

Court reiterated the well-settled test for Article III standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000): “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.” *Spokeo*, 2016 WL 2842447, at *5.² The Court’s analysis then focused on the first element of this three-part test—the requirement of an injury in fact. *Id.* at *6.

“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.’” *Id.* “For an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’” *Id.* And for an injury to be “concrete,” it must be ‘*de facto*’; that is, it must actually exist.” *Id.* at *7. In particular:

“Concrete” is not, however, necessarily synonymous with “tangible.” Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (free exercise).

In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 775–777, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). In addition, 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

² Internal citations and quotations are omitted, and emphasis is added, unless otherwise noted.

law.” 504 U.S., at 578. Similarly, Justice Kennedy’s concurrence in that case explained that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.*, at 580 (opinion concurring in part and concurring in judgment).

Spokeo, 2016 WL 2842447, at *7.

Significantly, the Court then made clear not only that “the risk of real harm” may “satisfy the requirement of concreteness,” but also that “a violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.” *Id.*, at *8. That is, the Court explained that “a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.” *Id.* Noteworthy, the Court referenced the “failure to obtain information subject to a disclosure” required by a federal statute as “a sufficiently distinct injury to provide standing to sue.” *Id.* (citing *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989)).

In the end, the Court found that because the Ninth Circuit did not “fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete.” *Id.* at *8. The Court then remanded the case so the lower court could perform the analysis required by *Lujan* and related decisions. In so doing, the Court noted: “We take no position as to whether the Ninth Circuit’s ultimate conclusion—that Robins adequately alleged an injury in fact—was correct.” *Id.*

Argument

I. *Spokeo* did not change settled Supreme Court and Seventh Circuit law, and thus does not impact this case.

As Ms. Chapman noted in her memorandum in support of her motion for final approval of the class action settlement, a change in the law resulting from the *Spokeo* decision could have impacted Article III standing here. ECF No. 21 at 6. For example, had the Court overruled *Lujan* and *Friends of the Earth* to require actual damages to support the injury-in-fact requirement for

Article III standing, this Court likely would not have subject matter jurisdiction as Ms. Chapman does not allege pecuniary, or out-of-pocket, monetary damages. However, in reiterating the three-part analysis for Article III standing under *Lujan* and *Friends of the Earth*, the Court chose not to pave new ground; rather, it reiterated that so long as a claimed injury is concrete and particularized, a plaintiff satisfies the injury in fact requirement for Article III standing. *Spokeo*, 2016 WL 2842447, at *15 (Ginsburg, J., dissenting) (“The Court’s opinion observes that time and again, our decisions have coupled the words “concrete *and* particularized.”) (emphasis in original).

Applying this standard, it has long been the settled law of this Circuit that a plaintiff need not have suffered actual damages to have standing to bring a claim under the FDCPA. *See Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir. 1998) (“The FDCPA does not require proof of actual damages as a precursor to the recovery of statutory damages.”). “In other words, the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not.” *Id.* at 593-94. Instead, a plaintiff need only demonstrate a redressible injury.

In particular, in *Matmanivong v. Nat’l Creditors Connection, Inc.*, Judge Kennelly applied *Lujan* to find that a plaintiff maintained Article III standing, without any actual damages, to bring an FDCPA claim similar to the one at issue here:

NCCI contends that the Seventh Circuit erred when it held in *Keele* that an FDCPA plaintiff has standing to sue even if he did not suffer actual damages. *See Keele*, 149 F.3d at 594. But the Supreme Court has allowed plaintiffs to pursue claims when a federal statute creates legal rights, the violation of which constitutes a redressible injury. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). The Court has stated that “[t]he actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” *Id.* at 373, 102 S.Ct. 1114 (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Put differently, “Congress does have the power to enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” *Sterk*, 770 F.3d at 623 (internal quotation marks omitted).

79 F. Supp. 3d 864, 870 (N.D. Ill. 2015).

Importantly, the Supreme Court echoed Judge Kennelly’s reasoning in *Spokeo*: “In addition, 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.” 2016 WL 2842447, at *7. Indeed, the Court took particular care to reiterate that “Congress has the power to define injuries and articulate claims of causation that will give rise to a case or controversy where none existed before.” *Id.* (citing *Lujan*, 504 U.S. at 578 (Kennedy, J., concurring)).

What’s more, when Congress creates new private rights, such as the rights afforded by the FDCPA (*i.e.*, the right to receive disclosures from a debt collector regarding the protections afforded by federal law), Article III standing exists once those private rights are invaded:

When Congress creates new private causes of action to vindicate private or public rights, these Article III principles circumscribe federal courts’ power to adjudicate a suit alleging the violation of those new legal rights. Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights. *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–374, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (recognizing standing for a violation of the Fair Housing Act); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137–138, 59 S.Ct. 366, 83 L.Ed. 543 (1939) (recognizing that standing can exist where “the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege”).

Id. at *12 (Thomas, J., concurring).

With this in mind, and because *Spokeo* did not change the law on Article III standing, the decision does not impact this case. *See id.* at *7 (noting that “‘concrete’ is not, however, necessarily synonymous with ‘tangible,’” and that “[a]lthough tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.”).

II. In any event, Ms. Chapman suffered an injury in fact sufficient to confer Article III standing to bring (and settle) her claim in federal court.

By way of background, Congress enacted the FDCPA in 1977 to “eliminate abusive debt collection practices by debt collectors.” 15 U.S.C. § 1692(e). It did so in response to “the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,” which contributes “to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.” *Id.*, § 1692(a). Recently, the Consumer Financial Protection Bureau (“CFPB”)—the federal agency tasked with enforcing the FDCPA—explained: “Harmful debt collection practices remain a significant concern today. The CFPB receives more consumer complaints about debt collection practices than about any other issue.”³ Of these complaints about debt collection practices, over one-third relate to debt collectors’ attempts to collect debts that consumers do not owe.⁴

To combat this problem, the FDCPA creates a series of private rights afforded to consumers. Among them is the right to receive from a debt collector “validation notices” containing certain information about their alleged debts and related rights “[w]ithin five days after the initial communication with a consumer in connection with the collection of any debt,” unless the required information was “contained in the initial communication or the consumer has paid the debt.” *Id.*, § 1692g(a). It is the failure to provide proper disclosures that forms the basis of Ms. Chapman’s lawsuit.

³ See Brief for the CFPB as Amicus Curiae, Dkt. No. 14, p. 2, *Hernandez v. Williams, Zinman, & Parham, P.C.*, No. 14-15672 (9th Cir. Aug. 20, 2014), http://www.ftc.gov/system/files/documents/amicus_briefs/hernandez-v.williams-zinman-parham-p.c./140821briefhernandez1.pdf.

⁴ See Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act—CFPB Annual Report 2014* at 9-10 (2014), http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf

In particular, Ms. Chapman alleges that Defendant violated the FDCPA by failing to adequately provide her (and other members of the class) with the disclosures required by 15 U.S.C. § 1692g(a)(4).⁵ Specifically, Defendant failed to inform Ms. Chapman that it need only provide her with proof of the legitimacy of her alleged debt if she disputed the debt in writing within 30 days of her receipt of Defendant's initial debt collection letter.

Importantly, inclusion of the "in writing" language in the disclosures mandated by the FDCPA is not merely an academic exercise. Rather, "[a]n oral notice of dispute of a debt's validity has different legal consequences than a written notice." *Osborn v. Ekpsz, LLC*, 821 F. Supp. 2d 859, 869 (S.D. Tex. 2011); *see also Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005) (noting that the FDCPA "assigns lesser rights to debtors who orally dispute a debt and greater rights to debtors who dispute it in writing.").

As the Southern District of Texas explained:

Section 1692g(b) provides that if the consumer notifies the collector of a dispute in writing within the 30-day period, the collector must cease collection activities until he obtains the verification or information required by subsections 1692g(a)(4) and (a)(5). But if the consumer disputes the debt orally rather than in writing, the consumer loses the protections afforded by § 1692g(b); the debt collector is under no obligation to cease all collection efforts and obtain verification of the debt.

Osborn, 821 F. Supp. 2d at 869.

Section 1692g(b), therefore, offers an additional protection to a consumer who disputes a debt in writing—the debt collector must cease collection of the debt until it obtains verification of

⁵ Section 1692g(a)(4) provides: "Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing – (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector." 15 U.S.C. § 1692g(a)(4).

the debt or a copy of a judgment, or the name and address of the original creditor, and mails that information to the consumer. 15 U.S.C. § 1692g(b); *accord Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 286 (2d Cir. 2013) (“Sections 1692g(a)(4) and (a)(5) call for affirmative steps on the part of the debt collector, and § 1692g(b) requires the debt collector to ‘cease collection of the debt’ unless it complies with several conditions that relate to verifying the debt or judgment in question. ‘Section 1692g(b) thus confers on consumers the ultimate power vis-à-vis debt collectors: the power to demand the cessation of all collection activities.’ *Brady v. Credit Recovery Co.*, 160 F.3d 64, 67 (1st Cir. 1998). It therefore makes sense to require debtor consumers to take the extra step of putting a dispute in writing before claiming the more burdensome set of rights defined in § 1692g(a)(4), (a)(5) and (b).”).

But a consumer who is not informed of the “in writing” requirement to obtain verification of the debt—like Ms. Chapman and the class members here—would be unlikely to avail herself of the protections afforded by section 1692g(b) by disputing the debt “in writing.” And “if a consumer contests a debt by telephone rather than in writing, the consumer will inadvertently lose the protections for debtors set forth in the FDCPA; the debt collection agency would be under no obligation to verify the debt and cease all collection efforts as required by § 1692g(b).” *Withers v. Eveland*, 988 F. Supp. 942, 947 (E.D. Va. 1997).

As the Eastern District of Virginia wrote, “[w]here the debt collector fails to advise that the debtor’s requests under subsections (a)(4) and (a)(5) must be in writing, the least sophisticated consumer is not simply uncertain of her rights under the statute, she is completely unaware of them.” *Bicking v. Law Offices of Rubenstein & Cogan*, 783 F. Supp. 2d 841, 845 (E.D. Va. 2011). Informing consumers of the “in writing” requirement, therefore, is of paramount importance.

Recognizing this, the CFPB and the Federal Trade Commission both explained that the

“validation requirement was a ‘significant feature’ of the law that aimed to ‘eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.’” *See Hernandez*, Brief for the CFPB as Amicus Curiae, Dkt. No. 14, p. 10. In other words, Congress deemed these safeguards necessary to protect consumers from the very real harm resulting from inaccurate debt collection efforts that subject consumers to monetary loss, stress, lower credit scores, and a host of other perils.

Accordingly, and if nothing more, failing to include the statutorily mandated disclosures that make up the “validation requirement” gives rise to a “risk of real harm” sufficient “to satisfy the requirement of concreteness.” *See Spokeo*, 2016 WL 2842447, at *8. Of course, because Congress very specifically identified an actual harm resulting from Defendant’s conduct at issue, this matter presents a scenario that includes far more than the simple “risk of real harm.” *See id.*

To be clear, and just as it has throughout this litigation, this Court has subject matter jurisdiction over Ms. Chapman’s FDCPA claim. There can be no doubt that the harm suffered by Ms. Chapman is “particularized,” in that the violative initial debt collection letter at issue was sent to her personally and misstated her rights regarding how to dispute the validity of her personal debt. *See Spokeo*, 2016 WL 2842447, at *6 (particularization refers to a harm done individually, as opposed to a generalized grievance).

Likewise, the harm suffered by Ms. Chapman, while not resulting in out-of-pocket monetary loss, was concrete, in that it not only created the risk of real harm, but was “real” as specifically identified by Congress. *See id.* at *8 (“Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.”) (emphasis in original).

There can be no doubt, therefore, that the abusive debt collection practices identified by Congress resulted here in real, concrete harm that Congress sought to redress by requiring debt collectors to accurately inform consumers of their rights. That is, Defendant's failure to comply with Congressionally mandated disclosure requirements resulted in real harm to Ms. Chapman and the members of the class who were deprived of important protections.

Separately, the invasion of a private right created by Congress, where Congress created a specific private right of action,⁶ also confers Article III standing. *Id.* at *12 ("Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights. A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right.") (Thomas, J., concurring).

⁶ The FDPCA specifically provides for a private right of action for a violation of its provisions. 15 U.S.C. § 1692k(4) ("An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs."). More specifically, "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

- (1) any actual damage sustained by such person as a result of such failure;
- (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or
(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and
- (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a).

As such, and consistent with *Spokeo* and Seventh Circuit jurisprudence, Ms. Chapman maintains Article III standing to bring and resolve her claims in this Court.

Conclusion

The Supreme Court's decision in *Spokeo* reiterated long-standing principles of Article III standing and did not change the law in the Seventh Circuit. And since Ms. Chapman meets the requirements for Article III standing, there is no question concerning this Court's jurisdiction over this matter. As a result, Ms. Chapman respectfully requests that this Court grant final approval to the parties' class action settlement and authorize the payments to class members set forth therein.

Dated this 23rd day of May, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed on May 23, 2016, via the Court Clerk's CM/ECF system, which will provide notice to all counsel of record.

/s/ Michael L. Greenwald
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