Nov. 22, 2016) (holding that fact that consumer would have waived defense of lack of service of process by attending hearing as wrongfully instructed in notice from collector is not sufficiently concrete where he did not, in fact, attend the hearing; failing to consider risk of harm).

68 *See, e.g.*, Toohey v. Portfolio Recovery Assocs., L.L.C., 2017 WL 2271548 (S.D.N.Y. May 12, 2017).

69 *See* § 6.11a.4.7, *infra* (standing to assert claim that collector wrongfully reported information to credit reporting agency).

70 *See* §§ 6.11a.4.7 (credit reporting), 6.11a.4.8 (wrongful third-party contacts), *infra*.

71 *See* § 6.11a.4.8, *infra* (wrongful third-party contacts).

72 *See* § 6.11a.4.12, *infra* (standing for suits regarding venue abuse).

73 Demarais v. Gurstel Chargo, P.A., ___ F.3d ___, 2017 WL 3707437 (8th Cir. Aug. 29, 2017); Moore v. Blibaum & Assocs., ___ Fed. Appx. ___, 2017 WL 3049521 (4th Cir. July 19, 2017); Reed v. IC Sys., Inc., 2017 WL 89047 (W.D. Pa. June 10, 2017) (wasted time and annoyance caused by repeated calls is concrete harm, even if consumer does not answer them); Barnhill v. FirstPoint, Inc., 2017 WL 22178439 (M.D.N.C. May 17, 2017); Bartl v. Enhanced Recovery Co., 2017 WL 1740152 (D. Minn. May 3, 2017); Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597, at *4 (N.D. Tex. Apr. 8, 2017); Morris v. Ocwen Loan Servicing, L.L.C., 2017 WL 1035944 (D.S.C. Mar. 17, 2017); Mogg v. Jacobs, 2016 WL 4395899 (S.D. Ill. Aug. 18, 2016). *But see* Mishniot v. Int'l Recovery Systems Ltd., 2017 WL 714345 (D. Nev. Feb. 22, 2017) (stating that "embarrassment, frustration, personal humiliation, mental anguish, and anger" are not concrete harms and are not analogous to traditionally-recognized injuries, without mentioning torts such as intentional infliction of emotional distress or Congress's focus on emotional harms such as marital instability and invasions of privacy). *But cf.* Bass v. Blitt & Gaines, P.C., 2016 WL 6877729 (N.D. Ill. Nov. 22, 2016) (finding allegation of emotional distress insufficient to satisfy concreteness requirement on the ground that it could not be fairly traced to the deceptive communication, as opposed to the collection suit to which the communication related).

74 *See* §§ 2.5.5.2.4, 2.5.3, 2.5.4, *supra*.

75 *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 263, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (holding that mental suffering and emotional anguish are compensable in § 1983 suit). *See generally* § 6.3.2, *infra*.

marital instability and invasions of individual privacy.[76]

Section 2.5.2.2, *supra*, includes a list of many other types of harm that FDCPA violations can cause.

6.11a.4 General Application of Spokeo *to Deception or Failure to Make Disclosures in Debt Collection*

6.11a.4.1 Introduction

Congress identified deceptive debt collection practices as one of its primary concerns when it enacted the FDCPA.[77] Many provisions of the FDCPA protect debtors from false, deceptive, or misleading practices. These are found primarily in section 1692e, but violations of the disclosure requirements of section 1692g can also be framed as false, deceptive, or misleading. Complaints about deception by debt collectors continue to be common.[78]

This section discusses the general application of *Spokeo* to the question of whether debtors have standing under Article III to assert claims of deception or nondisclosure in federal court. The section first analyzes tangible injuries that may be caused by these violations. It then looks at the two methods *Spokeo* identifies to establish that an intangible harm is concrete: first, that the 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;"[79] and second, that Congress has exercised its power to "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[80] This latter discussion includes an analysis of whether a denial of information, that Congress requires a debtor to be given, is an informational injury that is sufficient in itself to establish standing. Advocates should also refer to § 6.11a.3.4, *supra*, which lists the types of harms or threatened harms that violation of the FDCPA's prohibitions against deception or its disclosure requirements may cause debtors, with citations to decisions finding that these harms are concrete.

Later subsections examine the application of *Spokeo* to specific violations of the FDCPA's prohibitions against deceptive acts and nondisclosure: overstatement of the amount owed (§

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76 15 U.S.C. § 1692(a). *See* Demarais v. Gurstel Chargo, P.A., ___ F.3d ___, 2017 WL 3707437, at *3 (8th Cir. Aug. 29, 2017) ("Congress recognized that abusive debt collection practices contribute to harms that can flow from mental distress, like 'marital instability' and 'the loss of jobs.'").

77 15 U.S.C. § 1692a (referring to "abundant evidence of the use of ... deceptive ... debt collection practices").

78 Consumer Financial Protection Bureau, Fair Debt Collection Practices Act, CFPB Annual Report 20 (Mar. 2016), *available at* www.consumerfinance.gov (noting that common complaints include false threats of arrest or jail, threats to sue on a debt that is too old, attempts to collect the wrong amount, impersonation of an attorney or a law enforcement or government official, and claims that the consumer committed a crime by not paying the debt).

79 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

80 *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

6.11a.5.1, *infra*), misstatements to credit reporting agencies (§ 6.11a.5.2, *infra*), the collector's failure to identify itself and state the debt collection purpose of the call (§ 6.11a.5.3, *infra*), and other deceptive acts (§ 6.11a.5.4, *infra*). A later subsection (§ 6.11a.6, *infra*), analyzes the consumer's standing to assert violations of both the disclosure provisions and the other provisions of section 1692g.

In analyzing standing for deception and nondisclosure, it is important to remember that a "risk of real harm" can be sufficient to satisfy the requirement of concreteness.[81] For example, a consumer may have standing to bring suit regarding deception, even where the deception did not succeed, as long as there was a risk that it would succeed and cause some additional harm.

6.11a.4.2 Tangible Injuries That Deception or Nondisclosure May Cause

In some cases involving false, deceptive, or misleading debt collection practices in violation of section 1692e, the injury-in-fact element of standing will be easily established by demonstrating tangible harm as a result of those practices. For example, consumers with section 1692e(2)(A) claims may have paid interest, fees, or other charges that were not authorized in the agreement creating the debt. Courts have awarded actual damages under section 1692k(a)(1) for a wide variety of injuries as a result of abusive debt collection practices, including stress-related injuries,[82] out-of-pocket losses,[83] and injuries to personal relations.[84] Consumer attorneys should be sure to reference any actual damages[85] suffered by the consumer in their pleadings, as such damages will illustrate that the plaintiff's injury is "real and not abstract."[86] A substantial risk of these harms may also be sufficient to establish standing.[87] Types of tangible and intangible harms that consumers are likely to suffer as a result of deceptive debt collection practices are listed in § 6.11a.3.4, *supra*.

6.11a.4.3 Intangible Injuries Caused by Deception or Nondisclosure That Are Traditionally Recognized As Actionable

Where a deceptive statement or failure to make a required disclosure does not cause tangible harm, one of the two approaches that *Spokeo* recognizes to establish standing is to show that the intangible harm "has a close relationship to a harm that has traditionally been regarded as providing a

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81 *Id.* at 1549.
82 For a list of stress-related injuries and case citations, see § 2.5.2.2.2, *supra*.
83 For a list of out-of-pocket injuries and case citations, see § 2.5.2.2.3, *supra*.
84 For a list of injuries to personal relations and case citations, see § 2.5.2.2.4, *supra*.
85 *See* §§ 2.5.2.2 (listing types of injuries that may result from debt collection abuse), 6.3 (discussion of actual damages), *supra*.
86 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'").
87 *See* §§ 6.11a.2, 6.11a.3.4, *supra*.

basis for a lawsuit in English or American courts."[88] A number of courts recognize that the FDCPA's prohibition of false, deceptive, and misleading statements protects against a harm analogous to that which has been traditionally recognized as actionable at common law through torts such as fraud and deceit.[89] To the extent that false statements reach third parties, the harm caused is closely analogous to that long recognized as actionable by the torts of libel and slander.[90] One decision, while finding Article III standing on other grounds, concludes that common law did not treat false statements in the context of debt collection as actionable;[91] it erroneously focuses on what causes of action were recognized at common law rather than what types of harm were considered sufficient.[92]

6.11a.4.4 Congress's Definition of Deception and Nondisclosure As Giving Rise to a Case or Controversy

6.11a.4.4.1 Congress's articulation of its intent in enacting the FDCPA

The second approach that the *Spokeo* Court recognizes to show that an injury is concrete is that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[93] It "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[94]

Congress could not have made its intent clearer to define deception in debt collection as an injury that gives rise to a cause of action. The FDCPA begins with the statement: "(a) There is abundant evidence of the use of ... deceptive ... debt collection practices by many debt collectors."[95] This congressional finding is followed by the broad language of section 1692e: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." And furthermore, section 1692e(1) goes on to prohibit "[t]he use of any false

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88 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016).

89 Scibetta v. TD Banknorth, 2017 WL 3448544 (D.N.J. Aug. 11, 2017); Griffin v. Andrea Visgilio-McGrath, L.L.C., 2017 WL 3037387, at *6 (D.N.J. July 18, 2017); Bock v. Pressler & Pressler, L.L.P., ___ F. Supp. 3d ___, 2017 WL 2304643 (D.N.J. May 25, 2017); Haddad v. Midland Funding, L.L.C., ___ F. Supp. 3d ___, 2017 WL 1550187 (N.D. Ill. May 1, 2017); Thomas v. John A. Youderian Jr., L.L.C., 232 F. Supp. 3d 656, 669 (D.N.J. Feb. 3, 2017) ("The right not to be given false information about the true amount owed is rooted in an interest traditionally recognized at law.").

90 *See* § 9.5, *infra*.

91 Brown v. R & B Corp., ___ F. Supp. 3d ___, 2017 WL 3224728, at *5 (E.D. Va. July 28, 2017) (finding standing on ground that reporting a debt without reporting it as disputed violates a right created by Congress and creates a risk of harm).

92 *See* Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) *(*"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") (emphasis added).

93 *Id.* at 1549 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

94 *Id.* at 1549 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (J. Kennedy, concurring)).

95 15 U.S.C. § 1692(a).

representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." Section 1692e also enumerates fifteen prohibitions of specific types of deceptive debt collection conduct. In addition, Congress recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[96] Congress recognized that consumers should recover their actual damages[97] and "additional damages"[98] up to $1000 reflecting the frequency, persistence, nature, and extent[99] of the debt collector's noncompliance.

Moreover, the harm from deceptive debt collection conduct has long provided a basis for lawsuits in federal courts. "[P]rior to the passage of the FDCPA, the FTC had protected unsophisticated consumers from debt collection practices which have a tendency or capacity to deceive."[100] The Federal Trade Commission Act had prohibited deceptive practices early in the twentieth century, and the FTC actively pursued companies under the FTC Act for debt collection violations well before the enactment of the FDCPA.[101] Congress determined in both the FTC Act and the FDCPA that consumers had the right to accurate information.

6.11a.4.4.2 Decisions finding standing on the ground that Congress has defined deception and nondisclosure in debt collection as a concrete harm

Two of the first post-*Spokeo* circuit court decisions on standing apply this analysis to hold that deception and nondisclosure in violation of the FDCPA causes a concrete injury. In *Church v. Accretive Health, Inc.*,[102] the complaint alleged that the defendant medical accounts servicer failed to give the consumer section 1692e(11) and section 1692g notices. The Eleventh Circuit held that the complaint sufficiently alleged an injury in fact to meet the constitutional standing requirements in *Spokeo*:

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96 15 U.S.C. § 1692(a).
97 15 U.S.C. § 1692k(a)(1).
98 15 U.S.C. § 1692k(a)(2)(A).
99 15 U.S.C. § 1692k(b).
100 Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1173 (11th Cir. 1985).
101 *See, e.g.*, Slough v. Fed. Trade Comm'n, 396 F.2d 870, 872 (5th Cir. 1968) ("As to the prohibition against falsely threatening legal action, the fault with Petitioner's position is his own readily-made admission that the entire collection scheme is designed to collect without the necessity of legal action, and therein lies the deception."); Dorfman v. Fed. Trade Comm'n, 144 F.2d 737, 740 (8th Cir. 1944) ("threats to sue for the purpose of extorting money from customers where no money is due may be forbidden by the Federal Trade Commission, and an Order to Cease and Desist from such a practice is within its powers under the [FTC] Act"); Consent Order, *In re* Neighborhood Periodical Club, Inc., 81 F.T.C. 93 (F.T.C. 1972) (simulated legal process); Consent Order, *In re* Tops Furniture Co., 76 F.T.C. 402 (F.T.C. 1969); Consent Order, *In re* Better Bus. Serv., 74 F.T.C. 306 (F.T.C. 1968); *In re* Perpetual Encyclopedia Corp., 16 F.T.C. 443 (F.T.C. 1932).
102 654 Fed. Appx. 990 (11th Cir. 2016).

> The invasion of Church's right to receive the disclosures is not hypothetical or uncertain; Church did not receive information to which she alleges she was entitled. While this injury may not have resulted in tangible economic or physical harm that courts often expect, the Supreme Court has made clear an injury need not be tangible to be concrete. *See Spokeo, Inc.*, 578 U.S. at ___, 136 S. Ct. at 1549; *Havens Realty Corp.*, 455 U.S. at 373. Rather, this injury is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA. Accordingly, Church has sufficiently alleged that she suffered a concrete injury, and thus, satisfies the injury-in-fact requirement.[103]

The Court further distinguished *Spokeo* as involving a procedural right, whereas Church had alleged violation of the substantive right to receive the FDCPA disclosures, and that the defendant violated that substantive right.[104]

The Second Circuit's first post-*Spokeo* decision on standing, *Papetti v. Does 1-25*,[105] takes a similarly strong position—that the violation of FDCPA protections, at least those found in sections 1962e and 1692g, is a concrete injury in and of itself:

> The purpose of the FDCPA is, among other things, to protect debtors from "abusive debt collection practices by debt collectors." Section 1692g furthers that purpose by requiring a debt collector who solicits payment from a consumer to provide that consumer with "a detailed validation notice," which allows a consumer to confirm that he owes the debt sought by the collector before paying it. And, similarly, Section 1692e protects a consumer's ability to fully avail himself of his legal rights by prohibiting debt collectors from deceiving or misleading debtors in the course of collecting a debt. Thus, the FDCPA violations alleged by Papetti, taken as true, "entail the concrete injury necessary for standing."[106]

A robust body of other post-*Spokeo* decisions agree that the receipt of deceptive debt collection communications[107] or the failure to receive information that the FDCPA requires[108] is a

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103 *Id*. at 944. The Eleventh Circuit then dismissed the case on the merits, finding that the defendant was exempt under § 1692a(6)(F)(iii).

104 *Id*. at n.2.

105 691 Fed. Appx. 24 (2d Cir. 2017).

106 *Id.* at 26 (citations omitted).

107 Michael v. HOVG, L.L.C., 232 F. Supp. 3d 1229 (S.D. Fla. 2017) (attempting to collect processing fee that was not owed); Wheeler v. Midland Funding, L.L.C., 2017 WL 3235683 (N.D. Ill. July 31, 2017) (receiving misleading or incomplete information in violation of a statutory mandate satisfies concreteness requirement); Feldheim v. Fin. Recovery Servs., Inc., 2017 WL 2821550 (S.D.N.Y. June 29, 2017) (plaintiff who receives a false representation has suffered exactly the sort of harm the statute was intended to guard against; this is sufficient harm); Griffin v. Andrea Visgilio-McGrath, L.L.C., 2017 WL 3037387 (D.N.J. July 18, 2017) (receipt of false information is concrete injury); Hernandez v. Midland Credit Management, Inc., 2017 WL 2985764, at *3 (N.D. Ill. July 13, 2017) (finding standing to assert claims of deception in light of "Congress' findings in § 1692, the relationship of the trickery targeted by the FDCPA to intangible harms which have historically conferred standing to sue, and the risk of harm to consumers who receive inaccurate or inadequate collection letters from debt collectors"); Schweer v. HOVG, L.L.C., 2017 WL 2906504, at *4 (M.D. Pa. July 7, 2017); Bryant v. Aargon Collection Agency, Inc., 2017 WL 2955532 (S.D. Fla. June 30, 2017) (letter falsely stated that interest would be added, and demanded an unauthorized fee for payment by credit card; denial of statutory right to receive accurate, non-misleading information is concrete injury); Gonzalez v. Credit Protection Ass'n, L.P., 2017 WL 2798404 (N.D. Ill. June 28, 2017) (collection letters sought sales tax that was not owed;

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informational injury provides standing); Stockman v. Credit Protection Ass'n, 2017 WL 2798403 (N.D. Ill. June 28, 2017) (collection letters sought sales tax that was not owed; informational injury provides standing); Smith v. GC Servs. L.P., 2017 WL 2629476 (S.D. Ind. June 19, 2017) (misstatement in § 1692g notice about manner of disputing debt; giving inaccurate information is not a bare procedural violation, but presents material risk of harm); Lopez v. Law Offices of Faloni & Assocs., L.L.C., 2017 WL 2399083 (D.N.J. June 2, 2017) (consumer has substantive right to be free from false or deceptive information in debt collection; misrepresentation of legal status of debt is concrete injury without need to show additional harm); Pralle v. Cooling & Winter, L.L.C., 2017 WL 1653627 (M.D. Fla. May 2, 2017) (collection letter falsely stated that balance was owed on debt that had been fully paid; receipt of false information is concrete injury, plus this plaintiff incurred expenses to get his attorney to review the demand); Reed v. Receivable Recovery Services, L.L.C., 2017 WL 1399597 (E.D. La. Apr. 19, 2017) (finding standing where one of claims involved deception, but dismissing claims on merits), *appeal filed* (5th Cir. May 18, 2017); Irvine v. I.C. Sys., Inc., 198 F. Supp. 3d 1232 (D. Colo. 2016) (false statement that debt would remain on credit report until paid; violation of substantive right not to be given false information creates concrete injury); Bautz v. ARS Nat'l Services, Inc., 226 F. Supp. 3d 131, 141 (E.D.N.Y. Dec. 23, 2016) (where plaintiff seeks to enforce substantive right created by statute—here the right to truthful communications—she has standing without alleging material risk of harm, because infringement of the right is itself a concrete injury); Carney v. Russell P. Goldman, P.C., 2016 WL 7408849 (D.N.J. Dec. 22, 2016) (demand letter and suit seeking attorney fees to which creditor was not entitled causes informational injury and creates risk of economic injury); Anda v. Roosen Varchetti & Olivier, P.L.L.C., 2016 WL 7157414, at *5 n.2 (W.D. Mich. Oct. 31, 2016) (wrongfully including certain court costs in statement of amount of debt in garnishment applications; giving false and misleading information is explicitly prohibited by FDCPA and creates concrete injury); Hall v. Global Credit & Collection Corp., 2016 WL 4441868 (M.D. Fla. Aug. 23, 2016) (misidentification of original creditor; failure to provide information that FDCPA requires is concrete injury). *But see* Lyshe v. Levy, 854 F.3d 855, 859 (6th Cir. 2017) (rejecting view that receiving false information in connection with debt collection is a concrete harm in and of itself); Wheeler v. Am. Profit Recovery, Inc., 2017 WL 44585 (E.D. Mo. Jan. 3, 2017) (holding that plaintiff lacks standing to assert claim involving flat-rater's misrepresentation that collection agency was involved; rejecting view that informational injuries are sufficient to demonstrate standing); Perry v. Columbia Recovery Group, L.L.C., 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016) (misstatement of deadline in § 1692g notice did not cause concrete harm where plaintiff does not allege that he was confused, that debt was incorrect, or that he intended to dispute it; denial of information is not concrete harm in itself).

108 Qualls v. T-H Prof'l & Medical Collections, Ltd., 2017 WL 3087241 (C.D. Ill. July 20, 2017) (collector's failure to disclose in phone call that it was a collector causes concrete harm); Winehouse v. GC Servs. L.P., 2017 WL 2455075 (E.D.N.Y. June 6, 2017) (failure to disclose that voicemail was from collector; statute creates right to this information, and consumer suffers injury in fact when collector fails to provide it); Taylor v. Fin. Recovery Services, Inc., ___ F. Supp. 3d ___, 2017 WL 2198980 (S.D.N.Y. May 18, 2017) (leaving voice mail message that did not disclose that caller was a debt collector causes concrete injury; unlawful denial of access to information that is statutorily subject to disclosure alone sufficiently constitutes injury-in-fact); Hagy v. Demers & Adams, L.L.C., 2017 WL 1134408 (S.D. Ohio Mar. 27, 2017) (failure to disclose that letter was from collector and to include "civil Miranda" warning; failure to provide information required by FDCPA causes concrete injury); Guerrero v. GC Servs. L.P., 2017 WL 1133358 (E.D.N.Y. Mar. 23, 2017) (mag.) (failure to identify creditor specifically enough or to disclose whether fees could be added to amount of debt, and use of confusing extraneous language in § 1692g notice; this plaintiff also alleged lost time at work, waste of time, and fight with spouse as actual damages); George v. Wright, Lerch & Litow, L.L.P., 2016 WL 6963990 (S.D. Ind. Nov. 29, 2016); Allah-Mensah v. Law Office of Patrick M. Connelly, P.C., 2016 WL 6803775, at *6 (D. Md. Nov. 17, 2016) ("violation of § 1692g(a)'s requirements for essential information regarding debt collection, coupled with § 1692e's requirements that communication must be free from false or misleading representations, render Plaintiff's claims sufficient to meet the requirement of concreteness"); Janetos v. Fulton Friendman & Gullace, L.L.P., 2016 WL 9446140 (N.D. Ill. Sept. 21, 2016) (denial of statutorily-required information, here disclosure of name of creditor, is concrete harm as a matter of law); Saenz v. Buckeye Check Cashing, 2016 WL 5080747 (N.D. Ill. Sept. 20, 2016) (Congress gave consumer a legally protected interest in certain information about their debts; receiving deficient and misleading communications is concrete injury); Quinn v. Specialized Loan Servicing, L.L.C., 2016 WL 4264967 (N.D. Ill. Aug. 11, 2016) (failure to disclose debt collection purpose of visits; denial of information consumer has right to receive is concrete injury); Dickens v. GC Services, L.P., 2016 WL 3917530 (M.D. Fla. July 20, 2016) (violation of § 1692g by failing to

concrete injury in and of itself. Truthful information has intrinsic value to a debtor.[109] As one court stated: "[B]eing lied to in violation of an anti-trickery statute like the FDCPA is a concrete harm."[110]

The many post-*Spokeo* decisions finding Article III standing for particular deception or nondisclosure violations are cited and described in §§ 6.11a.5 and 6.11a.6, *infra*. So far, most of the decisions that have found a lack of standing for deceptive communications have involved unusual individual circumstances: a deceptive communication that never actually reached the debtor,[111] or one that reached the wrong party, who instantly recognized that it was not their debt.[112] A few other decisions take the position that an informational injury—denial of information that Congress requires to be provided to a debtor—is not concrete in and of itself, and dismiss deception or nondisclosure claims where the consumer failed to show some additional harm, such as some action taken in reliance on the incorrect information.[113] These decisions often neglect to analyze the risk of harm

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specify that certain notices must be in writing; non-receipt of information that FDCPA requires is concrete injury). *But see* Jackson v. Abendroth & Russell, P.C., 207 F. Supp. 3d 945 (S.D. Iowa 2016) (interpreting *Spokeo* not to hold that denial of information is concrete; must show additional injury). *But cf.* Lambe v. Allgate Financial, L.L.C., 2017 WL 3115755 (S.D. Fla. July 20, 2017) (conflating standing and the merits and holding that, while consumer has standing if collector failed to give her information that FDCPA requires, she does not have standing when FDCPA does not require it).

109 Haddad v. Midland Funding, L.L.C., ___ F. Supp. 3d ___, 2017 WL 1550187, at *4 (N.D. Ill. May 1, 2017).

110 *Id.* at *3.

111 Borg v. Phelan, Hallinan, Diamond & Jones, P.L.L.C., 2017 WL 2226649 (M.D. Fla. May 22, 2017) (where foreclosure firm had not yet requested allegedly illegal fee in any demand or complaint, but was merely keeping track of it with intent to ask court to include it in an award of costs if foreclosure action was successful, injury is too speculative and consumer lacks standing); Tourgeman v. Collins Fin. Services, Inc., 197 F. Supp. 3d 1205 (S.D. Cal. 2016) (risk of harm is too hypothetical as to misidentification of creditor and misrepresentations in letter that consumer never received), *appeal filed* (9th Cir. Aug. 19, 2016).

112 Benali v. AFNI, Inc., 2017 WL 39558 (D.N.J. Jan. 4, 2017).

113 *See* May v. Consumer Adjustment Co., 2017 WL 227964 (E.D. Mo. Jan. 19, 2017) (not all failures to provide statutorily-mandated information cause harm or risk of harm; statement of amount due that did not specify that interest was accruing did not cause harm to this plaintiff, who called the collector and got an explanation of why the amount due was changing); Wheeler v. Am. Profit Recovery, Inc., 2017 WL 44585 (E.D. Mo. Jan. 3, 2017) (plaintiff lacked standing to assert claim involving flat-rater's misrepresentation that collection agency was involved; noting that material risk of harm may establish standing, but failing to analyze this issue, and relying on fact that this plaintiff did not allege that he was deceived or took some action because of the letters); Abercrombie v. Rogers, Carter, & Payne, 2016 WL 8201965 (W.D. La. Nov. 22, 2016) (plaintiff who did not contest the debt or intend to dispute it lacks standing to assert claim for misstatements about right to dispute a debt), *adopted by* 2017 WL 489426 (W.D. La. Feb. 6, 2017); Bass v. Blitt & Gaines, P.C., 2016 WL 6877729 (N.D. Ill. Nov. 22, 2016) (holding that fact that consumer would have waived defense of lack of service of process by attending hearing as instructed in notice from collector is not sufficiently concrete where he did not in fact attend the hearing; engaging in overly minute analysis of causation of the emotional distress and counsel costs plaintiff pleaded as concrete harms, and failing to consider risk of harm); Perry v. Columbia Recovery Group, L.L.C., 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016) (misstatement of deadline in § 1692g notice did not cause concrete harm where plaintiff does not allege that he was confused, that debt was incorrect, or that he intended to dispute it; denial of information is not concrete harm in itself). *See also* Allgire v. HOVG, L.L.C., 2017 WL 1021394 (S.D. Ind. Mar. 16, 2017) (debtor has no risk of harm from misrepresentation that is not material—here a $1.90 misstatement of amount required to settle the debt—so does not have standing); Jackson v. Abendroth & Russell, P.C., 207 F. Supp. 3d 945 (S.D. Iowa 2016) (finding no standing for including language that overshadowed the § 1692g notice and failing to disclose the means of requesting verification of

caused by the violation—an essential element of the analysis of concreteness under *Spokeo*.[114]

The more significant negative decision is *Lyshe v. Levy*,[115] in which the Sixth Circuit held that the plaintiff lacked standing to assert, *inter alia*, a claim that a collection firm served discovery materials on him falsely stating that requests for admission would be deemed admitted unless the consumer provided sworn responses. The court characterized these as procedural violations. It rejected the position taken by other courts that receiving false information in connection with debt collection activities is a concrete harm in and of itself.[116] It stated that the potential harm of being required to visit a notary was "not the type of harm the FDCPA was designed to prevent"[117] and stressed that, in any event, the plaintiff had not suffered this harm and had conceded that he was at no risk of doing so. The court distinguished cases in which the defendants knowingly and intentionally misrepresent facts concerning a debt.[118]

6.11a.4.4.3 Informational injuries as a sufficient basis for standing

In *Spokeo*, the Supreme Court noted that, in some cases, a plaintiff "need not allege any *additional* harm beyond the one Congress has identified."[119] The Court gave as an example the right to information that Congress had decided should be made public, and cited two of its earlier decisions on this topic.[120] It described one, *Federal Election Commission v. Akins*,[121] as "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." In that case, a group of voters sought to appeal the Federal Election Commission's determination that an organization was not a political committee, and so did not have to make disclosures regarding expenditures made to influence federal elections. The Court held that the voters' "inability to obtain information ... that ... the statute requires to be made public" was both concrete and particular. It noted that the Commission's strongest argument was its contention that the suit involved only a generalized grievance, shared in substantially equal measure by all or a large class of citizens, but concluded that the voters' interest in the information was not as

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original creditor's identity; these errors did not create a risk of harm for this plaintiff, who conceded that the creditor identified in the notice was correct and he was not planning to dispute the debt).

114 *See, e.g.*, Scibetta v. TD Banknorth, 2017 WL 3448544 (D.N.J. Aug. 11, 2017) (holding that consumer lacks standing to assert claim that collector threatened repossession when it had no intention of doing so; failing to consider threat of harm). *See generally* § 6.11a.3.4, *supra*.

115 854 F.3d 855 (6th Cir. 2017).

116 *Id.* at 859.

117 *Id.* at 859, 861 (contrasting this violation with that serving requests on a debtor to admit things the collector knew were not true, which would cause the type of harm the FDCPA was designed to prevent).

118 *Id.* at 861.

119 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (emphasis in original).

120 *Id.* at 1549–1550.

121 524 U.S. 11, 20–25 (1998).

abstract as to justify a denial of standing.

The *Spokeo* Court's second example of a case involving an informational injury was *Public Citizen v. Department of Justice*,[122] which it described as "holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act 'constitute[d] a sufficiently distinct injury to provide standing to sue.'" There, a public interest organization sought information from the Department of Justice about judicial nominees. The Court held:

> As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records. ... There is no reason for a different rule here.[123]

Failure to provide information that the FDCPA requires is perhaps even more concrete than these two examples of informational injuries cited in *Spokeo*. Both *Akins* and *Public Citizen* deal with information that is required to be disclosed to the general public, while the FDCPA requires disclosures to a debtor about a matter of importance to them personally. Moreover, the disclosures required by the FDCPA relate to a concrete monetary obligation, rather than the more intangible interests that were held sufficient in the Supreme Court decisions.[124] These two decisions, and the *Spokeo* Court's reaffirmance of them, provide strong support for the view that a debtor's failure to receive information that the FDCPA requires, or receipt of false information, is a concrete injury in and of itself.

6.11a.5 Applying Spokeo *to Specific Deception or Nondisclosure Violations*

6.11a.5.1 Applying *Spokeo* to Claims That Collector Overstated Amount Owed

A common consumer claim is that the amount of the debt is overstated by a debt collector in a letter or a pleading in violation of section 1692e(2)(A), often in combination with parallel claims under sections 1692e(5), 1692e(10), and 1692f(1). Such consumers demonstrate tangible harm under an injury-in-fact analysis if they pay more than actually owed, or hire an attorney to help them get the error corrected or to defend against a collection lawsuit seeking inflated damages.[125] The consumer

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122 491 U.S. 440, 449 (1989).
123 *Id*. at 449 (citations omitted).
124 *See* Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016).
125 Demarais v. Gurstel Chargo, P.A., ___ F.3d ___, 2017 WL 3707437 (8th Cir. Aug. 29, 2017). *See generally* §§ 6.11a.3.4, 6.11a.4.2, *supra*.

may also have a diminished credit score due to the overstated amount of a debt or a judgment that is reported to consumer reporting agencies, thereby impeding the consumer's access to lower-cost credit, jobs, or housing.

In the absence of evidence of tangible harms, consumers can demonstrate the injury-in-fact element of standing through intangible injuries. History and congressional judgment indicate which intangible injuries demonstrate concreteness.[126] A violation of section 1692e(2)(A) is analogous to common law tort claims for negligent misrepresentation and, to the extent the false statement about the debt has been shared with others, the violation would also be similar to common law defamation.[127] Being subjected to attempts to collect debts not owed also has a close relationship to the harm made actionable by the common law torts of malicious prosecution, wrongful use of civil proceedings, and abuse of process.[128] Moreover, a violation of this section represents congressional judgment that this injury is sufficient to confer standing. Overstating the amount owed also creates an obvious risk of harm, in that the debtor may pay the overstated amount or a court may enter judgment on it.[129]

Not surprisingly, many courts have held that a collector's overstatement of the amount owed causes concrete injury to the consumer. These courts include the Fourth Circuit, which held in *Moore v. Blibaum & Associates, P.A.*,[130] that a consumer had standing to bring an FDCPA suit against a collector for demanding payment of an amount that was inflated because the collector had applied an improper interest rate. Noting that the plaintiff alleged that she had suffered emotional distress, anger, and frustration as a result of this violation, the Fourth Circuit held that this was not a bare procedural violation, divorced from any concrete harm. The Eighth Circuit has also held that a false representation in pleadings of the amount owed creates a risk of emotional distress sufficient to meet Article III's requirements.[131] Other post-*Spokeo* decisions have likewise found standing where the

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126 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). *See* § 6.11a.3.4, *supra*.

127 *See* § 6.11a.2, *supra*.

128 Demarais v. Gurstel Chargo, P.A., ___ F.3d ___, 2017 WL 3707437, at *3 (8th Cir. Aug. 29, 2017).

129 *See, e.g.*, Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (collection letter seeking payment of contingent fees that were not yet incurred, in violation of §§ 1692e and 1692f; overstatement of amount of debt creates risk that consumer will pay more than is owed); Ozmun v. Portfolio Recovery Assocs., 2017 WL 3140660, at *6 (W.D. Tex. July 24, 2017) (misstatement of balance due or character or status of debt "could have disastrous financial, legal, and reputational consequences for a consumer").

130 ___ Fed. Appx. ___, 2017 WL 3049521 (4th Cir. July 19, 2017). *Accord* Ben-Davies v. Blibaum & Assocs., P.A., ___ Fed. Appx. ___, 2017 WL 2378920 (4th Cir. June 1, 2017) (seeking interest on judgment debt at unauthorized rate, causing consumer to suffer emotional distress, is concrete injury).

131 Demarais v. Gurstel Chargo, P.A., ___ F.3d ___, 2017 WL 3707437 (8th Cir. Aug. 29, 2017). *See generally* § 6.11a.3.1, *supra* (further discussion of this decision).

consumer alleged misstatement of the amount owed[132] or that the amount owed was stated in a confusing way or without sufficient detail.[133]

Decisions that have found the overstatement of the amount of the debt to be material may also be helpful in identifying the important interest that is harmed by the FDCPA violation and help

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132 Ozmun v. Portfolio Recovery Assocs., 2017 WL 3140660, at *6 (W.D. Tex. July 24, 2017) (misstatement of balance due or character or status of debt "could have disastrous financial, legal, and reputational consequences for a consumer"); Coyne v. Midland Funding, L.L.C., 2017 WL 3088374 (D. Minn. July 20, 2017) (debtor has standing to assert claims under §§ 1692e and 1692f where letters asked for costs and interest he did not owe, even though he took no action in response to them), *appeal filed* (8th Cir. Aug. 18, 2017); Martin v. Trott Law, P.C., ___ F. Supp. 3d ___, 2017 WL 2972137, at *11 (E.D. Mich. July 12, 2017); Gonzalez v. Credit Protection Ass'n, L.P., 2017 WL 2798404 (N.D. Ill. June 28, 2017) (collection letters sought sales tax that was not owed; informational injury provides standing); Stockman v. Credit Protection Ass'n, 2017 WL 2798403 (N.D. Ill. June 28, 2017) (collection letters sought sales tax that was not owed; informational injury provides standing); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (collection letter seeking payment of contingent fees that were not yet incurred, in violation of §§ 1692e and 1692f); Taylor v. Financial Recovery Services, Inc., ___ F. Supp. 3d ___, 2017 WL 2198980 (S.D.N.Y. May 18, 2017) (plaintiff has standing to pursue claim that letters were misleading as to whether debts were accruing interest and fees); Haddad v. Midland Funding, L.L.C., ___ F. Supp. 3d ___, 2017 WL 1550187 (N.D. Ill. May 1, 2017) (falsely stating that additional charges may continue to be added to balance); Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *4 (W.D. Wash. Mar. 29, 2017) (consumer has standing where, upon receiving collection letter demanding unauthorized attorney fees and filing fees, he made telephone call to ask counsel to dispute the debt); Masson v. Pioneer Credit Recovery, Inc., 2017 WL 819099 (E.D. La. Mar. 2, 2017) (misrepresentation of liability for collection costs); Kaymark v. Udren Law Offices, P.C., 2016 WL 7187840 (W.D. Pa. Dec. 12, 2016) (allegation that complaint sought amounts to which creditor was not entitled, in violation of §§ 1692e(2)(A), 1692e(5), 1692e(10), and 1692f(1), shows concrete injury; FDCPA gives consumer the right to truthful information); Munoz v. Cal. Business Bur., Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016); Hill v. Accounts Receivable Services, L.L.C., 2016 WL 6462119 (D. Minn. Oct. 31, 2016) (consumer has standing to assert claim under §§ 1692e(2)(A), 1692e(5), 1692e(10), and 1692f against collector that filed suit seeking interest to which it is not entitled, even though consumer defeated collector's claim at trial), *appeal filed* (8th Cir. Dec. 2, 2016); Bernal v. NRA Group, L.L.C., 318 F.R.D. 64, 72 (N.D. Ill. Aug. 30, 2016) (receiving collection letter that wrongfully assessed percentage-based collection fee is concrete harm, even without allegation that debtor paid it); Nyberg v. Portfolio Recovery Assoc., 2016 WL 3176585 (D. Or. June 2, 2016) (incorrect statement of amount of debt). *But cf.* Allgire v. HOVG, L.L.C., 2017 WL 1021394 (S.D. Ind. Mar. 16, 2017) (debtor has no risk of harm from misrepresentation that is not material—here a $1.90 misstatement of amount required to settle the debt—so does not have standing); Borg v. Phelan, Hallinan, Diamond & Jones, P.L.L.C., 2017 WL 2226649 (M.D. Fla. May 22, 2017) (where foreclosure firm had not yet requested allegedly illegal fee in any demand or complaint, but was merely keeping track of it with intent to ask court to include it in an award of costs if foreclosure action was successful, injury is too speculative and consumer lacks standing).

133 Feldheim v. Fin. Recovery Services, Inc., 2017 WL 2821550 (S.D.N.Y. June 29, 2017); Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521, at *5–7 (D.N.J. July 27, 2017) (collection letters stated contradictory amounts owed, did not explain the calculation, and did not give amount owed on date of letter; plaintiff alleged that the letters confused her); Garcia v. Law Offices Howard Lee Schiff P.C., 2017 WL 1230847 (D. Conn. Mar. 30, 2017) (consumer has standing to assert claim under §§ 1692d, 1692e, and 1692f(1) for unclear statement of amount of debt; distinguishing cases where a required disclosure related to something that did not affect the consumer, such as a payment plan the consumer did not have; here the disclosure relates to consumer's own debt); George v. Wright, Lerch & Litow, L.L.P., 2016 WL 6963990 (S.D. Ind. Nov. 29, 2016) (holding that plaintiff has standing to assert claim that demand for 75% of debt, when the balance changed daily due to accrual of interest, was misleading, and need not show that she herself was deceived, but dismissing claim on merits). *But see* May v. Consumer Adjustment Co., 2017 WL 227964 (E.D. Mo. Jan. 19, 2017) (insufficiently specific statement of amount due, which did not state that interest was accruing, did not cause harm to this plaintiff, who called the collector and got an explanation of why the amount due was changing, so she does not have standing).

to show the concreteness of the harm for the *Spokeo* analysis.[134] For example, in *Powell v. Palisades Acquisition XVI, L.L.C.*,[135] a pre-*Spokeo* decision, the judgment creditor's mistaken statement of the amount of the debt (failing to credit a payment that was made and double charging for attorney fees) was found material, even though the amount stated was lower than what the consumer actually owed because of the omission of accrued interest. The Fourth Circuit held that the debt buyer's "overstatement—more than 50 percent [of the total debt, excluding interest]—was material under any standard," in that it could lead the consumer "to pay far more than she otherwise would have paid."[136] The fact that debt buyer later acknowledged its three mistakes in calculating the balance did not let it off the hook without the showing required by section 1692k(c) that its mistakes were bona fide, unintentional, and occurred despite the maintenance of procedures reasonably adapted to avoid such errors.[137] Decisions like this that address materiality support the argument that overstatement of the amount owed creates a concrete risk that the debtor will pay more than is owed.

6.11a.5.2 Applying *Spokeo* to Collector's Misstatements to Credit Reporting Agencies

Section 1692e(8) of the FDCPA prohibits collectors from reporting or threatening to report false credit information to any person.[138] This section includes a requirement that, when a collector communicates with a credit reporting agency about a debt that the consumer has disputed, it indicate that the debt is disputed.[139]

In *Sayles v. Advanced Recovery System, Inc.*,[140] the Fifth Circuit held that a consumer who alleged that a collector failed to report a disputed debt as disputed had Article III standing as interpreted by *Spokeo*. The consumer had not alleged any actual damages.[141] Noting the Supreme Court's holding that standing can be established where a statutory violation creates the risk of real harm, the Fifth Circuit held that this violation of section 1692e(8) "exposed Sayles to a real risk of financial harm caused by an inaccurate credit rating."[142] A number of district court decisions have agreed,[143] many of them noting that this risk is "readily apparent"[144] or even "axiomatic."[145] Courts

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134 *See* § 5.5.2.8, s*upra* and Appx. J.2.4.1.2, *infra*.
135 782 F.3d 119 (4th Cir. 2014).
136 *Id.* at 127.
137 *See* § 7.2, *infra*.
138 15 U.S.C. § 1692e(8), *discussed at* § 5.5.11, *infra*.
139 *See* 15 U.S.C. § 1692e(8), *discussed at* § 5.5.11, *infra*.
140 865 F.3d 246 (5th Cir. 2017).
141 Sayles v. Advanced Recovery Sys., Inc., 206 F. Supp. 3d 1210, 1211 (S.D. Miss. 2016), *aff'd*, 865 F.3d 246 (5th Cir. 2017).
142 Sayles v. Advanced Recovery Sys., Inc., 865 F.3d 246, 250 (5th Cir. 2017).
143 Brown v. R & B Corp., ___ F. Supp. 3d ___, 2017 WL 3224728 (E.D. Va. July 28, 2017) (finding Art. III

have also held that consumers have Article III standing to assert other violations of section 1692e(8), including reporting an inflated amount to a credit reporting agency[146] and threatening to report a discharged debt.[147]

The only contrary opinions are a series of nearly identical decisions issued by a single judge in the Eastern District of Virginia[148] that hold that the risk of harm from failure to report a debt as disputed is too speculative, and a decision from Florida that holds a similar complaint insufficient where it did not allege an effect on the plaintiff's credit score, how the plaintiff's score was affected, or whether the reduction in his score caused adverse consequences.[149] Even in courts that do not treat the consequences of inaccurate, damaging information on a person's credit report as obvious, it is advisable to plead any known facts showing an actual reduction in the plaintiff's credit score or other adverse consequences.

There is also an argument that misstatements to credit reporting agencies or other third

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standing even though plaintiff alleged no specific harm; failure to report debt as disputed poses a "readily apparent" risk of harm, because it may lead other creditors or potential creditors to take adverse action or decline to offer credit); Tejero v. Portfolio Recovery Assocs., 2017 WL 3217101 (W.D. Tex. July 27, 2017); Ozmun v. Portfolio Recovery Assocs., 2017 WL 3140660 (W.D. Tex. July 24, 2017); Duchene v. Aargon Collection Agency, Inc., 2017 WL 2402464, at *2 (M.D. Fla. June 2, 2017) ("Plaintiff has statutorily-created rights under the FDCPA to dispute a debt and have that debt properly reported to credit reporting agencies, so that Plaintiff's credit is not adversely impacted. It is axiomatic that an inaccurate credit rating poses a risk of harm because it may influence other creditors or potential creditors to take an adverse action, such as declining future credit."); Bowse v. Portfolio Recovery Assocs., 218 F. Supp. 3d 745, 749 (N.D. Ill. 2016) (failure to report debt as disputed creates "risk of substantial financial harm caused by an inaccurate credit rating"), *appeal filed* (7th Cir. Apr. 26, 2017); Irvine v. I.C. Sys., Inc., 198 F. Supp. 3d 1232 (D. Colo. 2016); Paz v. Portfolio Recovery Assocs., 2016 WL 6833932 (N.D. Ill. Nov. 21, 2016) (even without allegation of emotional or financial damages, failure to report dispute creates risk of an inaccurate credit rating, which is a concrete harm; "The FDCPA requires debt collectors to communicate the existence of a dispute even if the debt collector fully expects to win the dispute. The reason for these broad protections is because an incomplete credit disclosure creates the risk of an inaccurate credit rating. This risk of financial harm is a concrete harm, even though the harm was first defined and articulated by Congress."), *appeal filed* (7th Cir. Apr. 25, 2017); Evans v. Portfolio Recovery Assocs., 2016 WL 6833930, at *3 (N.D. Ill. Nov. 20, 2016) (presence of inaccurate information on credit report "poses a readily apparent risk of harm, because it may lead other creditors or potential creditors to take adverse action or decline to offer credit"), *appeal filed* (7th Cir. Apr. 13, 2017). *Cf.* Castillo v. Convergent Outsourcing, Inc., 2017 WL 2902844 (N.D. Cal. July 7, 2017) (dismissing complaint so that plaintiff can moot the standing question by adding allegations asserted in his opposition briefs that his credit score was in fact lowered because of collector's failure to report debt as disputed).

144 *See, e.g.*, Brown v. R & B Corp., ___ F. Supp. 3d ___, 2017 WL 3224728 (E.D. Va. July 28, 2017); Evans v. Portfolio Recovery Assocs., 2016 WL 6833930, at *3 (N.D. Ill. Nov. 20, 2016), *appeal filed* (7th Cir. Apr. 13, 2017).

145 Duchene v. Aargon Collection Agency, Inc., 2017 WL 2402464, at *2 (M.D. Fla. June 2, 2017).

146 Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *5 (W.D. Wash. Mar. 29, 2017).

147 Caprel v. Specialized Loan Servicing, Inc., 2017 WL 1739919 (N.D. Ill. May 4, 2017).

148 Taylor v. Medical Data Systems, Inc., 2017 WL 2989184 (E.D. Va. July 13, 2017); Gathers v. CAB Collection Agency, Inc., 2017 WL 2703686 (E.D. Va. June 22, 2017); Holmes v. Contract Callers, Inc., 2017 WL 2703685 (E.D. Va. June 22, 2017); Coleman v. Charlottesville Bur. of Credits, Inc., 2017 WL 1381666 (E.D. Va. Apr. 17, 2017).

149 Higgens v. Trident Asset Mgmt., L.L.C., 2017 WL 1230537 (S.D. Fla. Mar. 28, 2017).

parties cause harm that is closely analogous to the harm traditionally regarded as providing the basis for libel and slander claims in English and American courts.[150] While one decision concludes that common law did not treat false statements in the context of debt collection as actionable, it erroneously focuses on what causes of action were recognized at common law, rather than what types of harm were considered sufficient.[151]

As noted in § 4.5.1.1, *supra*, *Spokeo* draws a distinction between procedural and substantive violations. One decision, while finding Article III standing, characterizes failure to report a debt as disputed as a procedural violation.[152] However, reporting incorrect information to a third party is closely analogous to the common law torts of libel and slander, which would surely be characterized as protecting substantive rights. Indeed, many decisions characterize all of the FDCPA's protections as substantive.[153]

Standing when consumers assert violation of the related provision in section 1692g against reporting a debt to a credit reporting agency before responding to a consumer's dispute is discussed in § 6.11a.6, *infra*.

6.11a.5.3 Applying *Spokeo* to Collector's Failure to Identify Itself As a Collector and Disclose the Debt Collection Purpose of the Contact

Section 1692e(11) requires a debt collector to identify itself as such in communications with the consumer and, in initial communications, to disclose the debt collection purpose of the communication. These requirements address collection abuses observed by the Senate when the FDCPA was enacted, specifically "obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."[154] To end these abuses, Congress gave consumers the right to be informed that the entity contacting them is a debt collector and that any information obtained from the consumer will be used for collection purposes.[155]

The potential harms to consumers due to the failure to provide this congressionally mandated information can be seen in cases like *Romine v. Diversified Collection Services.*[156] In that case, Western Union urged consumers to call Western Union to confirm information to get delivery of a

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150 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016).

151 Brown v. R & B Corp., ___ F. Supp. 3d ___, 2017 WL 3224728, at *5 (E.D. Va. July 28, 2017) (rejecting analogy to harm recognized at common law, but finding standing on other grounds). *See generally* § 6.11a.2, *supra* (general discussion of tort analogies).

152 Brown v. R & B Corp., ___ F. Supp. 3d ___, 2017 WL 3224728 (E.D. Va. July 28, 2017).

153 *See* § 6.11a.3.3, *supra*.

154 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.

155 15 U.S.C. § 1692e(11).

156 55 F.3d 1142 (9th Cir. 1998).

personal telegram.[157] When the consumer called Western Union, it recorded the consumer's telephone caller ID, confirmed it with the consumer, and then provided the phone number to the debt collector, who used it to contact the consumer for debt collection.[158] In addition to disclosing personal contact information, consumers might unwittingly disclose personal information like bank account or credit card details, believing that this information was being provided for some other purpose.

Personal information that is obtained without section 1692e(11) disclosures is analogous to intrusion upon seclusion violations at common law, and the consumer is harmed even if there is no publication of that information.[159] Moreover, obtaining information without making the necessary disclosures raises the risk of additional harms such as unauthorized charges to credit cards or bank accounts and identity theft.

However, even if no personal information is disclosed, a violation of this section represents congressional judgment that this injury is sufficiently concrete to confer standing. As outlined above, the failure to provide the proper section 1692e(11) disclosures creates the real risk that the consumer may unwittingly disclose sensitive personal information. Moreover, section 1692e(11) requires information to be given to the consumer, and there is strong authority that the denial of access to information required by statute is a concrete injury under Article III.[160]

As the Senate concluded when it enacted the FDCPA, "the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce."[161] Viewed through this lens, the section 1692e(11) requirements provide struggling consumers with essential information to help them balance immediate expenses such as rent, medical care, food, transportation, and clothing with demands for repayment of past debts.

So far, courts have had little trouble concluding that a collector's failure to identify itself as a debt collector, in violation of section 1692e(11), causes the consumer a concrete harm. The leading decision is the Eleventh Circuit's unpublished decision in *Church v. Accretive Health, Inc.*,[162] in which the court held that a consumer had Article III standing to assert a claim that a medical accounts servicer failed to provide the section 1692e(11) notice. The court held that the right to

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157 *Id.*
158 *Id.*
159 *See* § 9.3.2, *infra*.
160 *See* § 6.11a.4.4.3, *supra*.
161 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.
162 654 Fed. Appx. 990 (11th Cir. 2016).

receive this information was substantive, and that Congress had elevated the injury to the status of a legally cognizable injury through the FDCPA. Other courts have been equally clear in finding that consumers have standing to assert violations of section 1692e(11).[163]

6.11a.5.4 Applying *Spokeo* to Other Claims of False, Deceptive, or Misleading Acts

Courts have also held that many other types of false, deceptive, or misleading acts cause concrete harm to consumers under the standards articulated by *Spokeo*:

- Demanding payment of an unauthorized fee;[164]
- Deception regarding the involvement of an attorney in a collection effort;[165]
- Misrepresentation regarding the imminence of garnishment or some other action to seize the debtor's assets;[166]
- False threats to take action that the collector does not intend to take;[167]
- Demanding payment of a debt that has been discharged in bankruptcy or otherwise is not

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163 Fausz v. NPAS, Inc., 237 F. Supp. 3d 559 (W.D. Ky. 2017) (finding standing even though consumer suffered no actual damages); Scibetta v. TD Banknorth, 2017 WL 3448544, at *3 (D.N.J. Aug. 11, 2017) (collector's failure to identify itself as a debt collector and use its proper name); Pisarz v. GC Servs. L.P., 2017 WL 1102636 (D.N.J. Mar. 24, 2017) (leaving voicemail that does not disclose that caller is a debt collector, in violation of §§ 1692d(6) and 1692e, is concrete injury, whether or not it results in other harm); Girdler v. Convergent Outsourcing, Inc., 2016 WL 7479541 (D. Mass. Dec. 29, 2016) (noting that nondisclosure impairs consumer's ability to make fair decisions about how to respond); Horowitz v. GC Servs. L.P., 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016) (debtor has standing to assert claim under §§ 1692d(6) and 1692e(11) based on voicemail message that collector left for him at phone number that he no longer had access to, where his former roommate continued to have access to the voicemail and there was a risk that former roommate would convey the message to debtor).

164 Fuentes v. AR Resources, Inc., 2017 WL 1197814 (D.N.J. Mar. 31, 2017) (misrepresentation that consumer would have to pay unauthorized convenience fee for credit card payments creates risk that she will pay it, so plaintiff has standing); Thomas v. John A. Youderian Jr., L.L.C., 232 F. Supp. 3d 656, 669 (D.N.J. Feb. 3, 2017) (demanding a fee for making payment on debt by credit card creates concrete injury, although barely; the misrepresentation might deter consumers from using this convenient payment method, even though plaintiff did not suffer this effect personally). *See also* § 6.11a.5.1, *supra* (applying *Spokeo* to claim that collector sought inflated amount).

165 Martin v. Trott Law, P.C., ___ F. Supp. 3d ___, 2017 WL 2972137 (E.D. Mich. July 12, 2017) (allegation that consumers were deceived and misled is sufficient; earlier decision notes that one of claims is that letters deceptively conveyed impression of attorney involvement); Pogorzelski v. Patenaude & Felix APC, 2017 WL 2539782 (E.D. Wis. June 12, 2017) (informational injury is more than procedural; consumer who has received debt collection communication misrepresenting attorney's involvement has suffered the type of injury the FDCPA was intended to protect against); Bock v. Pressler & Pressler, L.L.P., ___ F. Supp. 3d ___, 2017 WL 2304643 (D.N.J. May 25, 2017).

166 Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017) (consumer has standing to assert claims under §§ 1692e and 1692f against collector the misrepresented that administrative wage garnishment proceedings had already commenced or were imminent; these misrepresentations "could have materially and adversely affected [plaintiff's] decisions regarding debt repayment"). *But see* Scibetta v. TD Banknorth, 2017 WL 3448544 (D.N.J. Aug. 11, 2017) (holding that consumer lacks standing to assert claim that collector threatened repossession when it had no intention of doing so; failing to consider threat of harm).

167 Demarais v. Gurstel Chargo, P.A., ___ F.3d ___, 2017 WL 3707437, at *4 (8th Cir. Aug. 29, 2017) (consumer has standing to assert claim that collector made false threat to proceed to trial when it did not have any evidence or witnesses).

owed;[168]

● Misrepresentations about the nature of settlement offers, such as a false statement that an offer to settle a debt was time-limited;[169]

● Deceptive or misleading statements about potential tax consequences of settling a debt;[170]

● False statements about how long a debt would appear on the debtor's credit report;[171]

● Seeking payment of a debt without disclosing that it is time-barred;[172]

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168 Matute v. A.A. Action Collection Co., 2017 WL 2573714 (D.N.J. June 13, 2017) (consumer has standing to assert claim that collector sought amounts not owed); Barnhill v. FirstPoint, Inc., 2017 WL 22178439 (M.D.N.C. May 17, 2017) (collector represented that consumer owed debt that had been discharged in bankruptcy, causing her emotional distress); Prindle v. Carrington Mortg. Services, L.L.C., 2016 WL 4466838 (M.D. Fla. Aug. 24, 2016) (plaintiff has standing to assert that letter regarding discharged mortgage debt disclosed too inconspicuously that it was not seeking payment); Mogg v. Jacobs, 2016 WL 4395899 (S.D. Ill. Aug. 18, 2016) (false representations that debt was collectible when actually it was not because of automatic bankruptcy stay); McCamis v. Servis One, Inc., 2016 WL 4063403 (M.D. Fla. July 29, 2016) (Congress has elevated FDCPA violations to the status of legally cognizable injuries).

169 Haddad v. Midland Funding, L.L.C., ___ F. Supp. 3d ___, 2017 WL 1550187 (N.D. Ill. May 1, 2017). *But see* Johnston v. Midland Credit Mgmt., 229 F. Supp. 3d 625 (W.D. Mich. Jan. 26, 2017) (holding that collector's refusal to implement settlement that collection letter said was available did not cause concrete harm; disregarding without explanation plaintiff's travel expenses and the time he spent consulting with counsel and making telephone calls, and inexplicably holding that further collection attempts were not "certainly impending" in light of collector's repudiation of settlement it offered).

170 Taylor v. Financial Recovery Servs., Inc., ___ F. Supp. 3d ___, 2017 WL 2198980 (S.D.N.Y. May 18, 2017); Remington v. Fin. Recovery Servs., Inc., 2017 WL 1014994 (D. Conn. Mar. 15, 2017) (plaintiff who received letter falsely stating "this settlement may have tax consequences" has standing); Medina v. AllianceOne Receivables Mgmt., Inc., 2017 WL 220328, at *1 (E.D. Pa. Jan. 19, 2017) ("The FDCPA is designed to protect the consumer from the inherent harm caused when a debt collector, in seeking to collect a debt, is not straight with the consumer but instead makes a false or deceptive statement to achieve its purpose. The deceptive declaration in the letter about a requirement to report the consumer's resolution of the debt to the IRS creates a particularized and concrete injury, at the very least unnecessary fear and anxiety on the part of the consumer."); Bautz v. ARS Nat'l Services, Inc., 226 F. Supp. 3d 131 (E.D.N.Y. Dec. 23, 2016) (even if this misrepresentation were procedural rather than substantive, it presents a material risk of injury because misinformation about tax consequences could impact whether debtor decides to pay the lesser amount offered as opposed to the full debt or some other option). *See also* Everett v. Fin. Recovery Services, Inc., 2016 WL 6948052 (S.D. Ind. Nov. 28, 2016) (plaintiff's allegation that letter that misrepresented tax consequences caused her to incur costs consulting her attorney, suffer financial loss, and be subject to the threat of harm is sufficient).

171 Griffin v. Andrea Visgilio-McGrath, L.L.C., 2017 WL 3037387 (D.N.J. July 18, 2017) (false statement about how long a judgment debt would appear on credit record).

172 Wheeler v. Midland Funding, L.L.C., 2017 WL 3235683 (N.D. Ill. July 31, 2017) (consumer has standing to make claim that collector violated §§ 1692e(2)(A) and 1692f by offering a settlement through a website without indicating that debt was time-barred, even though an earlier collector had told him six months earlier that limitations period had expired); Kaiser v. Cascade Capital L.L.C., 2017 WL 2332856, at *5–6 (D. Or. May 25, 2017) (noting that, if plaintiffs had been induced to make a payment on the debt they would have waived the statute of limitations defense), *rejected on other grounds*, 2017 WL 3841726 (D. Or. Aug. 31, 2017) (referring case to arbitration; denying motion to dismiss as moot); Taymuree v. Nat'l Collegiate Student Loan Trust 2007-2, 2017 WL 952962 (N.D. Cal. Mar. 13, 2017) (rejecting argument that harm was caused by consumer's breach of payment obligation); Sullivan v. Allied Interstate, L.L.C., 2016 WL 7187507 (W.D. Pa. Oct. 18, 2016), *adopted by* 2016 WL 7189859 (W.D. Pa. Dec. 9, 2016); Hayes v. Convergent Healthcare Recoveries, Inc., 2016 WL 5867818 (C.D. Ill. Oct. 7, 2016) ([F]ailure to disclose that debt is not legally enforceable creates "material risk of harm—the risk that the consumer would be misled into believing that the debt is legally enforceable.

● Presentation of false or fabricated statements to debtors[173] or courts[174] in collection actions; and

● Misidentification of the creditor.[175]

Indeed, the Second Circuit has stated generally that the FDCPA's prohibitions against deceiving or misleading a consumer in the course of collecting a debt entail the concrete injury necessary for standing.[176]

6.11a.6 Applying Spokeo *to Section 1692g Claims*

6.11a.6.1 Introduction

Section 1692g gives consumers the right to identifying information about the debt and the debt collector at the beginning of a debt collector's work:

● The amount of the debt;[177] and

● The name of the current creditor.[178]

The section 1692g notice also gives the consumer the right to request additional information and access to an informal dispute resolution mechanism by requiring that the notice contain:

Furthermore, a dunning letter that misleads the consumer as to the legal status of the debt is exactly the harm that Congress identified and sought to curb by creating a statutory right to accurate information under the FDCPA."); Nyberg v. Portfolio Recovery Assoc., 2016 WL 3176585, at *7 (D. Or. June 2, 2016) (mag.; allegation that debt buyer filed time-barred state collection suit states "an invasion of a legally protected interest that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'"); Robinson v. JH Portfolio Debt Equities, L.L.C. (*In re* Robinson), 554 B.R. 800 (Bankr. W.D. La. 2016) (attorney fee for contesting time-barred proof of claim is concrete injury).

173 Hill v. Accounts Receivable Services, L.L.C., 2016 WL 6462119 (D. Minn. Oct. 31, 2016) (consumer has standing to assert claim under §§ 1692e(2)(A), 1692e(5), 1692e(10), and 1692f against collector that presented a fabricated assignment document to him during a court hearing, even though consumer defeated collector's claim at trial), *appeal filed* (8th Cir. Dec. 2, 2016).

174 Toohey v. Portfolio Recovery Assocs., 2017 WL 2271548 (S.D.N.Y. May 12, 2017) (filing of affidavit of merit in state court collection suit that gave false impression that collector had reviewed account-level documentation is a procedural violation that caused concrete harm by enabling collector to obtain state court judgment).

175 Velez v. Healthcare Revenue Recovery Group, L.L.C., 2017 WL 1476144 (M.D.N.C. Apr. 24, 2017) (plaintiff has standing to assert claim that collection letter gave unregistered false name for collector; injury in fact is being subjected to unfair and abusive practices); Tourgeman v. Collins Fin. Servs., Inc., 197 F. Supp. 3d 1205 (S.D. Cal. 2016) (misidentification of creditor in complaint served on debtor caused risk of harm in that it could have affected consumer's litigation strategy, led to lost opportunities to settle the debt, and exposed the consumer to the possibility of a default judgment, but risk of harm is too hypothetical as to misidentification and misrepresentations in letter that consumer never received), *appeal filed* (9th Cir. Aug. 19, 2016). *See also* Verdun v. Fidelity Creditor Serv., 2017 WL 1047109, at *5–6 (S.D. Cal. Mar. 20, 2017) (mag.; finding standing where debt collection letter gave impression that collector was the creditor and that California law required debtor to contact the collector). *See generally* § 6.11a.5.3, *supra* (standing to assert violation of § 1692e(11) requirement that collector identify itself as debt collector).

176 Papetti v. Does 1-25, 691 Fed. Appx. 24 (2d Cir. 2017).

177 15 U.S.C. § 1692g(a)(1).

178 15 U.S.C. § 1692g(a)(2). *See* § 5.7.2.5.1, *supra*. Section 1692e(11) also requires an initial disclosure to consumers that the debt collector is collecting a debt and any information obtained will be used be used to collect the debt. *See* §§ 5.5.14, 6.11a.4.8, *supra*.

● A statement that the consumer has the right to orally or by letter dispute the debt within thirty days, and that the debt collector will assume the debt is valid if it is not disputed;[179]

● A statement that if the consumer disputes the debt, or requests verification of the debt or the name of the original creditor in writing within thirty days, the debt collector will provide that verification[180] or the name of the original creditor.[181]

By clear implication and necessity, the debt collector must also identify itself and provide its contact information in these initial communications.[182]

In addition to requiring these disclosures, section 1692g requires collectors to take specific actions if the consumer exercises the right to dispute the debt or requests the name and address of the original creditor. It also requires a thirty-day pause in collection activity until the collector obtains verification of the debt, or the original creditor's name and address, and mails the information to the consumer.[183]

This section discusses Article III standing after *Spokeo* for claims under section 1692g. Advocates should also refer to the general discussion of standing in § 6.11a.4, *supra*, to assert claims regarding deception and nondisclosure, and to the discussion of standing in § 6.11a.5.3, *supra*, to assert claims for violation of the related requirement in section 1692e(11) to disclose the debt collector's identity as a debt collector and the debt collection purpose of a communication.

6.11a.6.2 Why Violations of Section 1692g Cause Concrete Harm

The rights and obligations established by section 1692g were considered by the Senate at the time of passage to be a "significant feature" of the Act.[184] "This provision [section 1692g] will eliminate the recurring problem of collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."[185]

The problems originally addressed by Congress in section 1692g have widened, and its importance has increased over the years. The last few decades have seen the rise of the debt buying industry, which often collects debt with incomplete and sometimes erroneous data.[186] The rise of the Internet has also introduced massive thefts of individuals' personal financial information from corporate computers and the subsequent sale of that data to identity theft networks as well as

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179 15 U.S.C. § 1692g(a)(3).
180 15 U.S.C. § 1692g(a)(4).
181 15 U.S.C. § 1692g(a)(5).
182 *See* § 5.7.2.6, *supra*.
183 15 U.S.C. § 1692g(b).
184 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696,
185 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.
186 *See* § 1.5.4, *supra*.

scammers who use the data to impersonate legitimate debt collectors.[187]

The initial section 1692g disclosures help consumers determine whether a debt collector is legitimate, whether the debt is the consumer's, and whether the debt is for the correct amount. For example, if the consumer has never heard of the creditor or does not recognize the amount of the debt, this may raise red flags that the debt collector's claim is mistaken or even fraudulent. The disclosures required by section 1692g also inform consumers of their verification rights so that they can inquire further about the identity of the original creditor, the amount of the debt, etc. Unfortunately, disclosures are often inadequate, not sent, or sent to the wrong address.[188]

To satisfy the requirement of concreteness in a section 1692g case, a consumer could point to payment of money not actually owed as evidence of tangible harm resulting from an absent or inaccurate section 1692g notice. In the absence of evidence of tangible harms, consumers can also demonstrate the injury-in-fact element of standing through intangible injuries. History and congressional judgment indicate which intangible injuries demonstrate concreteness.[189] A violation of section 1692g is analogous to a suit for an accounting at common law. Moreover, a violation of this section represents congressional judgment that this injury is sufficient to confer standing. *Spokeo* recognizes that informational injuries such as these—the failure to provide access to information required by law—are concrete.[190]

A risk of real harm can also satisfy the concreteness requirement.[191] The failure to provide a proper section 1692g notice creates the real risk that the consumer may pay a person who does not have authority to collect the debt. It creates the risk that the debt collector may overstate the amount of the debt and that the consumer may be misled into paying more than is due.[192] It also creates the risk that the debtor will waive the right to seek verification of the debt.[193] Waiver of this right also

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187 *See* § 1.5.11, *supra*.

188 For example, a frequent violation of § 1692g is to mail the notice that is required to a former address. One reason that this is so common is that consumers who run into financial trouble often must move to cheaper housing. Collectors often fail to send another § 1692g notice to the consumer's current address once it is identified. That failure gives the consumer the right to seek actual and statutory damages, attorney fees, and court costs under § 1692k.

189 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016). *See* § 6.11a.4.2, *supra*.

190 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549–1550, 194 L. Ed. 2d 635 (2016); Fed. Election Comm'n v. Akins, 524 U.S. 11, 20–25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (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); Public Citizen v. Department of Justice, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"). *See generally* § 6.11a.4.4.3, *supra* (general discussion of informational injuries).

191 *See* § 6.11a.4.2, *supra*.

192 *See* §§ 6.11a.4.5, 6.11a.4.6, *supra*.

193 *See, e.g.*, Geary v. Green Tree Servicing, L.L.C., 2017 WL 2608691 (S.D. Ohio June 16, 2017), *appeal filed*

means loss of the thirty-day pause in collection activity, clearly a substantive right.[194] Section 6.11a.3.4, *supra*, lists many other kinds of harm that may be caused by false information or nondisclosure, with citations to decisions holding that these harms are concrete.

6.11a.6.3 Decisions Applying *Spokeo* to Violations of Section 1692g

Most courts have had little difficulty finding that the failure to give the debtor the information required by section 1692g is a concrete harm. The leading decision is *Church v. Accretive Health, Inc.*,[195] in which the Eleventh Circuit held that failure to give the consumer section 1692e(11) and section 1692g notices was an injury in fact. In this unpublished decision, the court held that:

> The invasion of Church's right to receive the disclosures is not hypothetical or uncertain; Church did not receive information to which she alleges she was entitled. While this injury may not have resulted in tangible economic or physical harm that courts often expect, the Supreme Court has made clear an injury need not be tangible to be concrete. *See Spokeo, Inc.*, 578 U.S. at ___, 136 S. Ct. at 1549; *Havens Realty Corp.*, 455 U.S. at 373. Rather, this injury is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA. Accordingly, Church has sufficiently alleged that she suffered a concrete injury, and thus, satisfies the injury-in-fact requirement.[196]

The court further distinguished *Spokeo* as involving a procedural right, whereas Church had alleged violation of the substantive right to receive the FDCPA disclosures and that the defendant violated that substantive right.[197] The Second Circuit has likewise held that the violation of the FDCPA protections found in section 1692g is a concrete injury in and of itself.[198]

Other courts have similarly found Article III standing where the consumer alleged that the

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(6th Cir. June 30, 2017).

194 Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (pointing out that denial of § 1692g rights deprives debtor not only of information, but also of the ability to force a thirty-day cessation of collection activity; "The concrete harm, then, is the loss of the right to verification, which is enough to satisfy the concreteness requirement of Article III standing." [U]nder the FDCPA, the right to information is not merely an end unto itself, but it actually permits the debtor to trigger (by disputing the debt in writing) a moratorium on collection efforts until the verification information is mailed to the debtor. This further demonstrates the concreteness of the injury arising from a § 1692g violation."). *See also* Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597, at *4 (N.D. Tex. Apr. 8, 2017) (collector harmed consumer by reinitiating collection activity before mailing him a proper response to his dispute).

195 654 Fed. Appx. 990 (11th Cir. 2016).

196 *Id*. at 994. The Eleventh Circuit then dismissed the case, finding that the defendant was exempt under section 1692a(6)(F)(iii).

197 *Id*. at n.2.

198 Papetti v. Does 1-25, 691 Fed. Appx. 24 (2d Cir. 2017) ("[s]ection 1692g furthers [the FDCPA's] purpose by requiring a debt collector who solicits payment from a consumer to provide that consumer with 'a detailed validation notice,' which allows a consumer to confirm that he owes the debt sought by the collector before paying it; [T]he FDCPA violations alleged by Papetti, taken as true, "entail the concrete injury necessary for standing").

collector failed to:

- Give the consumer the section 1692g notice;[199]
- Disclose the amount of the debt, in violation of section 1692g(a)(1);[200]
- Identify the current creditor, in violation of section 1692g(a)(2);[201]
- Make the required disclosures accurately, clearly, and without omissions;[202]
- State accurately the steps the consumer must take to dispute the debt;[203] or

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199 Geary v. Green Tree Servicing, L.L.C., 2017 WL 2608691 (S.D. Ohio June 16, 2017) (finding standing to assert claim that initial communication did not contain § 1692g disclosures, which "go to the heart of the FDCPA"; noting that these plaintiffs would have disputed the debt, and did so once they received the § 1692g disclosures), *appeal filed* (6th Cir. June 30, 2017). *But cf.* Yeager v. Ocwen Loan Servicing, L.L.C., 237 F. Supp. 3d 1211 (M.D. Ala. 2017) (holding that failure to include § 1692g disclosures in initial letter not material does not entail a degree of risk sufficient to establish concreteness where collector provided the information thirteen days later, but noting in footnote that longer delay would present different question), *appeal filed* (11th Cir. Mar. 27, 2017).

200 Zirogiannis v. Seterus, Inc., 221 F. Supp. 3d 292, 300 (E.D.N.Y. 2016) (debtor has an actual, concrete interest in receiving information about the amount of the debt; this is not merely an abstract interest), *aff'd*, 2017 WL 4005008 (2d Cir. Sept. 12, 2017); Balke v. Alliance One Receivables Mgmt., Inc., 2017 WL 2634653 (E.D.N.Y. June 19, 2016) (no need to plead facts showing an injury beyond the statutory violation itself).

201 Long v. Fenton & McGarvey Law Firm P.S.C., 223 F. Supp. 3d 773 (S.D. Ind. 2016); Janetos v. Fulton Friendman & Gullace, L.L.P., 2016 WL 9446140 (N.D. Ill. Sept. 21, 2016) (denial of statutorily-required information, here disclosure of name of creditor, is concrete harm as a matter of law).

202 Martin v. Trott Law, P.C., ___ F. Supp. 3d ___, 2017 WL 2972137 (E.D. Mich. July 12, 2017) (holding that consumer has standing to assert several claims, one of which alleged that debt collection letters contained material that overshadowed dispute rights); Matute v. A.A. Action Collection Co., 2017 WL 2573714 (D.N.J. June 13, 2017) (finding standing where plaintiff alleged that defendant mailed collection letters that did not comply with § 1692g asserts rights that are not merely procedural); Reed v. Receivable Recovery Services, L.L.C., 2017 WL 1399597 (E.D. La. Apr. 19, 2017) (finding standing; claims include failure to make disclosures required by § 1692g), *appeal filed* (5th Cir. May 18, 2017); Allah-Mensah v. Law Office of Patrick M. Connelly, P.C., 2016 WL 6803775 (D. Md. Nov. 17, 2016) (misstatement of § 1692g rights—here, the extent to which debt will be assumed valid if consumer does not contest it—is concrete, especially in the context of this letter, which stresses the negative consequences such as garnishment that flow from a valid debt; noting at *8 that this violation "presents a material risk that the consumer would be misled into believing that the consumer has no right to challenge the debt after thirty days"); Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467 (N.D. Ill. July 11, 2016) (consumer has standing to assert claim that other material in collection letter overshadowed validation notice); Balke v. Alliance One Receivables Mgmt., Inc., 2017 WL 2634653 (E.D.N.Y. June 19, 2016) (no need to plead facts showing an injury beyond the statutory violation itself, here overshadowing of notice of right to dispute the debt). *But see* Jackson v. Abendroth & Russell, P.C., 207 F. Supp. 3d 945 (S.D. Iowa 2016) (finding no standing for including language that overshadowed the § 1692g notice and failing to disclose the means of requesting verification of original creditor's identity, where plaintiff conceded that the creditor identified in the notice was correct and he was not planning to dispute the debt).

203 Schweer v. HOVG, L.L.C., 2017 WL 2906504 (M.D. Pa. July 7, 2017) (letter advised consumer to call to dispute the debt, overshadowing the § 1692g notice); Bunham v. Robert Crane & Assocs., 2017 WL 2664287 (S.D. Ind. June 20, 2017) (failure to state that dispute must be submitted in writing to obtain validation is a harm defined and made legally cognizable by Congress; plaintiff has standing, even though he was later given the missing information); Smith v. GC Servs. L.P., 2017 WL 2629476 (S.D. Ind. June 19, 2017) (misstatement in § 1692g notice about manner of disputing debt; giving inaccurate information is not a bare procedural violation, but presents material risk of harm), *reconsideration denied*, 2017 WL 3017272 (S.D. Ind. July 17, 2017); Jones v. Advanced Bur. of Collections, L.L.P., 317 F.R.D. 284, 289 n.2 (M.D. Ga. 2016) (finding standing for claim that § 1692g notice failed to indicate that request for verification must be in writing); Macy v. GC Servs. L.P.,

More information regarding consumer litigation issues under this federal statute is available at https://library.nclc.org/fdc

- Perform its affirmative duties upon receipt of a dispute.[204]

6.11a.7 Applying Spokeo *to Contacts at Inconvenient Times or Places*

The FDCPA places four restrictions on contacts with consumers at inconvenient times or places.[205] Section 1692c(a)(1) prohibits debt collector calls at times and places that are inconvenient for the consumer. Section 1692c(a)(3) prohibits debt collector calls to a consumer at her workplace if such calls are prohibited. Section 1692c(c) allows the consumer to stop most future debt collector phone calls and letters altogether. And section 1692d(5) prohibits repeated calls with the intent to annoy or abuse any person. Consumers often complain to the CFPB about violations of these provisions.[206] These four FDCPA provisions combine to protect the consumer's individual privacy and personal relationships.

A consumer who suffers a violation of one of these four provisions might experience specific harms, such as mental distress, sleeplessness, or anxiety, that would constitute injury in fact.[207] These violations also create a risk of tangible injuries such as loss of a job.

Where the injury is intangible, one of the approaches *Spokeo* approves to establish that the injury is concrete is to show that it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[208] This standard is readily met by these four restrictions on contact with the debtor. The harm they address is closely analogous to that made actionable by the branch of the common law tort of invasion of privacy that protects

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2016 WL 5661525 (W.D. Ky. Sept. 29, 2016) (failure to provide accurate information creates substantial risk that debtor will inadvertently waive right to dispute debt; plaintiff has standing if communication failed to convey this information effectively, whether or not waiver actually occurred); Dickens v. GC Servs. L.P., 2016 WL 3917530 (M.D. Fla. July 20, 2016) (failure to state that dispute must be in writing to trigger collector's duty to verify debt). *But see* Abercrombie v. Rogers, Carter, & Payne, 2016 WL 8201965 (W.D. La. Nov. 22, 2016) (misstatement about whether a writing is required to dispute a debt, and about the extent to which the debt will be presumed valid if debtor does not dispute it, is a procedural right, designed to buttress the substantive right to be free from debt collection abuse, so plaintiff must allege additional facts showing that errors materially threatened his ability to contest an erroneous debt; no standing where he did not contest the debt or intend to dispute it), *adopted by* 2017 WL 489426 (W.D. La. Feb. 6, 2017); Perry v. Columbia Recovery Group, L.L.C., 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016) (misstatement of deadline in § 1692g notice did not cause concrete harm where plaintiff does not allege that he was confused, that debt was incorrect, or that he intended to dispute it; denial of information is not concrete harm in itself).

204 Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597, at *4 (N.D. Tex. Apr. 8, 2017) (collector's failure to deliver verification of debt by mail, and its re-initiation of collection activities without doing so, is concrete harm); Bartl v. Enhanced Recovery Co., 2017 WL 1740152 (D. Minn. May 3, 2017).

205 *See* §§ 5.3, 5.4.6, *supra*.

206 *See* Consumer Financial Protection Bureau, Annual Report on the Fair Debt Collection Practices Act 18–20 (Mar. 2016).

207 *See* §§ 2.5, 6.11a.3.4, *supra*.

208 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

against intrusion upon seclusion.[209] The "core" of the privacy right to seclusion "is the offensive prying into the private domain of another ... [such as] persistent and unwanted telephone calls."[210] A violation of sections 1692c(a)(1), 1692c(a)(3), 1692c(c), or 1692d(5) is an intrusion into the consumer's right to seclusion at night, at work, or at home, and those intrusions constitute injury in fact.

Spokeo also summarized a second way that an intangible injury may meet the requirement of concreteness: Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[211] 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."[212] Congress enacted sections 1692c(a)(1), 1692c(a)(3), 1692c(c), and 1692d(5) for the purpose of protecting consumers' privacy and relationships. Congress expressly stated in section 1692 its findings and declaration of purpose that "(a) ... Abusive debt collection practices contribute ... to the loss of jobs, and to the invasions of individual privacy ... [and] ... (b) Existing laws and procedures for redressing these injuries are inadequate."[213] A violation of these four provisions violates the privacy right to seclusion provided by Congress, and that violation is a concrete harm that satisfies the concreteness requirement for an injury in fact. While *Spokeo* added that an allegation of deprivation of a mere *procedural* right created by Congress would not necessarily meet the concreteness requirement without an allegation of additional harm, these four provisions create substantive prohibitions—they affirmatively prohibit collectors from taking actions that would harm consumers.

Several post-*Spokeo* decisions have addressed standing where the plaintiff alleged contacts at inconvenient times and places. These decisions have held that repeated calls[214] or violation of a

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209 *See* § 9.3.2, *infra*.

210 Lovgren v. Citizens First Nat'l Bank of Princeton, 534 N.E.2d 987, 989 (Ill. 1989) (citing Restatement (Second) of Torts § 652B, comments a, b, at 378–379 (1977); W. Prosser & W. Keeton, Torts § 117, at 854–856 (5th ed. 1984)).

211 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

212 *Id.* at 1549 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (J. Kennedy, concurring)).

213 *See also* S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra* ("this legislation strongly protects the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons"; the report continues by describing the narrow circumstances in which third party contacts are permitted by the Act).

214 Reed v. Receivable Recovery Services, L.L.C., 2017 WL 1399597 (E.D. La. Apr. 19, 2017), *appeal filed* (5th Cir. May 18, 2017); Morris v. Ocwen Loan Servicing, L.L.C., 2017 WL 1035944 (D.S.C. Mar. 17, 2017); Reed. v. IC System, Inc., 2017 WL 89047 (W.D. Pa. Jan. 10, 2017) (harassment caused by repeated calls, including wasted time and annoyance, is concrete even if consumer does not answer the ringing phone).

cease-contact letter[215] invade substantive rights and constitute concrete harm. Section 6.11a.3.4, *supra*, lists many other kinds of harm that may be caused by contacts at inconvenient times or places, with citations to decisions holding that these harms are concrete.

6.11a.8 Applying Spokeo *to Third-Party Contacts or Public Disclosure of Information About a Debt*

Many provisions of the FDCPA protect the consumer's privacy and relationships from harm by prohibiting third-party contacts or disclosure of information about the debt in a public way. Section 1692c(b) generally prohibits debt collector calls to friends, parents, children, other relatives, neighbors, and employers. Section 1692d(3) prohibits the publication of shame lists of consumers alleged to be refusing to pay their debts, and section 1692d(4) prohibits advertising debts for sale in order to coerce their payment. Section 1692f(8) prohibits debt collectors from placing debt collection information on postcards and envelopes. Section 1692b provides a narrow exception to the prohibition on third-party contact by allowing limited contacts that are for the sole purpose of obtaining the consumer's location information. These restrictions combine to provide significant protection of consumers' privacy, friendships, familial and work relationships.[216] There is little question that an invasion of privacy in violation of these protections is a concrete harm that establishes Article III standing under *Spokeo*.

The FDCPA's strong limitations on debt collectors' third-party contacts were "extremely important" to congressional lawmakers and consumers.[217] Before the FDCPA was enacted, it was not uncommon for debt collectors to call a financially distressed consumer's friends and relatives asking them to aid the consumer by personally paying the debt collector out of their own pockets. Debt collectors also used third-party contacts to shame and pressure consumers into prioritizing payments to the debt being collected. As late as 1992, a former debt collector told a House panel about a strategy to shame and harass the consumer called the "block party." The debt collector would telephone five to fifteen of the consumer's neighbors in a row, inform them that the debtor was

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215 Gibson v. US Collections West Inc., 2017 WL 1833597, at *3 n.4 (D. Ariz. May 8, 2017) (contacting consumer in violation of cease-contact letter is not a procedural violation; plaintiff has standing).

216 In addition, § 1692c(a)(1), which prohibits calls at inconvenient times and places, and § 1692c(c), which allows the consumer to stop debt collector contacts, protect the consumer's right to seclusion, an interest that is tightly tied to protecting the consumer's privacy and relationships. These provisions are discussed in § 5.3.2, *supra*, and Article III standing to assert them is discussed in § 6.11a.6, *supra*.

217 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, r*eprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. ("[T]his legislation adopts an extremely important protection ... it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of jobs.")

suspected of receiving stolen goods, and ask them to go to the debtor's home and request the debtor to call the collector.[218] A large part of the debt collection industry has abandoned such practices since then, in response to increased enforcement of the FDCPA by consumers and government enforcement agencies.[219] Still, complaints by consumers to federal agencies reporting unlawful third-party contacts remain "common."[220]

One of the ways that *Spokeo* identifies to establish that an intangible injury is concrete is to evaluate whether it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[221] The common law invasion of privacy torts provide a close analog to these FDCPA protections.[222] Invasion of privacy is an intangible harm that is recognized by the common law in almost all states.[223] Violations of sections 1692d(3) and 1692d(4), which involve publication of information about the debt, are analogous to common law causes of action for defamation[224] and the branch of the invasion of privacy tort that protects against public disclosure of private facts.[225]

Even if invasion of privacy were not a harm recognized as 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. Congress enacted multiple provisions of the FDCPA for the purpose of protecting consumers' privacy and relationships. Congress expressly stated in section 1692 its findings and declaration of purpose that "(a) ... Abusive debt collection practices contribute ... to the loss of jobs, and to the invasions of individual privacy ... [and] ... (b) Existing laws and procedures for redressing these injuries are inadequate."[226] As the

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218 O*versight Hearings on the Fair Debt Collection Practices Act Before the H. Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Fin., and Urban Affairs*, 101st Cong., 2d Sess. 77, vol. 4 (1992) (Statement of Richard W. Bell).

219 *See* Consumer Financial Protection Bureau, Annual Report on the Fair Debt Collection Practices Act 15 (Mar. 2016).

220 *Id.* at 17.

221 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

222 *See, e.g.*, St. Pierre v. Retrieval-Masters Creditors Bur., Inc., 2017 WL 1102635 (D.N.J. Mar. 24, 2017) (noting that right to privacy is deeply rooted in common law; finding breach of FDCPA's privacy protections to be a concrete injury), *appeal filed* (3d Cir. Apr. 14 and 28, 2017).

223 Eli A. Meltz, *No Harm, No Foul? Attempted Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 Fordham L. Rev. 3431, 3440 (May 2015) (state-by-state survey; "Currently, the vast majority of states recognize the intrusion strand of invasion of privacy either under common law or by statute"); Restatement (Second) of Torts §§ 652B (1977). *See generally* § 2.5.2.2.4, *supra* (cases awarding damages for violation of consumer's privacy and interference with personal relationships), § 9.3, *infra* (tort claims related to invasion of privacy in debt collection cases).

224 *See* § 9.5, *infra*.

225 *See* § 9.3.4, *infra*.

226 *See also* S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra* ("this legislation strongly protects the consumer's right to privacy by prohibiting a debt

Spokeo majority said, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'"[227]

It is worth noting that consumers dealing with debt collectors have privacy rights and remedies under other statutes such as the Fair Credit Reporting Act, which limits access to consumer credit files to legitimate users, gives consumers the right to accurate reports, and requires truncation of credit card numbers on receipts. The Right to Financial Privacy Act[228] and the Gramm-Leach-Bliley Act[229] protect the privacy of bank accounts. These additional privacy rights not only complete the consumer's shield against unlawful invasions of privacy, but also further indicate the importance that Congress attaches to consumers' privacy rights.

One of the FDCPA's privacy protections is its prohibition against the use of any language or symbol on an envelope that reveals that the sender is in the debt collection business.[230] Since *Spokeo*, several courts have held that a consumer suffers concrete injury when a collector violates this prohibition by sending a dunning letter in a window envelope that allows an account number (or a scannable barcode that will reveal an account number) to be seen.[231] These courts cite both the historical recognition of invasion of privacy as a cognizable harm and Congress's unequivocal intent to create a right against disclosure of personal information and make it actionable. The consumer has standing, even without showing that someone has actually viewed the private information.[232] In addition, many courts, including the Third, Eighth, Ninth, and Eleventh Circuits,[233] have held since

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collector from communicating the consumer's personal affairs to third persons"; the report continues by describing the narrow circumstances in which third party contacts are permitted by the Act).

227 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

228 *See* 12 U.S.C. § 3401 (restricting the U.S. government's access to individual's bank account information).

229 *See* 15 U.S.C. § 6801 (providing protection of nonpublic personal financial information).

230 15 U.S.C. § 1692f(8).

231 Stever v. Harrison, 2017 WL 2869505 (D.N.J. July 5, 2017) (noting that privacy is protected at common law, and that the disclosure of personal information is the very harm that Congress intended to prevent); St. Pierre v. Retrieval-Masters Creditors Bur., Inc., 2017 WL 1102635 (D.N.J. Mar. 24, 2017) (noting that right to privacy is deeply rooted in common law, and that Congress has often elevated disclosure of private information to the status of a cognizable harm), *appeal filed* (3d Cir. Apr. 14 and 28, 2017); Michael v. HOVG, L.L.C., 232 F. Supp. 3d 1229 (S.D. Fla. Jan. 10, 2017); Hartman v. Medicredit, Inc., 2016 WL 7669858, at *3 (W.D. Pa. Dec. 2016), *adopted by* 2017 WL 90383 (W.D. Pa. Jan. 10, 2017); Daubert v. NRA Group, L.L.C., 2016 WL 4245560 (M.D. Pa. Aug. 11, 2016) ("unlawful disclosure of legally protected information" is an injury-in-fact sufficient to satisfy Article III standing). *But cf.* Estate of Caruso v. Fin. Recoveries, 2017 WL 2704088 (D.N.J. June 22, 2017) (where the barcode that was visible through the window envelope did not have any personal information, scannable or otherwise, its display did not implicate any privacy concerns so there was no particularized injury).

232 Stever v. Harrison, 2017 WL 2869505 (D.N.J. July 5, 2017).

233 Robins v. Spokeo, Inc., 867 F.3d 1108 (9th Cir. 2017); Susinno v. Work Out World, Inc., 862 F.3d 346 (3d Cir.

Spokeo that the invasion of privacy in other contexts is a concrete injury.

6.11a.9 Applying Spokeo *to Collector's Contacts with Represented Debtor*

Section 1692c(a)(2) prohibits, with limited exceptions, a collector from communicating with a consumer who is represented by an attorney. It recognizes the consumer's right to retain and be represented by counsel, protects consumers' relationship with their attorneys, and protects the attorney's authority to effectively represent the consumer.[234]

The right of the represented consumer to be free of debt collector contacts is not procedural. It does not merely require collectors to follow certain procedures that might result in a benefit to a consumer, but affirmatively prohibits collectors from contacting represented consumers. This is a right that is invoked by the consumer's unilateral action of notifying the debt collector of the retention, name, and address of her attorney. But even if this right were merely procedural, its breach causes concrete harm to consumers. A contact in violation of this provision not only breaches the represented consumer's right to be free of debt collector contacts, but also harms the consumer by interfering with the attorney-client relationship and undermining the consumer attorney's authority as the consumer's representative.[235] It also creates a substantial risk of harm, in that it "can result in the inadvertent and uncounseled disclosure of information, to the debtor's detriment."[236] Since *Spokeo*, decisions have been uniform in confirming that a collector's contact with a represented debtor causes concrete harm sufficient for Article III standing.[237]

2017); Perry v. Cable News Network, Inc., 854 F.3d 1336 (11th Cir. 2017); Van Patten v. Vertical Fitness Group, L.L.C., 847 F.3d 1037 (9th Cir. 2017); *In re* Horizon Healthcare Servs., Inc. Data Breach Litig., 846 F.3d 625 (3d Cir. 2017) (invasion of privacy caused by failure to protect consumers' personal information in violation of FCRA is a concrete harm; it is closely related to harm recognized at common law, and Congress's passage of the FCRA and creation of cause of action establishes that unauthorized dissemination of personal information causes an injury in and of itself); Heglund v. Aitkin County, ___ F.3d ___, 2017 WL 3910116 (8th Cir. Sept. 7, 2017); *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 624 (2017).

234 The requirement that the debt collector communicate exclusively with the consumer's attorney terminates if the attorney is not reasonably responsive to the debt collector. *See* § 5.3.3, *supra*.

235 Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *4 (W.D. Wash. Mar. 29, 2017).

236 *Id*.

237 Scibetta v. TD Banknorth, 2017 WL 3448544, at *4 (D.N.J. Aug. 11, 2017) (plaintiff has standing to assert claims under §§ 1692b(6) and 1692c(a)(2); there are similar requirements in other contexts such as professional responsibility, so this harm "is found in traditions of common law"); Capel v. Specialized Loan Servicing, Inc., 2017 WL 1739919, at *3 (N.D. Ill. May 4, 2017) (noting that sending collection letter to represented debtor can confuse the debtor and can require debtor to spend time and effort deciphering it, deciding how to respond, and contacting his attorney); Munoz v. Cal. Bus. Bureau, Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016); Mogg v. Jacobs, 2016 WL 4395899 (S.D. Ill. Aug. 18, 2016) (finding standing where one of the claims was that collector contacted represented debtor); McCamis v. Servis One, Inc., 2016 WL 4063403 (M.D. Fla. July 29, 2016).

6.11a.10 Applying Spokeo *to Conduct Serving to Harass, Oppress, or Abuse*

Section 1692d prohibits conduct that serves to harass, oppress, or abuse any person in connection with the collection of a debt. It includes specific prohibitions of several practices, including threats of violence or other criminal means; obscene, profane, or abusive language; repeated telephone calls; and calls without meaningful disclosure of the caller's identity. Standing to assert violations of these prohibitions is discussed in this subsection. Subsection 6.11a.8, *supra*, addresses standing to assert violations of the prohibitions in sections 1692d(3) and 1692(4), against publication of lists of consumers who refuse to pay debts, and advertisement of debts for sale as a way of coercing payment in section 1692d(4).

In some cases involving section 1692d violations, the injury-in-fact element of standing will be easily established by demonstrating tangible harm as a result of the harassment, oppression, or abuse.[238] Courts have awarded actual damages under section 1692k(a)(1) for a wide variety of injuries as a result of abusive collection practices, including stress-related injuries,[239] out-of-pocket losses,[240] and injuries to personal relations.[241] Consumer attorneys should be sure to reference any actual damages[242] suffered by the consumer in pleadings, as such damages will show that the plaintiff's injury is "real and not abstract."[243]

In the absence of evidence of tangible harms, the *Spokeo* court held that consumers can demonstrate the injury-in-fact element of standing through intangible injuries.[244] First, an intangible harm may be concrete if it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[245] All of the acts prohibited by section 1692d are of a type that is likely to cause consumers emotional distress, a harm that is recognized as an element of damages for a wide variety of common law torts.[246]

In addition, the acts prohibited by section 1692d closely resemble common law torts. Violations of section 1692d(1) (use or threats of violence) are close if not identical to common law

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238 *See* § 6.11a.3.4, *supra* (listing types of harm that consumers may suffer).
239 For a list of stress-related injuries and case citations see § 2.5.2.2.2, *supra*.
240 For a list of out-of-pocket injuries and case citations see § 2.5.2.2.3, *supra*.
241 For a list of injuries to personal relations and case citations see § 2.5.2.2.4, *supra*.
242 See § 6.3, *infra* (discussion of actual damages).
243 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'").
244 *Id*. at 1549.
245 *Id*.
246 *See* §§ 6.11a.3.4, *supra*, 9.2.6, *infra*.

assault.[247] Section 1692d(2) (obscene, profane, or abusive language), section 1692d(5) (repeated telephone calls), and section 1692d(6) (anonymous telephone calls) protect consumers against the same harm as the common law torts of intentional infliction of emotional distress[248] and invasion of privacy.[249] Obtaining personal information from the debtor without meaningful disclosure of the collector's identity, in violation of section 1692d(6), is an additional invasion of privacy, and common law recognizes that the consumer is harmed even if there is no publication of that information.[250]

The *Spokeo* Court identified a second way that an intangible injury may be concrete: "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."[251] Congress clearly did so when it enacted section 1692d. Indeed, prohibiting these abuses by debt collectors was a central motivation for Congress when it enacted the FDCPA.[252] Senate Report No. 95-382 noted that:

> The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

Congressional findings and the declaration of purpose in the statute itself also highlight Congress's concerns about eliminating abusive collection behaviors:

> **(a)** There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.
>
> . . .
>
> **(e)** It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors ... .[253]

As discussed above, harassment and abuse create a real risk of physical, emotional, and

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247 *See* § 9.7.1, *infra*.
248 *See* § 9.2, *infra*.
249 *See* § 9.3, *infra*.
250 *See* § 9.3.2, *infra*.
251 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).
252 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.
253 15 U.S.C. § 1692.

mental harm to consumers.[254]

A 2017 district court decision holds that receiving a voice message from a debt collector that does not disclose the collector's identity, in violation of section 1692d(6), is a concrete harm.[255] The prohibition of anonymous calls in section 1692d(6) also includes a disclosure requirement, in that calls are prohibited "without meaningful *disclosure* of the caller's identity" (emphasis added). This is a violation of an informational right, and *Spokeo* makes it clear that such a violation is concrete: it cited favorably to two of its earlier decisions holding that the plaintiffs had standing to sue for failure to provide access to information required by law.[256] The general application of *Spokeo* to failure to provide information that the collector is required to provide is discussed in § 6.11a.4, *supra*. Section 6.11a.3.4, *supra*, lists many other kinds of harm that may be caused by harassment and abuse, with citations to decisions holding that these harms are concrete.

6.11a.11 Applying Spokeo *to Unfair or Unconscionable Collection Methods*

Section 1692f prohibits unfair or unconscionable collection methods, including several specifically enumerated acts, such as misuse of postdated checks, causing charges for communications to be made to a person while concealing their true purpose, and wrongful repossession or threats of repossession. This section discusses Article III standing to assert claims regarding violation of these provisions. Article III standing to assert violations of section 1692f(1) (collection of unauthorized amounts) is discussed in § 6.11a.5.1, *supra*, and standing to assert violations of section 1692f(7) and 1692f(8) (sending mail to the debtor in a way that reveals the existence of the debt) is discussed in § 6.11a.8, *supra*.

In some cases involving unfair practices in violation of section 1692f, the injury-in-fact element of standing will be easily established by demonstrating tangible harm as a result of unfair or unconscionable collection practices.[257] For example, consumers with section 1692f(2)–(4) claims may have incurred fees related to a postdated check such as penalties for bouncing a check or

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254 The risks of harm associated with § 1692d(6) disclosure violations are similar to violations of §§ 1692e(11) and 1692g. *See* §§ 6.11a.4 to 6.11a.6, *supra*.

255 Pisarz v. GC Servs. L.P., 2017 WL 1102636 (D.N.J. Mar. 24, 2017) (leaving voicemail that does not disclose that caller is a debt collector, in violation of §§ 1692d(6) and 1692e, is concrete injury whether or not it results in other harm).

256 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549–1550, 194 L. Ed. 2d 635 (2016) (citing Federal Election Comm'n v. Akins, 524 U.S. 11, 20–25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) and Public Citizen v. Department of Justice, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989)). *See generally* § 6.11a.4.4.3, *supra* (informational injuries).

257 *See* § 6.11a.3.4, *supra* (types of harm that FDCPA violations may cause).

overdraft fees. Courts have awarded actual damages under the FDCPA for a wide variety of injuries as a result of abusive collection practices, including stress-related injuries,[258] out-of-pocket losses,[259] and injuries to personal relations.[260] Consumer attorneys should be sure to reference any actual damages[261] suffered by the consumer in pleadings, as such damages will illustrate that the plaintiff's injury is "real and not abstract."[262]

In the absence of evidence of tangible harms, the *Spokeo* court held that consumers can demonstrate the injury-in-fact element of standing through intangible injuries.[263] First, an intangible harm may be concrete if it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[264] The acts prohibited by section 1692f closely resemble common law torts. Violations of section 1692f(1) (prohibiting collection of amounts not expressly authorized by agreement creating the debt) and section 1692f(6) (prohibiting wrongful repossession or threats of repossession) are close to common law conversion and trespass to chattels.[265] Section 1692f(3) (solicitation of postdated check for purpose of threatening or instituting criminal prosecution) and section 1692f(4) (depositing or threatening to deposit postdated checks prior to the date on the check) protect consumers against the same harms as the common law claims for intentional infliction of emotional distress[266] and extortion.[267]

The *Spokeo* court identified a second way that an intangible injury may be concrete: "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."[268] Congress clearly did so when it enacted section 1692f to prohibit unfair collection practices.[269] Senate Report No. 95-382 noted that:

> This legislation expressly prohibits a host of ... unfair debt collection practices. These include: ... collecting more than is legally owing; and misusing postdated checks. In addition to these specific prohibitions, this bill prohibits in general terms any ... unfair ... collection practice. This

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258 For a list of stress-related injuries and case citations see § 2.5.2.2.2, *supra*.
259 For a list of out-of-pocket injuries and case citations see § 2.5.2.2.3, *supra*.
260 For a list of injuries to personal relations and case citations see § 2.5.2.2.4, *supra*.
261 *See* § 6.3, *supra* (discussion of actual damages).
262 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'").
263 *Id*. at 1549.
264 *Id*.
265 *See* § 9.7.3, *infra*. *See also* National Consumer Law Center, Repossessions § 13.6 (9th ed. 2017), *updated at* www.nclc.org/library (discussion of tort claims for wrongful repossession).
266 *See* § 9.2, *infra*.
267 *See* § 9.7.5, *infra*.
268 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).
269 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.

> will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.

Congressional findings and the declaration of purpose in the statute itself also highlight Congress's concerns about eliminating unfair collection practices:

> (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.[270]

As discussed above, unfair collection practices create a real risk of harm to consumers.[271]

Finally, the requirement in section 1692f(2) that debt collectors notify consumers prior to depositing a postdated check is an informational right. *Spokeo* makes it clear that a violation of an informational right is concrete, citing favorably to two of its earlier decisions holding that the plaintiffs had standing to sue for failure to provide access to information required by law.[272] Standing to assert informational injuries is discussed in § 6.11a.4.4, *supra*.

So far, there have been few post-*Spokeo* decisions on whether consumers have standing to assert claims regarding violations of section 1692f. Some decisions find standing for a section 1692f claim without additional analysis after finding standing for parallel claims under other FDCPA provisions.[273] One decision holds that consumers had standing to assert claims under section 1692f based on collection letters that misrepresented the tax consequences of settling a claim.[274] Another decision finds standing for a section 1692f claim where a collector identified the creditor by an unregistered false name.[275] Standing to assert claims for these types of misrepresentations are discussed in detail in §§ 6.11a.4 and 6.11a.5, *supra*. Another decision holds that a non-debtor who received a telephone call had standing to assert a claim under section 1692f(5) that he was charged for the call, but the debtor (his former roommate), who was not responsible for paying the bill for the

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270 15 U.S.C. § 1692.

271 The risk of harm associated with § 1692d(6) disclosure violations are similar to violations of §§ 1692e(11) and 1692g. *See* §§ 6.11a.5.1, 6.11a.6, *supra*.

272 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549–1550, 194 L. Ed. 2d 635 (2016) (2016) (citing Federal Election Comm'n v. Akins, 524 U.S. 11, 20–25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) and Public Citizen v. Department of Justice, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989)).

273 *See, e.g.*, Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017) (consumer has standing to assert claims under §§ 1692e and 1692f against collector that misrepresented that administrative wage garnishment proceedings had already commenced or were imminent).

274 Everett v. Fin. Recovery Servs., Inc., 2016 WL 6948052 (S.D. Ind. Nov. 28, 2016) (finding standing to bring claim regarding letter's misrepresentation of tax consequences of settling claim; citing costs consumer incurred to consult her attorney as one of the harms).

275 Velez v. Healthcare Revenue Recovery Group, L.L.C., 2017 WL 1476144 (M.D.N.C. Apr. 24, 2017).

phone service, did not have standing to assert the claim.[276]

The only negative decision of any substance holds that a debtor had no standing to assert a claim that a collector threatened repossession when it did not intend to repossess.[277] The court stressed that none of the collector's statements about the debtor's rights were false. Failing to recognize the way a threat creates a false sense of urgency, and can cause a debtor to prioritize this debt over others,[278] the court stated that it did not see how a false threat to repossess goods causes harm. A better-reasoned decision recognizes that false threats of deprivation of property can adversely affect a consumer's decisions regarding debt repayment, and holds that a consumer had standing to assert a claim under sections 1692e and 1692f that a collector misrepresented the imminence of wage garnishment.[279]

6.11a.12 Applying Spokeo *to Lawsuits in Distant Forums*

Section 1692i prohibits venue abuse—the collection tactic whereby the collector sues the consumer in an inconvenient forum where it will be easy to obtain a default judgment.[280] In some cases involving section 1692i violations, the concreteness requirement will be easily established by demonstrating tangible harm as a result of a collection lawsuit filed in the wrong venue. For example, consumers might demonstrate that they incurred additional travel expenses, childcare expenses, or lost work hours due the need to travel to a distant forum. Alternatively, they may show that they incurred attorney fees to defend against a lawsuit in a distant forum or remove a default resulting from inability to travel to the incorrect venue.

In the absence of evidence of tangible harms, the *Spokeo* court held that consumers can demonstrate the injury-in-fact element of standing through intangible injuries.[281] First, an intangible harm may be concrete if it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[282] Violations of section 1692i meet this standard because they resemble the common law doctrine of forum *non conveniens*, which allowed for dismissal of a case due to improper venue. Forum abuse is also analogous to the abuse of

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276 Horowitz v. GC Servs. L.P., 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016).
277 Scibetta v. TD Banknorth, 2017 WL 3448544 (D.N.J. Aug. 11, 2017).
278 *See* § 6.11a.3.4, *supra*.
279 Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017).
280 *See* § 5.9, *supra*.
281 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (or if Congress has defined the injury and articulated a chain of causation that will give rise to a case or controversy).
282 *Id.*

process cause of action at common law.[283] Moreover, filing collection lawsuits in distant forums presents a real risk of harm: consumers will either incur additional time and expense to travel to the inconvenient forum or will be unable to defend themselves and risk the entry of a default judgment.

The *Spokeo* court identified a second way that an intangible injury may be concrete: "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."[284] Congress clearly did so when it enacted section 1692i. When it enacted the FDCPA, Congress included section 1692i because it was concerned with abusive practices by debt collectors filing collection lawsuits in distant forums. Senate Report No. 95-382 explained that:

> This legislation also addresses the problem of "forum abuse," an unfair practice in which debt collectors file suit against consumers in courts which are so distant or inconvenient that consumers are unable to appear. As a result, the debt collector obtains a default judgment and the consumer is denied his day in court.[285]

Section 1692i unequivocally prohibits this practice, and the FDCPA makes it actionable.

Of course, the *Spokeo* court also stated that deprivation of a "bare procedural right" without some other concrete harm would not establish standing.[286] An example of a procedural right is the right to challenge an agency's action, and a litigant has standing if there is some possibility that the requested relief will prompt the agency to reconsider the decision that harmed the litigant.[287] By contrast, section 1692i imposes a substantive prohibition that directly protects the consumer from harm, rather than a procedural requirement that the consumer might invoke in order to persuade some third party to adopt a favorable position.

The concerns that prompted Congress to define forum abuse as an injury redressable by consumers are underscored by a 2014 decision in the Seventh Circuit. The court emphasized that forum abuses continue to be a problem in debt collection lawsuits because:

> [a]s this case illustrates, one common tactic for debt collectors is to sue in a court that is not convenient to the debtor, as this makes default more likely; or in a court perceived to be friendly to such claims; or, ideally, in a court having both of these characteristics. In short, debt collectors shop for the most advantageous forum. By imposing an inconvenient forum on a debtor who may be impecunious, unfamiliar with law and legal processes, and in no position to retain a lawyer (and even if he can afford one, the lawyer's fee is bound to exceed the debt itself), the debt

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283 *See* § 9.6.3, *infra*.

284 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

285 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.

286 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

287 Massachusetts v. EPA, 549 U.S. 497, 517–518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

> collector may be able to obtain through default a remedy for a debt that the defendant doesn't actually owe.[288]

The first post-*Spokeo* decision to address the question had no trouble determining that venue abuse caused the consumer a concrete injury. In *Linehan v. Allianceone Receivables Management, Inc.*,[289] a collector sued a consumer in the wrong subdivision of the county court. The court held that, since Congress had defined being sued in a distant forum as a legally cognizable harm, the violation of this right constituted injury in fact: "The goal of the FDCPA is to protect consumers from certain harmful practices; it logically follows that those practices would themselves constitute a concrete injury."[290] Section 6.11a.3.4, *supra*, lists many other kinds of harm that may be caused by venue abuse, with citations to decisions holding that these harms are concrete.

288 Suesz v. Med-1 Sols., L.L.C., 757 F.3d 636, 639 (7th Cir. 2014).
289 2016 WL 4765839 (W.D. Wash. Sept. 13, 2016).
290 *Id*. at *8.