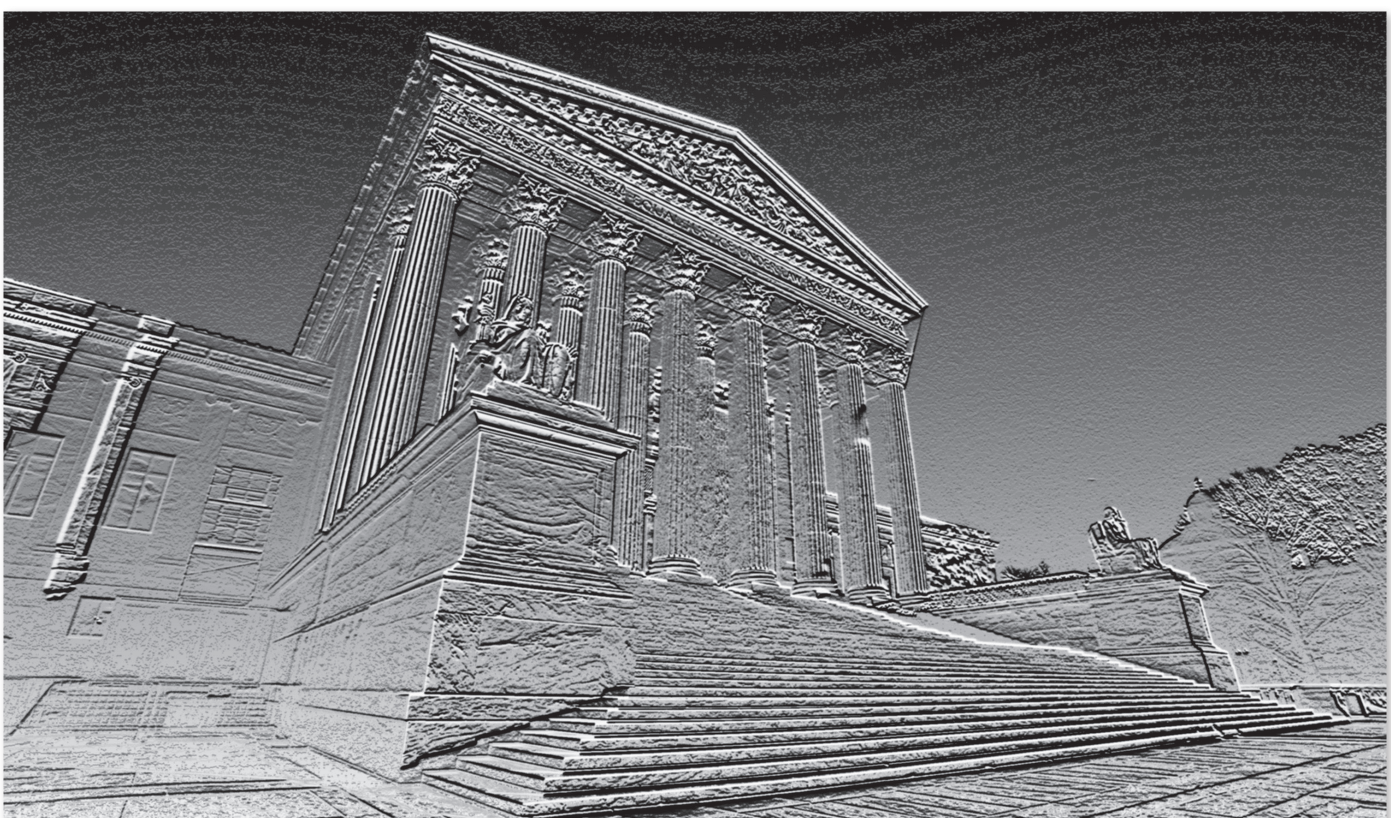
Assessing *Spokeo, Inc. v. Robins*: The Future of Statutory Damage Class Actions in the Consumer Protection Arena

by Tyler Kasperek Somes*



1. Introduction

About one year from the date of this issue's publication,[1] the United States Supreme Court decided *Spokeo, Inc. v. Robins*.[2] The eight-member bench declined to answer the case's central question of whether the plaintiff had standing, but it did provide new instructions on how to analyze the "concrete harm" requirement of the standing doctrine.[3]

In wake of the *Spokeo* decision, lower courts will have to apply these new instructions to a variety of statutes and fact patterns. Given the lingering ambiguities in the "concrete harm" analysis left open by the Court, it seems likely that divergent applications will emerge both across and within circuits.

Claims seeking statutory damages in the absence of actual damages will be especially affected by the development of this jurisprudence. Indeed, its evolution will determine the viability of the private enforcement consumer protection regime established by Congress, where statutory damages are particularly common and often invoked in class action litigation.

This article endeavors to measure the impact of *Spokeo* on claims arising under consumer protection statutes providing for statutory damages via an empirical study. It also proposes an application of the *Spokeo* decision which would protect against frivolous claims and simultaneously preserve access to the courts, promote economically efficient litigation and respect Congressional prerogatives.

2. Jurisprudential Background and the *Spokeo* Decision

A. Trends in Class Action Jurisprudence Before *Spokeo*

Recent Supreme Court decisions have substantially raised the barriers to class action certification. As a result, entire categories of class actions have become much harder to prosecute, including employment discrimination cases and any dispute where an arbitration agreement exists. One way the Court has accomplished this is by raising the threshold for commonality and predominance before class certification in cases like *Wal-Mart Stores, Inc. v. Dukes*[4] and *Comcast Corp. v. Behrend.*[5]

In the consumer law context, however, another line of decisions has been particularly consequential. In *AT&T Mobility LLC v. Concepcion,* the Court elevated an arbitration agreement with a class action waiver above a California doctrine holding such contracts unconscionable.[6] As a result, consumers asserting claims against their phone company were prohibited from participating in class-wide adjudication.[7]

These decisions have had significant real-world implications. Arbitration agreements have since proliferated across consumer industries as diverse as medical care, financial services and rental cars.[8] With the class action mechanism unavailable, many consumers' claims have become less valuable than the expense required to litigate them.[9] Since very few consumers elect to pursue individual arbitration, an increasing number of small consumer claims have been left unaddressed .[10]

An example from the financial services industry illustrates the scale of this problem. When the Consumer Financial Protection Bureau recently proposed a rule banning class action waivers across an array of financial services, it estimated consumers would reap an additional $342 million *per year* by regaining access to class actions.[11] It estimated plaintiffs' attorneys would earn an additional $66 million per year.[12] Thus, a relatively narrow rule covering banking accounts, credit cards and loan providers will return substantial monies to consumers and their advocates.

B. Against the Tide, Statutory Damage Class Actions Have Survived and Thrived

Since the 1960s, Congress has passed about a dozen consumer protection laws which provide consumers with private rights of action and statutory damages on a per-incident basis. Corporate defendants sued under these laws often have no contract with the aggrieved consumers, and therefore no opportunity to enforce an arbitration clause. Moreover, violations of these laws are typically uniform in character, widespread in scope and light on individual damages. As a result, they are well adapted for class certification, even under the heightened commonality and predominance requirements articulated by *Dukes* and *Comcast*.

Consider the case of a retailer who uses an automatic dialing system to solicit consumers without express prior consent as required by Telephone Consumer Protection Act (TCPA). The retailer probably has no contractual relationship with the consumers and the solicitation is probably systematic across a wide portfolio of phone numbers. For each violation, there is a penalty of $500 to $1,500.[13] Class certification is much easier in this scenario than, for example, a nationwide sex discrimination case because there are fewer individualized inquiries and the statutory damages are harmonized across the class.

Given the trends in class action jurisprudence, many commentators anticipated an expansive ruling that would curtail statutory damages class actions.

Lawsuits under these statutes represent a large and growing industry. According to WebRecon LLC, which tracks consumer litigation, the three most popular consumer protection statutes for private litigants are the Fair Debt Collection Practices Act (FDCPA), Fair Credit Reporting Act (FCRA) and the TCPA. In 2015, over 1,900 putative class actions were filed under the FDCPA, almost 900 under the TCPA, and over 600 under the FCRA.[14] The number of private litigants suing under these statutes has increased three-fold in less than a decade.[15] Despite the general trend restricting class action litigation, statutory damages consumer class actions have survived and thrived.

C. Defendants Raised the Standing Doctrine as a Fundamental Challenge to Statutory Damages Class Actions

In light of this success, the class action defense bar raised a new objection to statutory damages-only claims: that the plaintiffs cannot establish standing. This argument made it to the Supreme Court in *Spokeo, Inc. v. Robins*.[16] Given the trends in class action jurisprudence, many commentators anticipated an expansive ruling that would curtail statutory damages class actions.

The case presented a typical complaint under the Fair Credit Reporting Act. Spokeo, Inc. operates a "people search engine" where subscribers can obtain information about individuals such as contact information, criminal history, marital status, income, etc.[17] As a consumer reporting agency (CRA), Spokeo is obligated to follow "reasonable procedures to assure maximum possible accuracy" of the information it provides.[18] For willful violations of this provision, the Act provides for actual damages, as well as statutory damages ranging from $100 to $1,000 per incident.[19]

Robins sued Spokeo for misrepresenting his marital status, age, income level and educational attainment without taking reasonable measures to assure the accuracy of the information.[20] Significantly, he did not allege that he had lost an employment offer or suffered any other tangible injury as a result of the misrepresentation. Nor did he make a claim for actual damages.

In order to gain access to the federal courts, a plaintiff must establish three elements of standing: injury-in-fact, causation and redressability.[21] Importantly, Congress may not create a cause of action absent any element — they are constitutionally mandated.[22] Spokeo honed in on the injury-in-fact element, which requires that a plaintiff "must have suffered or imminently will suffer injury—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent."[23] It asserted that Robins failed to allege a concrete harm to a legally protected interest.[24] Rather, it suggested that he had alleged a mere technical violation of the FCRA without suffering any harm, which would be insufficient to confer standing.[25]

Spokeo's petition for a writ of *certiorari* underscored the sweeping implications of its argument. The petition names at least 16 federal statutes "likely to raise the same question," all of which include provisions of statutory damages.[26] When the Supreme Court granted *certiorari*, district courts across the country stayed statutory damages cases.[27] Given the Court's ideological composition and its recent jurisprudential trends, the case seemed to present an existential risk to statutory damages consumer class actions.[28]

D. *Spokeo, Inc. v. Robins:* The Supreme Court's Decision

The Supreme Court granted *certiorari* in *Spokeo* on April 27, 2015. Oral arguments were presented on November 2, 2015. Three months later, Justice Antonin Scalia died on a ranch in Shafter, Texas. Commentators quickly speculated about the effect of Justice Scalia's death on the *Spokeo* case.[29] He had authored each of the major class action decisions of the Roberts court, including *Walmart*, *Comcast*, *AT&T Mobility* and *Italian Colors*. He had a keen interest in standing issues and had signaled support for Spokeo's position during oral arguments.[30]

When the decision was released, advocates for both sides claimed victory. It is easy to see why: the eight-member Court did not decide the central question of whether Robins had standing.[31] Instead, it returned the case to the Ninth Circuit with an instruction to conduct a specific analysis of the "concrete harm" prong of the injury-in-fact requirement.[32]

The Court did provide guidance about the appropriate way to conduct a "concrete harm" analysis, however. This is the case's major contribution to standing jurisprudence. The method of analysis articulated by the court includes language which will be helpful for both plaintiffs and defendants in future statutory damages class actions, leaving the issue very much alive for case-by-case determinations in the lower courts.[33]

In principle, Spokeo won the case. The holding established that a "bare, procedural violation" of a statute, without more, is insufficient to satisfy the injury-in-fact requirement of standing.[34] Defendants will be emboldened by the Court's requirement that a concrete injury be "*de facto*, that is, actually exist."[35]

However, the Court also made clear that "intangible injuries can nevertheless be concrete."[36] Thus, a showing of actual damages is not required to trigger statutory damages, avoiding the worst-case scenario envisioned by the plaintiff's bar. Moreover, the Court preserved the possibility that an increased "risk of harm" could be "concrete."[37]

Now the debate will shift to where the line is drawn between "intangible," but "actually existing" harm. The Court provided two considerations to guide this analysis. First, it wrote that courts must consider the intention of Congress in enacting the statute. Second, it required courts to ask whether the harm has traditionally been redressable at law.[38]

In the context of the FCRA, the Court provided two examples of technical violations that would likely fall short of causing concrete harm. First, it suggested that the failure of a credit reporting agency to certify that its information is accurate would not suffice if, indeed, the information was accurate.[39] Second, it said it is "difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."[40]

E. Open Questions and Emerging Answers

The Supreme Court's decision in *Spokeo* clarified the parameters of the standing doctrine and provided lower courts with important new guidance on how to conduct a "concrete harm" analysis. However, the Court declined to determine the central question of whether Robins had standing to assert his claim and its decision provided rhetorical ammunition for both sides of the docket in statutory damages class actions. As a result, I hypothesize that lower courts will reach divergent conclusions about which types of harm are sufficient to allege a "concrete harm" in these cases.

The period following the *Spokeo* decision provides a window of opportunity to analyze its impact on the lower courts. As stays were lifted on dozens of cases around the country, courts directly grappled with the decision's ambiguities and applied it across a wide variety of consumer protection contexts.

3. Empirical Analysis: *Spokeo's* Impact on Statutory Damages Consumer Claim

The Supreme Court's decision in *Spokeo, Inc. v. Robins* preserved considerable uncertainty about what types of injuries are sufficient to confer standing where no actual damages are alleged. This section presents an empirical analysis of *Spokeo's* impact on statutory damages consumer claims in federal district and circuit courts in the first ten months after the decision.

A. Impetus and Goals

The first objective of this study is to determine which consumer protection claims with statutory damages at stake have been most, and least, susceptible to defeat on the basis of a standing defense. This will be relatively simple to ascertain based on the outcome of defendants' standing arguments.

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The second objective is to determine what types of intangible harms have been most, and least, successful at clearing the "concrete harm" threshold. Typical examples of intangible harms include "invasion of privacy," "informational injury," "waste of time," "nuisance" and "emotional stress." Answering this question will require isolating various causes of action, mapping the potential harms which could be pled for each and comparing them to the quantitative results of the study.

The results of these inquiries should be of interest to practitioners on both sides of the docket in statutory damages class actions. They also have implications for the broader integrity of the American consumer protection regime as it has been designed by Congress.

B. Methodology

For this study, I catalogued every federal court decision published from May 16 to October 16 which cited to *Spokeo*. From this catalogue, I identified each case which raised a cause of action under one of the below-listed consumer protection statutes. Each of these statutes allows statutory damages in the absence of actual damages, at least in some jurisdictions. As a result, each could be affected by a strict application of *Spokeo's* "concrete harm" requirement.

Next, I determined whether there was a holding on standing in each case. If a case went up on appeal, I used only the holding of the circuit court. This created an initial universe of 108 cases in the federal system which cited to *Spokeo* for a holding on standing in the five months after the decision. The statutes, their acronyms, and the number of cases in this universe are as follows:

- Fair Credit Reporting Act (FCRA) [25 cases]
- Fair and Accurate Credit Transactions Act (FACTA) [6 cases]
- Fair Debt Collection Practices Act (FDCPA) [27 cases]
- Telephone Consumer Protection Act (TCPA) [27 cases]
- Video Privacy Protection Act (VPPA) [2 cases]
- Driver's' Privacy Protection Act (DPPA) [5 cases]
- Electronic Communications Privacy Act (ECPA) [1 case]
- Stored Communications Act (SCA) [zero]
- Computer Fraud and Abuse Act (CFAA) [1 case]
- Electronic Funds Transfer Act (EFTA) [zero]
- Employment Retirement Income Security Act (ERISA) [1 case]
- Truth in Lending Act (TILA) [3 cases]
- Consumer Product Safety Act (CPSA) [zero]
- Real Estate Settlement Procedures Act (RESPA) [5 cases]
- Homeowner Protection Act (HOPA) [zero]
- Consumer Credit Protection Act (CCPA) [2 cases]

The vast majority of the cases falling within the scope of this survey were concentrated across three statutes: the FCRA, FDCPA and TCPA. Due to this concentration, I honed in on these statutes for a second round of data collection spanning from October 16, 2016 through March 15, 2017. This yielded an additional 114 cases wherein a holding on standing cited to the *Spokeo* decision, for a total of 193 cases across the three major statutes.

C. Empirical Results

The overarching initial trends suggest that a split is developing amongst district courts with respect to the application of *Spokeo* to FCRA suits. On the other hand, TCPA and FDCPA suits have been comparatively more insulated. The following table summarizes the number of times *Spokeo* was cited in a holding on standing for these three most frequently litigated statutes:

Time Frame: May 15, 2016 – March 15, 2017	*Spokeo* invoked and plaintiff had standing (number of cases)	*Spokeo* invoked and plaintiff lacked standing (number of cases)
FCRA	31	34
FDCPA	44	15
TCPA	53	11

i. Fair Credit Reporting Act

The FCRA was the statute at issue in *Spokeo*. It regulates the production, use and provision of credit reports. It imposes statutory damages of between $100 and $1000 for each violation.[41] Some of the most commonly litigated provisions of the FCRA include the:

- "Stand alone disclosure" requirement: employers seeking consumer reports on their current or prospective employees must provide them with a "clear and conspicuous disclosure" in a document "that consists solely of the disclosure" that such a report will be obtained for employment purposes;[42]
- "Reasonable procedures" requirement: CRAs must maintain "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates;"[43]
- "Accurate disclosure" requirement: upon the request of a consumer, CRAs are obligated to fully and accurately disclosure the content of their file, the sources of information in the file and the persons or entities who have procured the file.[44]

Under the FCRA, I was able to identify eighty-two causes of action across the 63 cases which cited to *Spokeo* for a holding on standing. In two cases, multiple claims under the Act produced different holdings on standing.

Over one third of the causes of action captured by the survey arose under the "stand alone disclosure" requirement, making it the most frequently litigated provision by a wide margin. The empirical analysis shows an emerging trend in "stand alone disclosure" cases: the plaintiffs lacked standing by a ratio of 2:1 (twenty without standing, ten with standing).

The individual facts of the case are certainly a factor in the "stand alone disclosure" outcomes. Many of the plaintiffs without standing alleged only that extra information was included in the disclosure. This claim failed far more often than those claiming to have never received a disclosure.

The type of harm pled in "stand alone disclosure" cases did not seem affect the outcomes. Informational injury and invasion of privacy harms, the most commonly alleged by a large margin, failed at approximately the same rate as "stand alone disclosure" claims writ large. There may be some certainty on the horizon, however, as the 9th Circuit recently held that an invasion of privacy suffices as concrete harm in these cases.[45]

Tied for the second most frequent causes of action under the FCRA were "unauthorized purpose" claims under 15 U.S.C. § 1681b(f) and "inaccurate disclosure" claims under 15 U.S.C. § 1681g(a). Each of these appear relatively more insulated from standing challenges, as six of eight "unauthorized purpose" claims survived, as did seven of eight "inaccurate disclosure" claims. Invasion of privacy was the most successful harm alleged in "unauthorized purpose" claims, while risk of harm succeeded in the most "inaccurate disclosure" claims.

Seven claims asserting a failure to maintain "reasonable procedures" to ensure accuracy of consumer information in violation of 15 U.S.C § 1681e were captured in the survey. In only one case did the plaintiff lack standing. If this trend holds, Robins should find himself with standing to sue Spokeo when the 9th Circuit rules on remand. Whether this will be a nationwide trend remains to be seen, however, since four of these decisions came from the Northern District of California.

Violations of 15 U.S.C. 1681b(b)(3)(A) alleging that employers took action based on a credit report without providing a copy of the report or a disclosure of rights to the consumer also appeared seven times. Only three of these claims survived a standing challenge, suggesting potential hostility to these claims where the harm is not apparent.

No other category of FCRA claim registered more than three appearances in the ten months since the *Spokeo* decision. As a result, it is difficult to identify even the earliest signs of a trend for these causes of action. Across the totality of claims, however, it appears that the *Spokeo* decision will present a challenge to plaintiffs asserting statutory damage-only claims under the FCRA. This particularly true with regard to "stand alone disclosure" claims.

ii. Telephone Consumer Protection Act

The TCPA regulates commercial solicitations conducted via telephone, text message and fax. It provides for $500 in statutory damages per violation and $1500 in statutory damages per willful violation.[46] The vast majority of litigation under the act arises from one of the two following requirements:

- Automated Telephonic Dialing Systems: Prior express consent is required for any commercial solicitation made via call or text via an auto-dialing system or using a prerecorded message;[47]
- Junk Fax Prevention Act: Unsolicited advertisements may not be sent to fax machines.[48]

Unlike FCRA claims, *Spokeo* has had only a limited effect on TCPA claims. Of the sixty-nine TCPA claims falling within the scope of the study, only fifteen failed on standing grounds. A closer examination further reveals the weakness of a standing defense in the TCPA context. Several of the unsuccessful claims involved remarkably weak facts. One centered on a professional plaintiff who entrapped companies into accidentally calling her cell phone for the purpose of filing TCPA complaints.[49] Another involved an advertisement consisting of a single line of text on an otherwise solicited fax.[50] At least two featured poorly pled complaints which failed to advance any theory of "concrete harm."[51]

Several other cases failed on the basis of a particular legal theory regarding automated dialer claims. This theory is probably best articulated in *Romero v. Dep't Stores Nat'l Bank*, where the court reasons that the alleged harms (invasion of privacy and nuisance) would have been the same if the calls had been manually dialed.[52] It cites to the language in *Spokeo* that a "bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement" to find that the plaintiff lacked standing.[53] For the time being, only a small minority of district courts have taken this view.

In terms of alleging a concrete harm, pleading an invasion of privacy seems to reliably satisfy the requirement (thirty-four out of thirty-seven cases where the plaintiff had standing). This makes sense, since "invasion of privacy" is both a common law cause of action and reflects the Congressional rationale for statute. "Waste of time" was also generally successful -- it was deemed a concrete harm in fifteen of the eighteen cases where it appeared.

These results suggest that the *Spokeo* decision will not present an obstacle to many TCPA claims cases, but the line of argument advanced in *Romero* has the potential to develop into a wider challenge.

iii. Fair Debt Collection Practices Act

The FDCPA regulates how debt collectors interact with consumers. It generally applies only to third party debt collectors, not internal collectors for an original creditor. It imposes statutory damages of $1,000 per violation.[54] Its most frequently litigated provisions:

- Prohibit repeated calls with an intent to harass any person;[55]
- Prohibit false or misleading representations;[56]
- Require the collector to notify consumers of their right to dispute a debt within 30 days of initiating communication with the consumer;[57]
- Prohibit the collector from sending any communication which "overshadows," or contradicts, the information required in the initial communication notice.[58]

FDCPA claims in the ten months following the *Spokeo* decision have survived standing challenges at about the same rate as TCPA claims. Among eighty causes of action, only eighteen failed for lack of standing. This is a somewhat surprising result, given the many provisions of the FDCPA which can convey liability and their often informational nature.

In every category of FDCPA claim, plaintiffs had standing more often than they lacked standing, with the sole exception of "overshadowing" claims based on 15 U.S.C. § 1692g. These claims essentially assert that a debt collector "overshadowed" a consumer's thirty day window to dispute a debt by threatening adverse action earlier. These claims failed on standing grounds three out of four times, suggesting that they are the most susceptible to a standing defense.

Finally, the FDCPA decisions took significantly less care to identify a specific concrete harm than those addressing TCPA or FCRA claims. It appears courts are applying the *Spokeo* analysis less rigorously in FDCPA suits, which may provide grounds for appeal by defendants. Seventeen of the sixty-two FDCPA decisions finding standing did not cite a specific concrete harm or refer to a precedential case that did. By contrast, only five of the thirty-one FCRA cases with standing failed to cite a specific concrete harm. In TCPA cases, only four of fifty-three cases with standing failed to cite a specific concrete harm.

4. Rationalizing *Spokeo* within the Private Enforcement Regime of Consumer Protection Law

A. Introducing the Private Enforcement Consumer Protection Regime

Consumer protection laws in the United States are enforced largely through a regime of private litigation. This regime can be divided into two categories: statutory damages class actions and state-level Deceptive Trade Practices Act litigation.[59] We know legislators intended to create such a regime by their inclusion of private rights of action in these statutes. These rights essentially create a regulatory "market" for the enforcement of consumer protection laws in the United States.

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In the absence of a private enforcement regime, there would be minimal enforcement of consumer protection law, as things stand today. There are potential alternatives, however. For example, public sector consumer protection in Europe is dramatically higher than in the United States, while private litigation is less frequently available.[60] A robust non-profit consumer protection community could also be a substitute for private sector enforcement, but the ban on class action litigation for federally funded legal services has effectively neutralized that alternative, at least for the time being.[61]

One fundamental challenge of building a private enforcement regime revolves around inducing attorney participation. Without such participation, the statutory rights of consumers would be largely precatory. In cases where actual damages are small but insufficient to finance the cost of litigation, the class action tool makes the claims economically efficient. However, where unlawful conduct does not result in actual damages, as is often the case under the statutes discussed above, an additional element is required to bring private attorneys into the courthouse.

Statutory damages can fill that gap by effectively transforming no-damages claims into small-damages claims which are efficient in the class action context. Some commentators have suggested, however, that statutory damages over-incentivize private sector participation in the consumer protection regime.[62] Under this theory, statutory damages encourage frivolous suits seeking huge statutory penalties where no harm was actually inflicted -- all for the purpose of enriching plaintiffs' attorneys.[63]

This section advances an argument that even a liberal application of *Spokeo*'s "concrete harm" analysis would be sufficient to limit frivolous statutory damages consumer class actions. Such an application has the added advantage of preserving the incentive-generating effect of statutory damages class actions which bring private attorneys into the consumer protection regime. It also strikes a better balance with regard to separation of powers concerns by recognizing the Congressional prerogative to provide remedies for intangible injuries.

B. Attorney Incentives in the Private Enforcement Regime

Many consumer protection statutes include provisions authorizing attorneys' fees for a prevailing party.[64] This raises a question: are class actions really essential to incentivizing attorney participation when statutory attorneys' fees are available? At the very least, it appears that the class action device provides a greater incentive for attorneys to participate. This likely translates into higher caliber lawyers taking consumer protection cases and more competition for plaintiffs seeking representation. Concerns about over-incentivization in the statutory damages context are addressed in the next subsection.

Sole reliance on attorneys' fee provisions would reduce the incentives which currently bring attorneys into the private enforcement regime, not least by raising the disincentives. A key reason for this is that attorneys' fees provisions often require a party to "prevail" or be "successful" before fees can be awarded.[65] According to Supreme Court precedent, a "prevailing party" exists only where there is a judgement on the merits or a court ordered consent decree.[66] Thus, many settlements do not enable counsel to claim statutory attorneys' fees. Moreover, if a plaintiff loses on the merits, her counsel may be obligated to pay the defendant's fees and costs.[67]

Even if a plaintiff prevails on the merits, her attorney's award will be less under statutory attorneys' fees than under the class action mechanism. The Supreme Court has said that attorney compensation under an attorneys' fees provision should be determined via the lodestar method.[68] It has further held that a strong presumption against lodestar multipliers applies to attorneys' fees statutes.[69] However, plaintiffs' lawyers are able to escape these strictures by entering into a class action settlement where there is no "prevailing party."[70]

A class action settlement frees the district court to apply multipliers to the lodestar amount or to determine attorney compensation based upon a percentage of the common fund. According to a recent study, the lodestar method was applied in 29% of consumer class action settlements and 45% of debt collection settlements.[71] The median multipliers were 1.13 and .66, respectively.[72] This represents a 113% and 66% increase in attorney compensation over the pure lodestar approach that would be used under an attorneys' fees provision.

The remaining settlements applied the percentage of the common fund method, which generally provides higher returns than the lodestar method.[73] Thus, it is clear that the class action mechanism provides stronger incentives than statutory attorney's fees to induce lawyer participation in the private enforcement of consumer protection laws.

Finally, some consumer protection statutes do not even include an attorneys' fees provision; the TCPA is a notable example. In these cases, Rule 23's provision permitting recovery of attorneys' fees and costs in class actions is absolutely essential to the creation of an economically viable litigation landscape.[74]

C. "Concrete Harm" as a Limitation on Frivolous Claims

Strong financial incentives to participate in class actions inevitably give rise to concerns about encouraging litigation that has the effect of extorting corporate defendants into entering unwarranted settlements.[75] In the statutory damages context, this concern may be particularly acute due to the strict liability nature of the financial penalties.[76] However, even a liberal application of the "concrete harm" requirement would effectively filter out class actions which seek to frivolously take advantage of statutory damages. A liberal approach would also preserve the incentives for private attorneys to participate in the private enforcement of consumer protection law and, crucially, protect the power of Congress to regulate intangible harms.

The Supreme Court's decision in *Spokeo* articulated a new methodology. Courts should conduct their analysis of "concrete harm," but provided little guidance on how courts should draw the line in a close case. Here, I propose that "concrete harm" should be interpreted as merely a procedural backstop for ensuring that litigation arising under a statutory violation is aligned with Congress's rationale for enacting the statute. This should address the concern about frivolous statutory damages claims, as long as "frivolous" is conceptualized from the perspective of the legislation-enacting Congress. The Supreme Court's instruction that lower courts should consider the intention of Congress when conducting their analysis suggests this is an appropriate conceptualization.

Given the availability of "risk of harm" as a concrete injury, this proposal would represent a liberal interpretation of *Spokeo*. For example, it would permit a finding of "concrete harm" in the *Gubala* case, because Congress's intent in enacting the CCPA was to reduce the risk of identity theft. There, the plaintiff could successfully argue that any retention of personal information beyond the statutorily limited period increased the risk of identity theft and therefore confers a "concrete harm." This also makes sense intuitively: why would Congress have enacted the limitation otherwise?

This interpretation would not be a blank check for plaintiffs, however. An example illustrates the type of limitation that would remain: the FACTA prohibits vendors from publishing receipts which display "more than the last 5 digits of the [credit] card number or the expiration date." Under the language of the statute, a receipt which publishes only the *first* five digits would technically be illegal. Without any "concrete harm" limitation, that consumer would be eligible for $100 to $1,000 in statutory damages.

However, under my interpretation the court would have to investigate whether this technically illegal conduct increased the risk of harm that Congress sought to prevent. We know that Congress sought to reduce the risk of identity theft by enacting the FACTA. Thus, the relevant question would become: does printing the first five digits of a credit card instead of the last five digits increase the risk of identity theft? If not, then there would be no "concrete harm" and no standing to bring the claim.

This interpretation is faithful to the standing analysis established by *Lujan*. It is also consistent with the examples provided by the Supreme Court in *Spokeo* where they noted that it was

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difficult to imagine an increased risk of harm. However, it has the advantages of preventing judicial overreach into the legislative prerogatives of the United States Congress and preserving the incentives for private attorney participation in the consumer protection regime.

5. Conclusion

There are good reasons why Congress would chose to impose liability for intangible harms such as invasion of privacy, informational injury and exposure to a risk of harm. Statutory damages class actions incentivize private attorneys to take up these cases and enforce consumer's substantive rights. Yet, this system is not without the potential for abuse, as some of the cases discussed above make clear.

The Supreme Court's "concrete harm" analysis in *Spokeo* should be interpreted to knock out marginal claims that do not reflect the goals of Congress in enacting these statutes. It should not be construed any more broadly, however, since Congress needs the ability to provide remedies for non-tangible harms in order to effectively legislate in the consumer protection arena.

** J.D. Candidate, University of Texas School of Law, Class of 2018.*

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19 15 U.S.C. §1681n(a).
20 *Spokeo*, 136 S. Ct. at 1546.
21 Lujan v. Defenders of Wildlife, 504 U.S. 555, 550-61 (1992).
22 Raines v. Byrd, 521 U.S. 811, 820 n.3, (1997) ("Congress cannot erase Article III's standing requirement by statutorily granting the right to sue to a plaintiff who would not otherwise have standing"); *Summers v. Earth Island Inst.*, 555 U.S. 488 at 497 (the "requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute").
23 Lujan, U.S. 555 at 560.
24 Brief for Petitioner at 52 - 53, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).
25 *Id.*
26 Petition for a Writ of Certiorari at 16 - 18, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).
27 Tony Mauro, "Scalia's Death Complicates 'Spokeo' Cases in Lower Courts," Supreme Court Brief (March 30, 2016) ("Judges in lower courts nationwide are staying or halting cases that relate to *Spokeo v. Robins*, a key case argued before the high court in November that has yet to be decided.")
28 Harrison Brown, Ana Tagvoryan and Joshua Briones, "*Spokeo Inc. v. Robins*: How the Supreme Court Could Transform Consumer Class Actions," 22 No. 7 Westlaw Journal Class Action (2015); Jeremy M. Creelan and Daniel H. Wolf, "Justice Roberts Raises Thresholds for Class Action Plaintiffs," Law.com Class Action Reporter (May 5, 2016).
29 Arthur H. Bryant, "Post-Scalia, Class Actions Hang in the Balance," The National Law Journal (April 11, 2016); John C. Coffee Jr, "The Tide Turns for Class Actions: Complex Litigation After Scalia; Corporate Securities," New York Law Journal (March 31, 2016).;
30 *Id.*
31 *Spokeo,* 136 S. Ct. at 1550.
32 *Id.*
33 Amy Howe, "Opinion analysis: Case on standing and concrete harm returns to the Ninth Circuit, at least for now," SCOTUSblog (May. 16, 2016) ("Today's eight-Justice Court may have split the difference, but we could very well get something more definitive on these issues from a nine-Justice Court in the not-too-distant future.")
34 *Spokeo*, 136 S. Ct. at 1550.
35 *Id.*, at 1548.
36 *Id.*, at 1549.
37 *Id.*
38 *Id.*, at 1549.
39 *Id.*, at 1550.
40 *Id.*
41 15 U.S.C. § 1681n.
42 15 U.S.C. § 1681b(b)(2)(A)(i).
43 15 U.S.C. § 1681e(b).
44 15 U.S.C. § 1681g(a).
45 Syed v. M-I, LLC, 846 F.3d 1034 (9th Cir. 2017).
46 47 U.S.C. §227(b)(3).
47 47 U.S.C. 227(b)(1)(A).
48 47 U.S.C. § 227(b)(1)(C).
49 Stoops v. Wells Fargo Bank, N.A., No. 3:15-83, 2016 U.S. Dist. LEXIS 82380 (W.D. Pa. 2016).
50 Supply Pro Sorbents, LLC v. RingCentral, Inc., No. C 16-02113 JSW, 2016 U.S. Dist. LEXIS 140033 (N.D. Cal. 2016).
51 Sartin v. EKF Diagnostics, Inc., No. 16-1816, 2016 U.S. Dist. LEXIS 86777 (E.D. La. 2016).
52 Romero v. Dep't Stores Nat'l Bank, No. 15-CV-193-CAB-MDD, 2016 U.S. Dist. LEXIS 110889 (S.D. Cal. 2016) at 20 - 21.
53 *Id.* at 17 - 18.
54 15 U.S.C. § 1692k(a)(2).
55 15 U.S.C. § 1692(d).
56 15 U.S.C. § 1692(e).
57 15 U.S.C. § 1692(g).
58 15 U.S.C. § 1692(g)(b).
59 *See* Stephen B. Burbank, Sean Farhang and Herbert M. Kritzer, "Private Enforcement," 17 Lewis & Clark L. Rev. 637 (2012).

60 Jason Rothod and Sandeep Veheeson, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. Rev. 303

61 *Prev. cit.*, "Private Enforcement," at 653.

62 *See, i.e.*, Sheila B. Scheuerman, "Due Process Forgotten: The Problem of Statutory Damages and Class Actions," 74 Mo. L. Rev. (2009).

63 *Id*.

64 *See, i.e.,* Fair Credit Reporting Act, 15 U.S. Code § 1681n(a)(3); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2). The Telephone Consumer Protection Act does not include such a provision.

65 *See*, *i.e.*, Truth in Lending Act, 15 USC § 1640(a)(3); Fair Credit Reporting Act, 15 U.S. Code § 1681n(a)(3); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2). All permit attorneys' fees and costs "in the case of any *successful* action."

66 Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 600-05 (2001).

67 *See* Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983).

68 City of Burlington v Dague, 505 US 557, 562 (1992).

69 Blum v. Stenson, 465 U.S.886, 898–900 (1984).

70 For a thorough, if dated, discussion of this inconsistency, see: Martha Pacold, "Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes," *University of Chicago Law Review*: Vol. 68: Iss. 3, Article 15 (2001), 1010-15.

71 Brian Fitzpatrick, "An Empirical Study of Class Action Settlements and Their Fee Award," 7 J. Empirical Legal Stud. 811 (2010), 835.

72 *Id.*

73 *Id.*

74 Fed. R. of Civ. Pro. 23(h).

75 *See, i.e.,* "Jonathan R. Macey and Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform," 58 U. Chi. L. Rev. 119-27 (1991).

76 *Prev. cit.*, Scheuerman.