

## 3.2.10.7 Standing

### 3.2.10.7.1 General

The question of whether the plaintiff has standing to maintain an action in federal court is not typically raised in RESPA servicing actions seeking remedies under section 2605(f). This is because the challenges of pleading and proving a “pattern or practice” of noncompliance in order to obtain statutory damages under RESPA, as discussed earlier, means that plaintiffs generally do not bring RESPA actions seeking solely statutory damages. In fact, the statute’s reference to the pattern or practice statutory damages as “additional” damages has led some courts to suggest that an action seeking statutory damages alone for a violation of section 2605 may not be pursued.<sup>1</sup> Thus, plaintiffs in RESPA servicing actions are almost certainly seeking recovery of actual damages, and thus have alleged an injury in fact that is traceable to the servicer’s violation of a RESPA requirement.

However, standing has been an issue in actions brought to enforce the RESPA provisions that deal with mortgage settlement services.<sup>2</sup> For example, service providers have argued that plaintiffs lack standing under RESPA and Article III of the United States Constitution if they cannot allege that various practices involving fee-splitting, fee-padding, and duplicative or unearned fees have actually resulted in an overcharge or caused other monetary injury to the plaintiffs.<sup>3</sup> Four circuit courts have concluded that an overcharge is not required for standing,<sup>4</sup> but a number of district courts have reached the opposite conclusion.<sup>5</sup> While the Supreme Court initially granted certiorari to review a

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1 *See, e.g.*, *Renfroe v. Nationstar Mortgage, L.L.C.*, 2016 WL 2754461, at \*6, n.4 (11th Cir. May 12, 2016) (“This Court has not addressed in a published opinion whether RESPA pattern-or-practice damages are available in the absence of actual damages, and our unpublished opinions have used conflicting language. The question is not now before us, but we observe without ruling on the question, that the use of “additional” seems to indicate that a plaintiff cannot recover pattern-or-practice damages in the absence of actual damages.”).

2 *See* 12 U.S.C. § 2607 (section 8 of RESPA) and 12 C.F.R. §§ 1024.14, 1024.15; National Consumer Law Center, *Mortgage Lending* § 7.4 (2d ed. 2014), updated at [www.nclc.org/library](http://www.nclc.org/library).

3 *See, e.g.*, *Clements v. LSI Title Agency, Inc.*, 779 F.3d 1269, 1272–1273 (11th Cir. 2015) (borrower has standing based on an actual injury by alleging that had she not been charged \$385 in improper settlement fees, she would have been provided a credit in the same amount at closing); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009) (no overcharge needed for standing); *Contawe v. Crescent Heights of Am., Inc.*, 2004 WL 2244538 (E.D. Pa. Oct. 1, 2004) (finding no standing without overcharge). *See also* National Consumer Law Center, *Mortgage Lending* § 7.4.5 (2d ed. 2014), updated at [www.nclc.org/library](http://www.nclc.org/library).

4 *Galiano v. Fid. Nat’l Title Ins. Co.*, 684 F.3d 309, 315 n.9 (2d Cir. 2012) (“An allegation of overcharge is not necessary to sustain a § 8(a) claim.”); *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009). *See also* *Alexander v. Washington Mut., Inc.*, 2008 WL 2600323 (E.D. Pa. June 30, 2008) (plaintiffs’ failure to allege a settlement overcharge does not preclude a finding of injury in fact for purposes of Article III standing).

5 *See, e.g.*, *Mullinax v. Radian Guar., Inc.*, 311 F. Supp. 2d 474, 486 (M.D.N.C. 2004); *Contawe v. Crescent Heights of Am., Inc.*, 2004 WL 2244538, at \*3–4 (E.D. Pa. Oct. 1, 2004); *Moore v. Radian Grp., Inc.*, 233 F.

case raising this question in the context of a RESPA settlement services claim, the Court later dismissed the writ as improvidently granted.<sup>6</sup>

To demonstrate federal court Article III standing, a 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.<sup>7</sup> In *Spokeo, Inc. v. Robins*, the Supreme Court addressed the Article III standing doctrine in the context of a suit seeking statutory damages for violations of the Fair Credit Reporting Act (FCRA). The Court focused on the injury in fact element for establishing subject matter jurisdiction and stated: “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.’”<sup>8</sup> The Court held that the lower court adequately considered the particularity requirement of injury in fact but had not analyzed the concreteness requirement.<sup>9</sup> Thus, the case was remanded to the Ninth Circuit Court of Appeals to determine whether the consumer reporting agency’s alleged violations of the FCRA’s procedural requirements caused concrete injury to the plaintiff.

### **3.2.10.7.2 Application of *Spokeo* to RESPA servicing claims for statutory damages**

In cases in which the plaintiff has adequately pleaded actual damages stemming from a RESPA servicing violation, standing is clearly established and *Spokeo* should not be a concern. Although not typically brought for violations of RESPA section 2605, the plaintiff may elect to plead only a claim for statutory damages.<sup>10</sup> In this situation, the plaintiff must plead and prove that there has been a violation of a legally protected interest under RESPA that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”<sup>11</sup> The Court in *Spokeo* was careful to note that concreteness is not limited to tangible injuries and that “we have confirmed in many of our

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Supp. 2d 819, 825–826 (E.D. Tex. 2002), *aff’d*, 69 Fed. Appx. 659 (5th Cir. 2003).

6 *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *certiorari dismissed as improvidently granted*, 132 S. Ct. 2536 (2012).

7 *Spokeo, Inc. v. Robins, Inc.*, 136 S. Ct. 1540, 1547 (2016), *citing* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

8 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *citing* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

9 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (“Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete.”).

10 However, some courts have suggested that an action seeking statutory damages alone for a violation of section 2605 may not be pursued because of the statute’s reference to the pattern or practice statutory damages as “additional” damages. *See, e.g., Renfroe v. Nationstar Mortgage, L.L.C.*, 2016 WL 2754461, at \*6, n.4 (11th Cir. May 12, 2016) (“we observe without ruling on the question, that the use of ‘additional’ seems to indicate that a plaintiff cannot recover pattern-or-practice damages in the absence of actual damages.”)

11 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

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previous cases that intangible injuries can nevertheless be concrete.”<sup>12</sup>

The alleged violations of the FCRA in *Spokeo* were viewed by the Court as violations of “procedural rights” granted by the statute. The Court noted that a plaintiff cannot simply “allege a bare procedural violation, divorced from any concrete harm,” but also clearly stated that “violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.”<sup>13</sup> Importantly for purposes of consumer protection enforcement, the *Spokeo* Court stated that the risk of real harm can satisfy the concreteness requirement, noting that: “ ‘Congress is well positioned to identify intangible harms that meet minimum Article III requirements, [and] its judgment is also instructive and important.’ ”<sup>14</sup> In cases in which a plaintiff is seeking recovery for such harms, even if emanating from a procedural right, “a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.”<sup>15</sup> The Court cited as examples two prior decisions involving the inability to obtain information required by statute.<sup>16</sup>

Section 2605 of RESPA and its implementing regulations provide borrowers with numerous rights to obtain information as discussed in this chapter, including the right to request information about their mortgage loans, the right to detailed disclosures about the transfer of servicing rights of their mortgage loans, the right to obtain information about loss mitigation options, and the right to be notified by servicers at various stages in the loss mitigation process about the status of their applications. Congress enacted the servicing amendments to RESPA in 1990 in response to widespread reports of consumer complaints about mortgage servicing problems.<sup>17</sup> In response to continuing servicer abuses and the foreclosure crisis related to the Great Recession, Congress amended RESPA again in 2010, through the Dodd-Frank Act, to change some of the statute’s existing servicer requirements and to add several new foreclosure avoidance requirements. This legislative history demonstrates that Congress was aware of the potential harms to consumers from servicing practices and that RESPA’s provisions were intended to carry out a remedial consumer protection purpose.<sup>18</sup> Thus, the risk of real harm to borrowers who have been deprived critical

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<sup>12</sup> *Id.* at 1549 (citing as examples two cases involving free speech and free exercise).

<sup>13</sup> *Id.* at 1549.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (emphasis in original).

<sup>16</sup> *Id.*, 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).

<sup>17</sup> See U.S. Gen. Accounting Office, Report, Home Ownership—Mortgage Servicing Transfers Are Increasing and Causing Borrower Concern (1989), available online as companion material to this treatise. See also *Wanger v. EMC Mortg. Corp.*, 127 Cal. Rptr. 2d 685 (Cal. Ct. App. 2002).

<sup>18</sup> *Marais v. Chase Home Fin. L.L.C.*, 736 F.3d 711, 719 (6th Cir. 2013); *Medrano v. Flagstar Bank*, 704 F.3d 661, 665–666 (9th Cir. 2012) (“Although the ‘settlement process’ targeted by the statute was originally limited to the

information available under RESPA can satisfy the concreteness requirement.

For example, borrowers who are not informed about servicing transfers risk potential default and foreclosure by sending payments or loss mitigation information to the wrong servicer. Borrowers who are deprived information about available loss mitigation options, who are not notified about information and documents needed to complete a loss mitigation application and related deadlines for submission, or who are not informed about loan modification decisions and related appeal rights risk the loss of their homes in the foreclosure process. In most instances, violations of these information rights give rise to actual damages by borrowers that establish injury in fact. Nevertheless, in seeking statutory damages, it is advisable for the plaintiff to describe the harm that Congress and the CFPB intended to avoid in granting borrowers these disclosure rights and the authority to bring suit to vindicate those rights.<sup>19</sup> In pleading a violation of a statutory notice requirement, the plaintiff should clearly articulate the purpose of the required disclosure and the harm it was intended to prevent. As noted earlier, this may be sufficient under *Spokeo* and the plaintiff “need not allege any additional harm beyond the one Congress has identified.”<sup>20</sup>

In addition, statutory damages under RESPA may be awarded only if it can be shown that there has been a pattern and practice of noncompliance by the servicer.<sup>21</sup> By imposing this heightened pleading and proof requirement upon plaintiffs, it can be argued that Congress has effectively elevated the violation of procedural rights under RESPA to a concrete injury, by requiring a showing that the risk of harm from the servicer’s practices is not only to the plaintiff but also other similarly situated consumers.

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negotiation and execution of mortgage contracts, the scope of the statute’s provisions was expanded in 1990 to encompass loan servicing.”); *Friedman v. Maspeth Federal Loan and Sav. Ass’n*, 30 F. Supp. 3d 183, 187 (E.D.N.Y. 2014) (“The Act was designed to throw the federal judiciary’s protective cloak over residential-occupant owners of real property and their kin to protect against abuse by banks during loan closings and subsequent related events. The Act should be broadly applied to accomplish its prophylactic purposes by exercising federal subject matter jurisdiction.”); *Rawlings v. Dovenmuehle*, 64 F. Supp. 2d 1156 (M.D. Ala. 1999).

<sup>19</sup> This chapter contains numerous references to the CFPB’s rationale for specific servicing requirements, often provided in the Section-by-Section Analysis issued at the time the regulation was adopted.

<sup>20</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (emphasis in original).

<sup>21</sup> See § 3.2.10.3.2, *supra*.

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