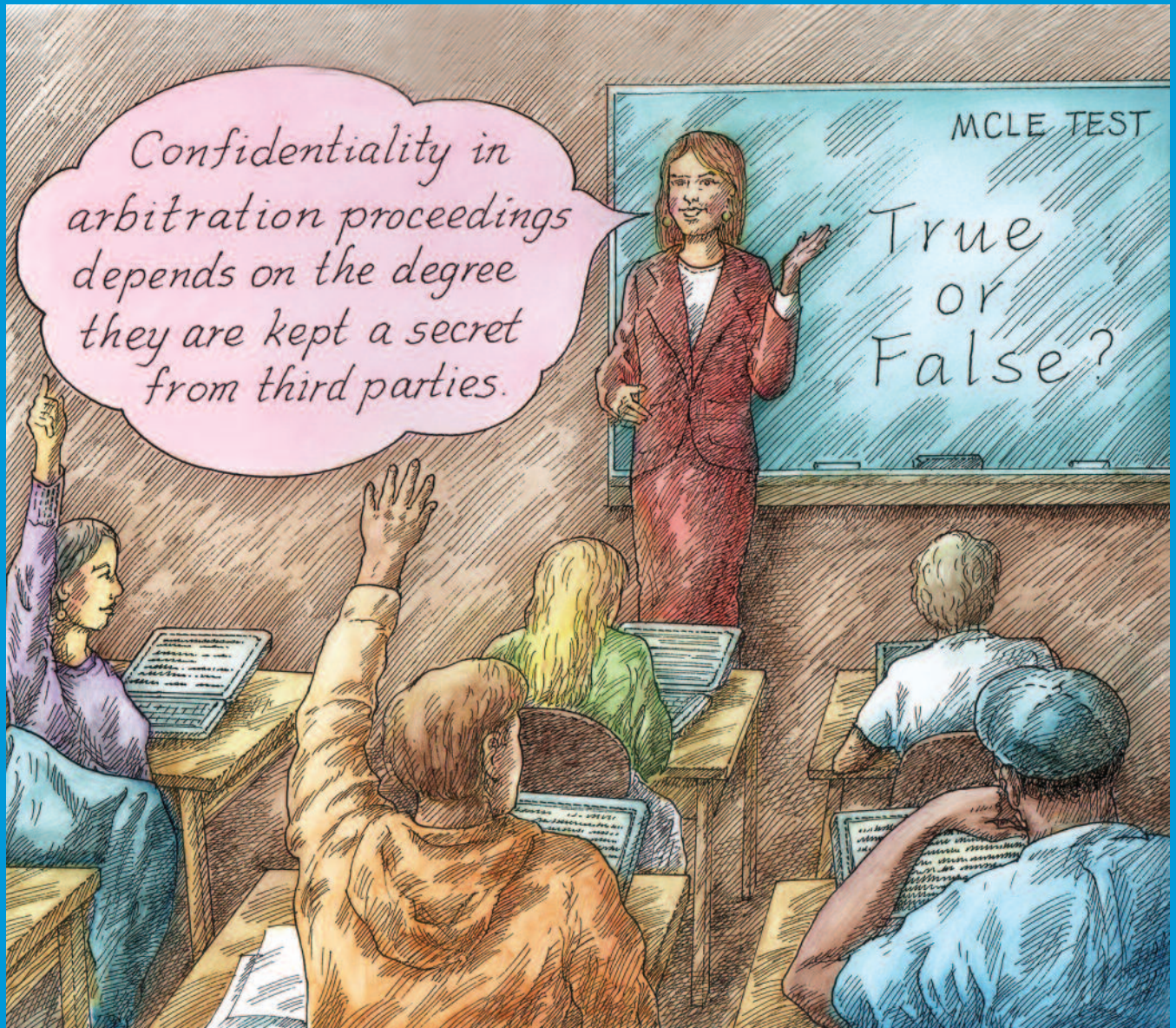


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# How Intangible Harms Can Result in Tangible FCRA Damages in California's Post-*Spokeo* Landscape

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**A**lthough the Supreme Court's decision in *Spokeo, Inc. v. Robins* was initially hailed by defense counsel as a new

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bulwark against consumer litigation alleging purely technical violations of consumer protection statutes, the initial enthusiasm for *Spokeo*-based defenses and motions to dismiss has been tempered by recent decisions limiting *Spokeo*'s reach. *Spokeo* has by no means shut the door on plaintiffs who allege no tangible, real-world harm from Fair Credit Reporting Act ("FCRA") violations. Indeed, the Supreme Court emphasized that allegations of intangible injuries could satisfy the concreteness prong of Article III injury in fact. (*Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540, 1549.) The Court's suggestion that, in certain circumstances, the violation of a statutory right may alone suffice to constitute an injury in fact, appears to have opened the door for plaintiffs to establish standing by alleging violations of privacy rights under FCRA. Plaintiffs have successfully established standing under FCRA by alleging risks of harm that they claim result from inaccurate credit reporting.

Because the FCRA allows consumers to recover statutory and punitive damages for willful violations (15 U.S.C. § 1681n), the opening left by *Spokeo* makes it possible for a class or plaintiffs to receive damages awards without ever having to allege or prove that the named plaintiff or any class member suffered actual harm. This is precisely what happened recently when a California federal jury awarded over \$60 million to a class of consumers who had been inaccurately identified by TransUnion as individuals on a federal list of terrorists and narcotics traffickers. While the named plaintiff had arguably suffered tangible harm from this inaccuracy, the critical steps to the court's concreteness analysis were that he had at least suffered a material risk of real harm and that his indi-

vidual standing satisfied the standing requirement for the entire class. (*Ramirez v. TransUnion, LLC* (N.D.Cal., No. 12-CV-00632-JSC) 2016 WL 6070490, \*4-5.)

### — *Spokeo*'s Concreteness Requirement —

To briefly recap, the plaintiff in *Spokeo* filed a class action alleging that Spokeo.com—a "people search engine" for entities performing background checks—generated inaccurate information about plaintiff's occupation, approximate age, marital status, and education. (*Robins v. Spokeo, Inc.* (C.D.Cal., Jan. 27, 2011, No. CV10-05306-ODW), 2011 WL 597867, \*1), *reinstatement granted*, 2011 WL 11562151.) The district court found that plaintiff's concern that the inaccuracies would affect his ability to obtain credit, employment, and insurance did not constitute "actual or imminent harm" necessary to show an injury in fact and establish standing. (*Id.* [dismissing complaint without prejudice].) The Ninth Circuit reversed, finding that plaintiff had established injury in fact by violations of his statutory rights and that the interests protected by those statutory rights were sufficiently concrete and particularized. (*Robins v. Spokeo, Inc.* (9th Cir. 2014) 742 F.3d 409, 413-414.)

The Supreme Court reversed and remanded on the grounds that the Ninth Circuit had not adequately addressed both necessary elements of injury in fact: concreteness and particularization. (*Spokeo*, 136 S.Ct. at 1550 [although Ninth Circuit had adequately addressed particularization, it had not addressed whether the alleged procedural FCRA violations "entail a degree of risk sufficient to meet the concreteness require-

ment”].) The Court emphasized that a plaintiff could not establish injury in fact merely by

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“alleg[ing] a bare procedural violation, divorced from any concrete harm.” (*Id.* at 1548.)

The Court also revealed two paths for plaintiffs to show concreteness of intangible injuries. First, “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.” (*Ibid.*) “In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.” (*Id.* at 1549.) Second, the concreteness requirement could be satisfied in some instances by allegations of procedural FCRA violations that create only a risk of real harm. (*Ibid.*)

— **Privacy Rights as Concrete Injury** —

Earlier this year, the Ninth Circuit addressed standing in the context of a FCRA provision governing when employers may obtain private information from job applicants. (*Syed v. M-I, LLC* (9th Cir. 2017) 853 F.3d 492.) The Court articulated the precise nature of the rights at issue as follows:

The disclosure requirement at issue, 15 U.S.C. § 1681b(b)(2)(A)(i), creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process. The authorization requirement, § 1681b(b)(2)(A)(ii), creates a right to privacy by enabling applicants to withhold permission to obtain the report from the prospective employer, and a concrete injury when applicants are deprived of their ability to meaningfully authorize the credit check.

(*Id.* at 499.) Additionally, subsection (i) requires that the disclosure be contained in a separate document consisting solely of the disclosure. Plaintiff alleged that, when he applied for a job with defendant, defendant provided him with a document containing both the required disclosure and a liability waiver. (*Id.* at 498.) Plaintiff claimed that he was confused by the inclusion of both a disclosure and waiver in the same document and

would not have signed it had it contained a sufficiently clear disclosure as required by statute. (*Id.* at 499.) The Ninth Circuit found these allegations sufficiently concrete to survive a motion to dismiss on standing. (*Ibid.*)

Put simply, the plaintiff in *Syed* established standing because he did not meaningfully assent to provide his private information to his prospective employer. Thus, the key component of plaintiff’s claim was that he was confused by the disclosure. By contrast, a plaintiff in an earlier case failed to establish standing to pursue the same FCRA violation because he did not allege that he was actually prevented from understanding the disclosure, or that he would not have authorized a background report had he received a FCRA-compliant disclosure. (*Lee v. Hertz Corp.* (N.D.Cal., No. 15-CV-04562-BLF) 2016 WL 7034060, \*5.) “Instead, the crux of Plaintiff’s complaint is that the consent form did not technically comply with the requirements of the FCRA.” (*Ibid.*)

While the FCRA provisions at issue in *Syed* govern the permissible purposes of consumer reports, other provisions appear to create a right of privacy by restricting the type of information that may be included in a consumer report. A violation of one of these provisions is perhaps the clearest example of a FCRA violation that constitutes a concrete injury in and of itself. Under 15 U.S.C. section 1681c(a)(2), a consumer report may not contain, except under certain enumerated circumstances, information regarding civil suits, civil judgments or records of arrest older than seven years. One district court found that, by violating this statute, the defendant had “disclosed records of arrest that Congress has protected from disclosure, thereby intruding upon plaintiff’s privacy interest.” (*Hawkins v. S2Verify* (N.D.Cal., No. C-15-03502-WHA) 2016 WL 3999458, \*6.)

— **Inaccurate Reporting as** —  
**Concrete Injury**

A string of lawsuits has been brought in the Northern District against Experian Information Solutions and others, alleging

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inaccurate reporting of debts and debt delinquencies. (E.g., *Keller v. Experian* (N.D.Cal., No. 16-CV-04643-LHK) 2017 WL

130285; *Artus v. Experian* (N.D.Cal., No. 5:16-CV-03322-EJD) 2017 WL 346022; *Harris v. Experian* (N.D.Cal., No. 16-CV-02162-BLF) 2017 WL 1354778; *Conrad v. Experian* (N.D.Cal., No. 16-CV-04660-NC) 2017 WL 1739167; *Lugo v. Experian* (N.D.Cal., No. 5:16-CV-04647-EJD) 2017 WL 2214641.) The FCRA provisions at issue in these cases require consumer reporting agencies (“CRAs”) and financial institutions who furnish information to those CRAs to investigate reported inaccuracies in credit reports. (15 U.S.C. §§ 1681i(a)(1), 1681s-2(b).) Courts have consistently concluded that the types of inaccuracies pleaded in these cases constitute concrete injuries:

In *Spokeo*, the Court held that the reporting of an incorrect zip code could not confer Article III standing. [] By contrast, plaintiffs allege here that the injury stems from defendants’ inaccurate reporting of debts and debt delinquencies. This inaccurate reporting of debt constitutes the precise harm Congress sought to protect against in enacting the FCRA, and thus cannot be classified as a ‘mere procedural violation.’

(*Mamisay v. Experian* (N.D.Cal., No. 16-CV-05684-YGR) 2017 WL 1065170, \*2.)

This language appears to suggest that inaccurate reporting of debt and debt delinquencies may constitute an injury in and of itself in the same way that a privacy violation could itself constitute an injury. That the Northern District did not engage in a “risk of actual harm” analysis further suggests such an interpretation. Note, however, that all of these complaints have thus far been dismissed because none of the plaintiffs sufficiently alleged inaccuracies that would trigger investigative obligations under the FCRA. In any case, there do not appear to be any post-*Spokeo* cases litigated in California federal courts that were ultimately successful on the

merits without some showing that the inaccuracies created at least a risk of actual harm.

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At the extreme end of the success-on-the-merits spectrum, is the \$60 million award

against TransUnion, the largest FCRA verdict to date. TransUnion offered a product known as “OFAC Alert,” that purported to identify individuals included on a list published by the Treasury Department’s Office of Foreign Assets Control. (*Ramirez v. TransUnion* (N.D.Cal., No. 12-CV-00632-JSC) 2016 WL 6070490.) OFAC’s list included terrorists and narcotics traffickers—persons with whom it is illegal to do business. When Mr. Ramirez attempted to purchase a car with his wife on credit, the dealership told him that his name appeared on an OFAC Alert and refused to extend him credit. His wife obtained the loan and purchased the car solely in her name.

The Northern District found that Mr. Ramirez had established standing to pursue two categories of claims. His first category of claims, “reasonable procedure” or “accuracy” claims, were brought under 15 U.S.C. § 1681e(b), which requires a CRA to “follow reasonable procedures to assure maximum possible accuracy of the information.” Plaintiff alleged that TransUnion used only first and last names to search the federal list, even if TransUnion possessed additional identifying information, and then automatically placed an OFAC Alert on those consumers’ reports. The court suggested that plaintiff had exceeded the necessary showing of concreteness by pleading real harm: he was denied credit to purchase a car, and was “concerned” and “scared” because he “was on the terror list.” The court also emphasized that the inaccuracy at issue “creates a material risk of real harm,” such as that already suffered by plaintiff. (*Ibid.*)

Plaintiff’s second category of claims, “disclosure claims,” were brought under 15 U.S.C. § 1681g(a), which requires a CRA, upon a consumer’s request, to “clearly and accurately disclose to the consumer ... [a]ll information in the consumer’s file,” and

15 U.S.C. § 1681g(c), which requires such a disclosure to include a summary of consumer rights. Plaintiff alleged that he did not initially receive any OFAC information when he requested a complete copy of his file. When he later received a “courtesy” letter with his OFAC information, it did not include a disclosure as to how he could dispute inaccurate information. The court found that these omissions were material:

[T]he OFAC Alert—being identified as a potential terrorist or drug trafficker—is not even close to the innocuous zip code mentioned in *Spokeo*. ... These alleged violations created a risk that Plaintiff would be harmed in precisely the way Congress was attempting to prevent when it mandated what disclosures consumer credit reporting agencies must make to consumers: a risk that the consumer is not made aware of material inaccurate information in the consumer’s file, nor aware of how to dispute the inclusion of the harmful information. Thus, these omissions entailed a degree of risk sufficient to satisfy Article III’s concrete injury requirement.

(*Id.* at \*4.)

Other lawsuits undoubtedly will be filed following *Ramirez*, particularly where the inaccuracies at issue are not as extreme as being wrongly identified as a potential terrorist, although perhaps not as innocuous as an incorrect zip code. The inaccuracies at issue in *Spokeo* (e.g., occupation, age, marital status, education) present a much closer question on the issue of concreteness. Robin’s risk theories hold at least some facial appeal—for example, if an unemployed person is incorrectly reported as employed, she may, in certain circumstances, risk losing potential job opportunities. But in *Ramirez*, the inaccuracy created the belief that lending to the plaintiff was *illegal*, completely foreclosing his opportunity to obtain a loan and allegedly causing him emotional distress.

## — When Does the *Spokeo* Concreteness Standard Matter?

The importance of the *Spokeo* standing analysis in a FCRA case indirectly hinges on whether a plaintiff brings an action for negligent or willful noncompliance.

Bringing a negligence claim under FCRA requires that the plaintiff plead actual damages (15 U.S.C. § 1681o; *Messano v. Experian* (N.D.Cal., No. 16-CV-05697-HSG) 2017 WL 1833280, \*4), which is a significantly higher burden than *Spokeo*'s "concreteness" requirement. While actual damages compensate a plaintiff for economic or emotional injuries that have actually been sustained (*Grigoryan v. Experian* (C.D.Cal. 2014) 84 F.Supp.3d 1044, 1084-1087), a concrete injury may include the *risk* of real harm (*Spokeo*, 136 S.Ct. at 1549) Actual damages are synonymous with "tangible damages," which is precisely what the Supreme Court said was not necessary to establish concreteness. (*Ibid.*). Thus, even the most defense-friendly interpretation of *Spokeo* will not impose a higher burden of demonstrating harm than the FCRA itself.

Unlike negligent violations, willful FCRA violations entitle a plaintiff to either actual or statutory damages, along with punitive damages. (15 U.S.C. § 1681o [also allowing recovery of attorney's fees and costs].) Given the availability of statutory damages, the FCRA does not require a plaintiff to show actual harm, or any harm, caused by a willful violation. (*Syed*, 853 F.3d at 498.) Thus, in willfulness cases, a plaintiff's showing of injury in fact under *Spokeo* may be the first and last time during litigation that she is required to allege any type of harm, making *Spokeo* a critical gatekeeper in such cases.

A FCRA violation is willful if it is either "knowing or reckless." (*Ramirez*, 2017 WL 1133161, at \*1.) Although it seems counterin-

tuitive, when a statute unambiguously bars a defendant's acts, willfulness has been found as a matter of law, even absent well-established law interpreting that statute. (*Syed*, 853 F.3d at 505-506.) Of course, such a finding is not necessary for a showing of willfulness. (*Ramirez*, 2017 WL 1133161, \*2.)

*Ramirez* illustrates the advantage to a plaintiff who can show a willful violation. The jury instructions contained not one word about harm or damages, except that statutory damages were available if TransUnion willfully violated the FCRA. Each class member was eventually awarded \$984 in statutory damages and \$6,353 in punitive damages, totaling over \$60 million for all 8,185 class members. A negligence case could not have been as lucrative. As a final note on standing, *Ramirez* reaffirmed the general rule that, "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements." (*Ramirez*, 2016 WL 6070490, \*5.)

### — Conclusion —

*Spokeo* changed the legal landscape by explicitly requiring that plaintiffs sufficiently plead both particularization and concreteness to establish injury in fact. Courts in the Ninth Circuit, however, have developed a substantial body of case law in the aftermath of *Spokeo* making it much easier for plaintiffs to allege FCRA violations and recover substantial damages by alleging only intangible harms.

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