11.2 Standing

11.2.1 General

The proposition that consumers have standing for Article III purposes in federal court when they are deprived of their statutory right to TILA disclosures or other statutory protections were violated has been noncontroversial.[1] The decision by the United States Supreme Court in *Spokeo, Inc. v. Robins*, although in the context of the Fair Credit Reporting Act, raises the pleading stakes in the context of statutory damages. This decision, its scope, and application in the TILA context are discussed in § 11.2.3a, *infra*. This section addresses general federal court standing concerns, immediately followed by standing issues related to the identity of the person raising the TILA claim. The last section describes standing issues in bankruptcy court.

As a general matter, standing must exist as of the date of the contract.[2] If, for example, a person not a party to a mortgage was subsequently deeded the subject property, that person does not have standing to raise TILA claims.[3]

Congress limited standing for consumers alleging violations of the disclosure requirements of the Fair Credit and Charge Card Disclosure Act of 1988[4] to those cardholders who pay periodic fees or membership fees and to users of the credit card or charge card.[5] This limitation does not affect closed-end transactions.

Standing issues arise where the consumer has died. Generally, the TILA claim survives the death of its holder and can be pursued by the estate.[6] To maintain an action on behalf of an estate, the

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1 {10} DeMando v. Morris, 206 F.3d 1300 (9th Cir. 2000). *See also* Reed v. Chase Home Fin., L.L.C., 893 F. Supp. 2d 1250, 1254 (S.D. Ala. 2012) (failure to receive § 1641(g) notice is injury-in-fact and consumer has Article III standing even without actual damages), *aff'd on other grounds*, 723 F.3d 1301 (11th Cir. 2013) (affirming district court's conclusion that transfer was for administrative convenience, so § 1641(g) disclosure requirement was inapplicable, but without addressing standing issue); Acosta v. Target Corp., 2011 WL 2550754 (N.D. Ill. June 24, 2011) (standing inquiry is separate from question of plaintiff's entitlement to particular form of relief; plaintiff may have standing to sue credit card issuer even if she did not incur finance charges or late fees).

2 {11} State law determines when the consumer is contractually obligated. *See* § 4.4.4, *supra*.

3 {12} Nash v. Long Beach Mortgage Co., 158 Fed. Appx. 843 (9th Cir. 2005); First Trust Nat'l Ass'n v. Daruka, 1991 WL 100855 (Conn. Super. Ct. May 7, 1991).

4 {13} 15 U.S.C. § 1637(c) and (d).

5 {14} Pub. L. No. 100-583, § 3, 102 Stat. 2960, *amending* 15 U.S.C. § 1640(a). *See, e.g.*, Muro v. Target Corp., 580 F.3d 485, 494 (7th Cir. 2009); Shah v. Am. Express Co., Am. Express Bank, F.S.B., Am. Express Centurion Bank, 2009 WL 3234594 (D.N.J. Sept. 30, 2009). *See also* § 6.5.7, *supra*.

6 {15} *See, e.g.*, Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407 (7th Cir. 1980) ("the measure of damages is not so severe as to render it penal"); *In re* Wood, 643 F.2d 188 (5th Cir. 1980) (although characterized as penal, statutory damages are not penal for survival purposes); James v. Home Constr. Co., 621 F.2d 727 (5th Cir. 1980); Riggs v. Gov't Employees Fin. Corp., 623 F.2d 68 (9th Cir. 1980) (TILA claim passes

estate needs an individual representative officially appointed to represent it under state law.[7]

Actual damages are not necessary to obtain TILA statutory damages.[8] In addition, it should be possible to obtain declaratory judgment relief without proof of actual damages under the Declaratory Judgment Act.[9]

The special rules defining who has standing to exercise rescission rights are discussed at § 10.2.8, *supra*.

11.2.2 Co-Obligors

In the usual case, the person seeking and entitled to Truth in Lending remedies is a "consumer" who is the primary obligor in the credit transaction (for purposes of the right to rescind, the definition of consumer is expanded).[10] However, liability arises when a creditor fails to comply with TILA requirements "with respect to any person."[11] "Person" is more broadly defined than "consumer" and includes a natural individual or an organization.[12] The phrase "with respect to any person" is not limited to "consumers" or primary obligors.[13] A third-party guarantor[14] or any

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to bankruptcy trustee; analysis indicates it would survive debtor's death also); Murphy v. Household Fin. Corp., 560 F.2d 206 (6th Cir. 1977) (same); Abel v. Knickerbocker Realty Co., 846 F. Supp. 445 (D. Md. 1994) (TILA claim may be maintained by executor of estate); § 11.6.2, *infra*.

7 {16} Gonzalez v. JP Morgan Chase Bank, N.A., 2014 WL 5462550, at *3 (N.D. Cal. Oct. 28, 2014) (daughter to whom deceased consumer deeded the home cannot raise TILA origination claim unless she becomes personal representative of the estate; also must allege this status, not state that she is merely identified in the will); Evans v. Wells Fargo Bank, 2013 WL 4049062, at *2 (N.D. Cal. Aug. 8, 2013) (*pro se*) (dismissing *pro se* case where borrower died and her son, although named in her will as the administrator, had not been officially appointed by the probate court); In *re* Evans, 114 B.R. 434, *further proceedings*, 120 B.R. 817 (Bankr. E.D. Pa. 1990). *See also* Amonette v. Indymac Bank, 515 F. Supp. 2d 1176 (D. Haw. 2007) (trustee of revocable living trust which held the trustee's own dwelling had standing to assert claims for rescission of a mortgage loan pursuant to TILA); *In re* Johnson, 140 B.R. 850 (Bankr. E.D. Pa. 1992).

8 {17} *See* § 11.6.2, *supra*.

9 {18} 28 U.S.C. §§ 2201, 2202. *See* § 11.4, *infra*. *But cf.* Martinez v. Weyerhaeuser Mortgage Co., 1997 WL 361578 (N.D. Ill. June 20, 1997) (no standing to seek declaratory and injunctive relief against illegal escrow practices where creditor had discontinued the practices in question and had also transferred one consumer's account and servicing rights to a different entity; proof of damages also inadequate).

10 {19} 15 U.S.C. § 1602(i); Reg. Z § 1026.2(a)(11). *See* § 10.2.8, *supra*.

11 {20} 15 U.S.C. § 1640(a).

12 {21} 15 U.S.C. § 1602(e).

13 {22} Barash v. Gale Employees Credit Union, 659 F.2d 765 (7th Cir. 1981); Anderson v. Rizza Chevrolet, 9 F. Supp. 2d 908 (N.D. Ill. 1998) (accommodation party has right to sue for TILA violations); Soto v. PNC Bank (*In re* Soto), 221 B.R. 343 (Bankr. E.D. Pa. 1998) (person who signed mortgage to secure loan to nephew had right to raise recoupment claim for TILA damages); McCullough v. Bank of Stamford Inc., 14 Conn. L. Trib. 35, Clearinghouse No. 44,553 (D. Conn. Feb. 10, 1988); Westbank v. Maurer, 658 N.E.2d 1381 (Ill. App. Ct. 1995). *See also* Maddox v. St. Joe Papermakers Fed. Credit Union, 572 So. 2d 961 (Fla. Dist. Ct. App. 1990). *See generally* § 2.2.2.2, *supra*.

14 {23} "Guarantor" is used in this discussion to refer generically to anyone who is secondarily liable on a credit obligation. It is intended to include accommodation parties, defined in the U.C.C. as a person who signs a negotiable instrument for the purpose of incurring liability on the instrument without being a direct beneficiary

individual or organization with potential liability under the contract, even if not a primary or joint obligor, may have standing.[15] For example, a person who is a co-owner of secured realty and whose signature on the loan documents is only to encumber that interest has standing to recover statutory damages.[16] The standing of forgery victims is discussed at § 11.2.3, *infra*.

The statute provides for only one recovery of the statutory penalty in transactions involving multiple obligors.[17] Class action recoveries, actual damages, and the HOEPA enhanced damages available under section 1640(a)(4) are not subject to that limitation.[18] The law was less clear prior to

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of the value given for the instrument. U.C.C. § 3-419(a) (2002). The precise U.C.C. definition of a guarantor is an accommodation party who adds words of guaranty to her signature, such as "payment guaranteed." U.C.C. § 3-419(c) (2002). A surety is a broader term than accommodation party, encompassing not only parties who sign on the instrument itself, but also those who sign a separate document to ensure payment. U.C.C. § 3-419, cmt. 3 (2002). The term "cosigner" is often used generically but does not have a precise definition.

15 {24} "Guarantor" is used in this discussion to refer generically to anyone who is secondarily liable on a credit obligation. It is intended to include accommodation parties, defined in the U.C.C. as a person who signs a negotiable instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument. U.C.C. § 3-419(a) (2002). The precise U.C.C. definition of a guarantor is an accommodation party who adds words of guaranty to her signature, such as "payment guaranteed." U.C.C. § 3-419(c) (2002). A surety is a broader term than accommodation party, encompassing not only parties who sign on the instrument itself, but also those who sign a separate document to ensure payment. U.C.C. § 3-419, cmt. 3 (2002). The term "cosigner" is often used generically but does not have a precise definition.

Contrast the Equal Credit Opportunity Act, which originally gave a cause of action only to "applicants," and was interpreted to deny standing to bring ECOA claims to accommodation parties prior to a clarifying amendment to the Act. *See*, *e.g.*, Anderson v. Rizza Chevrolet, Inc., 9 F. Supp. 2d 908 (N.D. Ill. 1998) (guarantor has standing to sue); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc., 595 F. Supp. 800 (E.D. Pa. 1984) (Regulation B § 202.2(e) was amended in 1985 to give accommodation parties standing to sue for certain specified violations).

16 {25} Villareal v. Snow, 1996 WL 28282 (N.D. Ill. Jan. 19, 1996). *See also* Pregler v. First NLC Fin. Servs. L.L.C., 2010 WL 3548484 (D. Minn. Sept. 7, 2010) (non-debtor co-owner of home, whose interest became subject to security interest created by debtor, may bring TILA suit); Johnson v. First Fed. Bank of Calif., 2008 WL 682497 (N.D. Cal. Mar. 10, 2008) (granting leave to amend where co-owner's income was used to qualify consumer for mortgage, although co-owner did not sign any loan papers and did not have standing). *But see* Correa v. BAC Home Loans Servicing L.P., 853 F. Supp. 2d 1203 (M.D. Fla. 2012) (*pro se*) (borrower's fiancé, who signed gift affidavit but not mortgage or note, cannot bring TILA claim); Wilson v. JPMorgan Chase Bank, 2010 WL 2574032 (E.D. Cal. June 25, 2010) (mistakenly stating that non-obligor spouse who co-signed mortgage cannot bring TILA suit because she is not an "obligor" or "consumer"; failing to note that 15 U.S.C. § 1640(a) makes creditor liable to "any person"). *But cf.* Bishop v. Quicken Loans, Inc., 2010 WL 3522128 (S.D. W. Va. Sept. 8, 2010) (non-obligor co-owner of home cannot join in obligor's claim that servicer violated § 1641(f), which requires response to request "by obligor"); New Haven Invs., Inc. v. Nelson, 1992 WL 394692 (Conn. Super. Ct. Dec. 18, 1992) (rejecting second mortgage holder's attempt to assert TILA claims against first mortgage holder for lack of standing).

17 {26} 15 U.S.C. § 1640(d). *See* Herrera v. First Northern Sav. & Loan Ass'n, 805 F.2d 896 (10th Cir. 1986) (TILA Simplification applies to a pre-1980 transaction, so only one statutory damages recovery was awarded to several obligors); Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608 (7th Cir. 1982) (interpreting pre-Simplification Act in light of Simplification amendments to allow only one recovery to several obligors). *See generally* § 9.6.12.1, *supra* (HOEPA enhanced damages).

18 {27} 15 U.S.C. § 1640(d); McCullough v. Bank of Stamford, Inc., 14 Conn. L. Trib. 35, Clearinghouse No. 44,553 (D. Conn. Feb. 10, 1988) (each obligor may recover separate actual damages); *In re* Quenzer, 274 B.R. 899 (Bankr. D. Kan. 2001), *rev'd on other grounds*, 288 B.R. 884 (D. Kan. 2003). Measures of actual damages are discussed at § 11.5, *infra*. Enhanced HOEPA damages are discussed at § 9.6.12.1, *supra*.

Simplification, and some courts held that multiple obligors were each allowed to recover statutory damages.[19]

Guarantors do not generally have the right to receive copies of the disclosures.[20] Nondelivery to the guarantor therefore would not be a violation of the Act and would not be a claim for the guarantor or anyone else to raise.[21] The right of guarantors to raise, at least defensively, the failure to provide correct disclosures to the primary obligor is, however, well supported by both TILA policy and UCC and pre-UCC surety law.

As a matter of TILA policy, guarantors have a right not to be misinformed by the use of erroneous disclosures in the transaction. Secondarily liable parties should have the opportunity to view the original of the disclosure statement even if they do not have a right to a copy.

Under UCC and pre-UCC surety law, guarantors are generally permitted to raise claims defensively that would have been available to the principal debtor as counterclaims or setoffs.[22] Thus, for example, if the APR or finance charge[23] in the disclosure statement prepared for the transaction was incorrect, that would have been a counterclaim or setoff available to the principal debtor, and thus should be available to the guarantor as well in those jurisdictions following that rule.

While the guarantor's standing to raise TILA violations as a counterclaim or setoff available to the principal obligor should probably be decided as a matter of UCC and its predecessor law, a guarantor's recovery may be limited by TILA law if the principal obligor has already raised the claim. The TILA ban on multiple recovery of statutory penalties may forbid the guarantor's recovery, without invoking UCC surety principles.

11.2.3 Forgery Victims

Two circuit courts have considered whether a consumer who is the victim of a (creditor-committed) forgery can pursue a TILA claim based on the forged document. The first was the

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19 {28} *Compare* Anderson v. Farmers Bank, 640 F.2d 1347 (8th Cir. 1981) (multiple recovery), *and* Barash v. Gale Employees Credit Union, 659 F.2d 765 (7th Cir. 1981) (multiple recovery), *and* White v. World Fin., 653 F.2d 147 (5th Cir. 1981) (multiple recovery), *with* Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608 (7th Cir. 1982) (single recovery), *and* Riggs v. Gov't Employees Fin. Corp., 623 F.2d 68 (9th Cir. 1980) (single recovery), *and* Hinkle v. Rock Springs Nat'l Bank, 538 F.2d 295 (10th Cir. 1976) (single recovery), *and* Mason v. General Fin. Corp., 542 F.2d 1226 (4th Cir. 1976) (single recovery).

20 {29} *See* § 2.2.2.2, *supra*. Co-owners of secured real property where rescission of the transaction is available are a special case, discussed at § 10.2.8, *supra*.

21 {30} *Cf*. Aurora Firefighter's Credit Union v. Harvey, 516 N.E.2d 1028 (Ill. App. Ct. 1987).

22 {31} U.C.C. § 3-305(d) (2002).

23 {32} *See* § 11.6.5, *infra* (list of the disclosure violations giving rise to a claim for statutory penalties). Actual damages are available for a broader array of violations. *See* § 11.5, *infra*.

Seventh Circuit, which held that a consumer may not sue for disclosure violations contained in a contract on which the consumer's signature was forged, reasoning that a forged contract is of no effect whatsoever.[24] Several trial courts have also taken this position.[25] This result is in contrast to the established rule that a consumer retains her TILA cause of action with regard to a contract unenforceable under state law.[26] It is also contrary to case law granting the right to rescind an unconsummated contract under TILA.[27]

Perhaps recognizing the absurdity of permitting a creditor to use its own criminal act of forgery as a defense to its TILA violations, the Fifth Circuit, in contrast, chose to analyze consummation from the consumer's perspective. It found consummation, as well as standing to pursue a TILA claim, though the consumer might well have a defense to the enforceability of the contract due to the forgery.[28] A district court also held that that the fair credit billing portions of TILA protect those whom the creditor claims are obligors, not just individuals who are in fact legally obligated on the contract.[29] But, in a case where the creditor was not involved in the wrongdoing, the Sixth Circuit upheld the dismissal of a claim that delivery of TILA disclosures to a post office box set up by an identity thief (the victim's mentally ill wife) was insufficient.[30]

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24 {33} Jensen v. Ray Kim Ford, Inc., 920 F.2d 3 (7th Cir. 1990).

25 {34} Anthony v. Anthony, 642 F. Supp. 2d 1366 (S.D. Fla. 2009) (follows *Jensen*, forged contract not enforceable, so no TILA liability); Cahalan v. Ameriquest, 2006 WL 1312961, at *2 (W.D. Pa. May 10, 2006) (husband could not rescind loan on marital residence where his name and signature were forged since there was no loan to him); Steele v. Chase Manhattan Mortgage Corp., 2005 WL 2077271 (E.D. Pa. Aug. 26, 2005) (no claim for disclosure violation in forged contract because contract has no effect); Walker v. Michael W. Colton Trust, 47 F. Supp. 2d 858 (E.D. Mich. 1999) (dismissing TILA claim based on forged documents); Fillmore v. Markham Motors Outlet, 1996 WL 238733 (N.D. Ill. May 3, 1996) (dutifully following *Jensen*); Monogram Credit Card Bank v. Morris, 2002 WL 31360695 (N.Y. City Civ. Ct. May 10, 2002). *See also* § 12.5.5, *infra*. *Cf.* Sirote v. BBVA Compass Bank, 857 F. Supp. 2d 1213, 1218 (N.D. Ala. 2010) (consumer alleging forgery had no standing to assert TILA because he claims he never entered into transaction with creditor), *aff'd per curiam*, 462 Fed. Appx. 888 (11th Cir. 2012).

26 {35} *See, e.g.,* Dryden v. Lou Budke's Arrow Fin. Co., 630 F.2d 641 (8th Cir. 1980); Lawrence v. Credithrift of Am., Inc., 622 F.2d 1207 (5th Cir. 1980); Williams v. Public Fin. Corp., 598 F.2d 349 (5th Cir. 1979); § 12.5.5, *infra*. *See also* 12 C.F.R. pt. 1026, supp. I, § 1026.17(c)(1) cmt. 1 (hereinafter cited as Official Interpretations § 1026.17(c)(1)-1). *Cf.* Bryson v. Bank of New York, 584 F. Supp. 1306 (S.D.N.Y. 1984) (applicant who was denied loan had right to pursue TILA claim (apparently pre-Simplification transaction, but court's analysis should still apply)); § 4.4.4, *supra*.

27 {36} *See, e.g.,* Thomas v. Leja, 468 N.W.2d 58 (Mich. Ct. App. 1991) (contract was not consummated under state law since loan proceeds were never disbursed, so consumer's right to rescind within three days after consummation never expired).

28 {37} Fairley v. Turan-Foley Imports, Inc., 65 F.3d 475 (5th Cir. 1995), *rev'g* 864 F. Supp. 4 (S.D. Miss. 1994).

29 {38} Belmont v. Assocs. Nat'l Bank, 119 F. Supp. 2d 149 (E.D.N.Y. 2000) (Fair Credit Billing protections).

30 {39} MacDermid v. Discover Fin. Servs., 488 F.3d 721, 734 (6th Cir. 2007). *Accord* Myles v. GMAC, 1998 WL 158483 (E.D. La. Apr. 1, 1998) (creditor has no obligation to make TILA disclosures to person whose name was forged on contract). *But see* Carter v. Atchley Ford, Inc., 2002 WL 802682 (D. Neb. Feb. 20, 2002) (granting summary judgment to forgery victim for non-delivery of closed-end credit disclosures even though creditor was unaware of forgery).

11.2.3a Standing and Statutory Damages

11.2.3a.1 *Spokeo* and Article III Standing

Recently in *Spokeo, Inc. v. Robins*, the Supreme Court addressed the federal court Article III standing doctrine in the context of a suit filed by a consumer seeking statutory damages for violations of four provisions of the Fair Credit Reporting Act (FCRA).[31] The court focused on one of the three elements that a plaintiff must plead to establish subject matter jurisdiction in federal court—injury in fact.[32] "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[33] The Supreme Court held that the Ninth Circuit Court of Appeals adequately analyzed the particularity requirement[34] of injury in fact but overlooked the concreteness requirement.[35] As a result, the appeals court failed to determine whether a consumer reporting agency's alleged violations of the FCRA's procedural requirements caused concrete injury.

If the consumer alleges and can later prove actual damages, *Spokeo* should be easily satisfied. In many cases, however, the plaintiff will choose to plead only a claim for statutory damages. Where actual damages have not been incurred or pleaded, the consumer must plead and prove 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[36] *Spokeo* acknowledges that either tangible or intangible injuries can satisfy this requirement.[37]

The Court characterized the alleged violations of the FCRA as violations of "procedural rights" granted by statute.[38] The Court clearly stated that "violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact."[39] Moreover, a risk of real harm can satisfy the concreteness requirement. In this part of the opinion, the Court cited to two

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31 ___U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447 (May 16, 2016).
32 The plaintiff also must plead that the injury in fact is "fairly traceable to the challenged conduct of the defendant ... and ... is likely to be redressed by a favorable judicial decision." *Id.* at 2016 WL 2842447, at *5 (relying on Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992)).
33 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *6 (May 16, 2016).
34 For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Id.* at *6. The Court found this part of the standing test was easily satisfied in the case before it. In her dissent, Justice Ginsburg highlighted the fact that the majority remanded only on the issue of concreteness. *Id.* at *14.
35 *Id.* at *1.
36 *Id*. at *5.
37 *Id*. at *9. The Court summarized a variety of approaches to meet the concrete element when the injury is intangible. *Id*. at *7–8.
38 *Id.* at *8.
39 *Id.*

of its prior decisions as examples of when an informational injury—the personal denial of access to information required by statute—is a concrete injury under Article III.[40] In *Public Citizen v. U.S. Department of Justice*, the court held that the plaintiff had standing to challenge DOJ's failure to provide access to information, the disclosure of which was allegedly required by the Federal Advisory Committee Act, because the inability to obtain such information "constitutes a sufficiently distinct injury to provide standing to sue."[41] Similarly, *Federal Election Commission v. Akins* stands for a similar point: "confirming that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury in fact to satisfy Article III."[42]

Of relevance to TILA, the *Spokeo* Court noted: " 'Congress is well positioned to identify intangible harms that meet minimum Article III requirements, [and] its judgment is also instructive and important.' "[43] Nonetheless, "Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."[44]

Later in the opinion, the majority provided two examples of the types of procedural violations that may not cause concrete enough harm to satisfy Article III.[45] First, where a consumer reporting agency violates the FCRA's requirement that it give the user a notice about its duties but the disseminated information is accurate, the Court stated that the violation may result in no harm. Second, the Court held that the disclosure of an incorrect zip code might not cause harm or present any material risk of harm, in the absence of a more specific allegation about the harm involved.[46]

The Court remanded the case to the Ninth Circuit to determine "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness

40 *Id*. (relying on Federal Election Comm'n v. Akins, 524 U.S. 11, 20–25 (1998) and Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989)).

41 491 U.S. 440, 449 (1989). In this case, the plaintiffs sought access to the ABA Committee's meetings and records in order to monitor its workings and participate more effectively in the judicial selection process by attempting to compel the Justice Department and the ABA Committee to comply with FACA.

42 Spokeo, Inc. v. Robins, ___ U.S. ___, 2016 WL 2842447, at *8 (May 16, 2016) (citing *Akins*, 524 U.S. 11, 20–25 (1998)). In *Akins*, the plaintiffs challenged the refusal of the Federal Election Commission to treat a specific political group as a "political committee" so that the recordkeeping and disclosure requirements of the Federal Election Campaign Act applied.

43 *Id.* at *7 (quoting Justice Kennedy's concurrence in Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992)).

44 *Id.* at *7.

45 *Id.*

46 *Id.*

requirement."[47]

11.2.3a.2 Scope of the *Spokeo* Ruling

Notably, Article III standing only is relevant to federal court subject matter jurisdiction. Depending on whether a particular state has a concreteness requirement as a condition of access to its courts, the Supreme Court's examination of this issue in *Spokeo* may be persuasive, albeit not binding. Neither federal nor state court standing doctrines apply in collection actions where the consumer raises TILA violations by way of recoupment. This is so because of the nature of the recoupment doctrine. It permits defendants to raise claims defensively that arise out of the same transaction. Moreover, recoupment damages only can be set off against and cannot exceed the plaintiff's recovery.[48]

In addition, the Court clarified that these standing concerns are not heightened merely because the case is filed as a class action.[49] Plaintiffs must take care to plead and demonstrate standing for each cause of action and for each form of relief that is sought.[50]

It is important to remember that the issue of standing is distinct from the issue of the proof necessary to trigger statutory damages. The jurisprudence related to the availability, purpose, and character of TILA statutory damages is long-standing and discussed at § 11.6.2, *infra*. The nutshell version: consumers need not show that they were deceived nor prove that they incurred any actual damages. Statutory damages are often referred to as civil "penalties" because the monetary award is unrelated to any harm that the consumer may suffer. Once liability is established, the imposition of statutory damages for violations is mandatory. Consequently, even though consumers must allege and prove a risk of real harm for purposes of standing when seeking statutory damages, they need only prove the violation itself to support an award of these damages.

11.2.3a.3 Application of *Spokeo* in TILA cases

11.2.3a.3.1 Violations of disclosure rules

When TILA was enacted in 1968, it represented Congress's effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit, to enable consumers to make informed

47 *Id.*
48 *See* discussion in § 12.2.5.2, *infra* (in the context of the TILA statute of limitations).
49 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *5, n.6 (May 16, 2016).
50 Davis v. Fed. Election Comm'n, 554 U.S. 724, 734, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006)).

choices in the credit marketplace, and to avoid abusive lending.[51] The disclosure requirements grew over the years when Congress identified additional aspects of the life cycle of consumer credit transactions that required transparency and the strengthening of consumer protections.[52] The disclosure regimes differ depending on whether the credit transaction is fixed-term ("closed-end") or open-end and whether the transaction is unsecured, secured by personal property, or is secured by real estate.[53] In short, the TILA, Regulation Z, and the Official Interpretations to Regulation Z are voluminous.

For this reason, it is impossible to provide a litany of each injury that could result from the violation of each requirement. Instead, this section outlines relevant aspects of the Act and congressional intent, as well as analytical steps to help practitioners identify the risk of the specific harm.

First, the particularized prong of injury in fact in relation to TILA violations should rarely, if ever, be an issue. All TILA transaction-specific disclosures are provided directly to consumers either by the creditor, its servicer, or a mortgage broker or a settlement agent for whom the creditor is responsible.[54] This information is private, not public. The one providing the information is either the creditor, its servicer, an assignee of the creditor, or a party for whom the creditor is or may be responsible.[55] The creditor and its assignee are contractually related to the transaction, as is the consumer. The injury, therefore, affects the consumer in a "personal and individual way."[56]

Regarding the second prong of injury in fact, concreteness, if the disclosure violation relates to the failure to give the specified information either before or at closing, the risk of misleading the consumer about the actual cost or terms of the legal obligation is high. This is so because these TILA disclosures must reflect the terms of the legal obligation.[57] Consequently, the consumer is harmed in a concrete way because she cannot successfully comparison shop, is misled about the loan terms, and the central purposes of the Act is defeated. This analysis applies to loan consummation disclosures in the closed-end unsecured or personal property-secured loan contexts, to the

51 *See* § 1.1.1, *supra*. These goals are embodied in the congressional findings provision of the Act. 15 U.S.C. § 1601(a).
52 *See* the discussion of the Congressional expansion of TILA in §§ 1.2.3–1.2.11, *supra*.
53 *Compare* Chapter 4, *supra* and Chapter 5, *supra* (closed-end) *with* Chapter 6, *supra* and Chapter 8, *supra* (open-end).
54 *See, e.g.*, Chapter 5, *supra* (closed-end disclosures), Chapter 6, *supra* and Chapter 8, *supra* (open-end disclosures).
55 *See* § 11.6.9, *infra*.
56 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *6 (May 16, 2016).
57 Reg. Z §§ 1026.17(c)(1) (closed-end transactions), 1026.5(c) (open-end); Official Interpretations §§ 1026.37-1 and 1026.37(b)-1 (TILA/RESPA loan estimate), 1026.38-3 (TILA/RESPA closing disclosure).

solicitation, application, and account-opening disclosures in the credit card and home equity lines of credit contexts, and to the loan estimates and closing disclosures in the closed-end real-estate-secured loan context.[58]

TILA also requires that certain types of disclosures be provided following consummation in a number of circumstances, for example, when a mortgage loan is transferred, a loan is modified, a loan is assumed, or a consumer requests the identity of the loan holder.[59] The creditor or servicer of a mortgage loan must also provide periodic statements, payoff statements, and escrow cancellation notices.[60] In the credit card context, the credit card issuer must provide: periodic statements; notice of the addition of new credit features; disclosures of changes in terms, the imposition of penalty rates, and change in account insurance provider; notice of the imposition of a penalty rate; and disclosures upon renewal of the credit card.[61]

The rationale of Congress and the CFPB for imposing these post-consummation notice requirements underscores the harm or injury intended to be avoided. Each of these post-consummation disclosures serves varying purposes that need to be articulated at the pleading and proof stages along with the harm they were intended to prevent.

For example, in 2009, Congress enacted the Helping Families Save Their Homes Act of 2009.[62] This Act amended TILA to establish a new requirement for notifying consumers of the sale or transfer of their mortgage loans. This provision became section 1641(g). Among other reasons, Congress enacted this provision:

> to provide consumers with information about the identity of the owner of their mortgage loan. In some cases, consumers that have an extended right to rescind the loan under TILA ..., can assert that right against the purchaser or assignee. ... Among other things, the 2009 Act seeks to ensure that consumers attempting to exercise this right know the identity of the assignee and how to

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58 In the closed-end context, the required disclosures include: the annual percentage rate; amount financed; finance charge; total of payments; payment schedule with payment dates and amounts; and security interest information. In the credit card context, the required disclosures include: the annual percentage rate (including introductory and penalty rates); the amount each fee charged or chargeable, for example, fees for issuance or availability of a card, transaction charges for purchases, cash advance and balance transfer fees, late payment, over-the-limit, and returned-payment fees, and charges for required insurance, debt cancellation or debt suspension coverage; grace period information; and disclosures related to security interests and billing error rights.

59 *See* § 5.15, *supra*.

60 *Id.*

61 *See* § 6.8, *supra*.

62 Pub. L. No. 111-22, 123 Stat. 1632 (2009). *See* discussion of this provision in § 5.15.2, *supra*.

contact the assignee or its agent for that purpose.[63]

If the notice is not provided or does not adequately identify the new owner, the consumer's right to rescind is undermined or eliminated. The consumer's ability to determine the identity of the owner for other purposes, such as for negotiating loan modifications or determining if a party seeking to foreclose has standing, are compromised.

In *Akins* and *Public Justice*,[64] the Supreme Court found injury in fact in situations where the information sought should have been available to the public. In the case of information that a creditor must provide about an actual transaction pursuant to TILA, the concrete nature of the injury is more pronounced because Congress placed statutory duties upon creditors for benefit individual consumers.[65] When creditors fulfill these duties, Congress believed the entire economy would benefit, as well as the economy as a whole.[66]

The practitioner should examine the particular rule at issue, its purposes, and congressional or regulatory intent to identify specific concrete harm that did or could result from the violation. The Court in *Spokeo* emphasized that Congress can elevate even the violation of procedural rights to a concrete injury if they protect against an identified harm, and "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."[67] Remember that a "risk of real harm" is sufficient. To assist in articulating these harms, the following steps should be fruitful.

Step 1: Review the discussion of the particular disclosure rule in this treatise that may address the rationale for the rule.

Step 2: Review any legislative or regulatory history cited in this treatise that addresses the rationale for the rule. The legislative and regulatory history is often discussed and cited in

63 74 Fed. Reg. 60,143, 60,144 (Nov. 20, 2009) (FRB's discussion of the purposes of this provision; *citing* 155 Cong. Rec. S5098–S5099 (daily ed. May 5, 2009) (citations omitted); 155 Cong. Rec. S5173–S5174 (daily ed. May 6, 2009)).

64 These cases, relied upon by the Court in *Spokeo*, are discussed in § 11.2.3a.1, *supra*.

65 15 U.S.C. § 1601(a) (purposes of the Act include meaningful disclosure of credit terms and costs so that *the* consumer will be informed in a meaningful way). Justice Thomas, in his concurrence in *Spokeo*, agreed that: "If Congress has created a private duty owed personally to Robins to protect *his* information, then the violation of that legal duty suffices for Article III injury in fact." Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *13 (May 16, 2016).

66 15 U.S.C. § 1601(a) (the result of consumers' informed use of credit is to enhance economic stabilization and increase competition among credit providers).

67 Spokeo, Inc. v. Robins,___U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447, at *8 (May 16, 2016) (emphasis in original).

the relevant text of this treatise, especially for changes made since 1994.[68]

Step 3: For legislative history available through NCLC, go to the online "Companion Materials" accompanying this treatise. Near the bottom of the "Table of Contents" of the online version of this treatise, click on "Primary Sources" and then on "TIL Act and History." This compilation will be updated in 2016, particularly for the more recent statutory amendments.

Step 4: Review the regulatory history related to the promulgation of relevant regulations. The Federal Reserve Board in the past and, now, the CFPB rely upon legislative history and expressions of congressional intent in the supplementary information accompanying the regulation. These agencies also provide explanations and justifications for the proposed and final versions of regulations that can be extremely helpful.

Step 5: For regulatory history available through NCLC, go to the online "Companion Materials" accompanying this treatise. Near the bottom of the "Table of Contents" of the online version of this treatise, click on "Primary Sources," then on "Regulation Z and Commentary," and then on "Federal Register Notices." Listed there are links to many of the relevant *Federal Registers*. This list will be updated in 2016 to complete the list. To track additions to and changes over time in Regulation Z and the Official Interpretations to Regulation Z and the rationale provided for each change, review "Appendix B Historical Chart of Regulation Z and Official Interpretations" under listed in Appendices in the Table of Contents of the online version of this treatise. This chart chronicles the *Federal Register* history of each and every amendment to Regulation Z and the Official Interpretations from 1968 to July 2015. It provides the citations to all *Federal Registers* for this time period but does not contain links. This chart is searchable to find all references to a particular provisions by using the citations.

11.2.3a.3.2 Violations of actionable disclosure rules are "significant"

It is important to educate the court that not all TILA disclosure violations trigger a remedy, including statutory damages. First, the civil liability provision in the Act provides a private right of action for violations only of the rules contained in Parts B, D, and E.[69] None of the sections of the

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68 For the recent CFPB overhaul of mortgage loan disclosures that integrated the TILA early and closing information with that of RESPA described in § 5.11, *supra*, the footnotes accompanying the text cite to the specific pages in the *Federal Register* where the CFPB discussed the rationale for the disclosures required under each section of the loan estimate and closing disclosure.

69 15 U.S.C. § 1640 (first paragraph).

Act included in Part A (General Provisions) and Part C (Credit Advertising and Limits on Credit Card Fees) are actionable. In addition, in 1980 Congress reduced the number of violations for which statutory damages are available by passing the Truth in Lending Simplification and Reform Act.[70] The changes were more than substantial enough to justify the Federal Reserve Board's characterization of the legislation as a "new Truth-in-Lending Act."[71] Congress changed TILA to make creditor compliance easier by streamlining disclosures and by limiting creditor liability for statutory penalties to "significant" violations only.[72] To achieve this latter result, Congress amended section 1640(a) making only listed provisions of the disclosure requirements found in sections 1637 (open-end rules) and 1638 (closed-end rules) actionable.[73] Charts showing which closed-end and open-end disclosure violations trigger damages appear in § 11.6.6.1, *infra*, and § 11.6.7, *infra*.

The clear implication of how Congress crafted and amended section 1640 is that a violation of one of the identified disclosures requirements will lead to statutory damages where the error is greater than the allowed tolerance, no matter how "technical" or "de minimis" in the creditor's eyes. Most circuit courts have held that TILA is a strict liability statute.[74] Nonetheless, in light of the statement of the Court in *Spokeo* that " 'Article III standing requires a concrete injury even in the context of a statutory violation,'" practitioners should identify the specific risk of harm that the rule at issue was intended to prevent.

11.2.3a.3.3 Violations of rules creating substantive protections

Over the decades, Congress has added substantive protections into the Act. For example, a few substantive limitations were placed on home equity lines of credit in 1988.[75] Congress enacted the Home Ownership and Equity Protection Act in 1994 that added numerous substantive protections applicable to high-cost mortgage loans in the form of contract limitations and prohibited acts or practices.[76] The Credit Card Accountability, Responsibility and Disclosures Act of 2009 was the Congressional response to credit card abuses. Congress added several substantive credit card

70 Title V of DIDMCA, *codified at* 15 U.S.C. §§ 1601–1615. For the legislative history, see S. Rep. No. 73, 96th Cong., 1st Sess. (Apr. 24, 1979) and H.R. Conf. Rep. No. 842, 96th Cong., 2d Sess. (Mar. 21, 1980), *reprinted at* 1980 U.S.C.C.A.N. 280, 298, respectively. *See generally* § 1.2.2, *supra* (history of these amendments).
71 46 Fed. Reg. 20,941, 20,949 (Apr. 7, 1981).
72 S. Rep. No. 368, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S.C.C.A.N. 236, 252. *See also* § 1.2.2, *supra* (summarizing how the disclosures were streamlined).
73 15 U.S.C. § 1640(A) (last paragraph). These exclusions are described in § 11.6.6 and § 11.6.7, *infra*.
74 *See* § 12.5.1, *infra* (compiling these cases).
75 *See* § 1.2.3 and Chapter 8, *supra*.
76 *See* § 1.2.4 and § 9.5, *supra*.

protections to TILA.[77] Most recently, Congress again amended TILA to include a variety of substantive provisions relating primarily to mortgage lending and servicing and to provide for expanded statutory damages recoveries for certain of these violations.[78]

Although the risk of concrete harm arising from the violations of substantive protections may seem self-evident, this harm also should be pleaded and proved. The suggested steps to identify these harms are discussed in § 11.2.3a.3.1, *supra*.

77 *See* § 1.2.8 and Chapter 7, *supra*.
78 *See* § 1.2.11 and Chapter 9, *supra*.