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NO HARM, NO FOUL? HOW COMPANIES CAN LIMIT THEIR LIABILITY UNDER FEDERAL CONSUMER PROTECTION STATUTES AFTER *SPOKEO*

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Over the past few years, there has been growing concern over how to address the influx of cases predicated solely on statutory damages under federal consumer protection statutes, which do not require evidence of physical or economic harm. These cases are commonly referred to as claims based on “no-harm” injuries. Courts have been inundated with such cases under the Telephone Consumer Protection Act (“TCPA”), the Fair Credit Reporting Act (“FCRA”), the Fair and Accurate Credit Transactions Act (“FACTA”), and various other consumer protection statutes that allow for statutory damages as discussed later in this Note. Under many of these statutes, companies are not only subject to these private action claims but also to civil suits by the Federal Trade Commission (“FTC”).² In the 2016 majority opinion for *Spokeo v. Robins*, the Supreme Court of the United States attempted to clarify which claims would fulfill the “injury-in-fact” requirement for standing when a federal statute with built-in statutory damages is violated.³ However, the Court

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² E.g. 15 U.S.C. § 1681s(2)(a) (2018) (authorizing FTC to seek \$2,500 civil penalty per violation). Of note, these amounts were adjusted for inflation under 16 C.F.R. § 1.98 and therefore, as of 2019, the fines are currently \$3,895 per violation. Adjustments to Civil Penalty Amounts, 83 Fed. Reg. 2902 (Jan. 22, 2018) (to be codified at 16 C.F.R. pt. 1).

³ 136 S. Ct. 1540 (2016).

seems to have fallen short as evidenced by a continuing circuit split⁴ and a writ of *certiorari* to the Supreme Court in the *Spokeo* litigation itself.⁵ The Court’s opinion provided a few new guidelines as to when to allow cases to proceed with standing when based on “no-harm” claims and seemingly invalidated certain consumer protection statutes while expanding the scope of others.⁶

Numerous companies have been hit with multi-million-dollar judgments⁷ or settled with consumers⁸ based on statutory damages from consumer protection statutes alone, which can easily derail a company’s financial stability.⁹ Given that some courts have allowed these “no-harm” injuries to meet standing requirements, companies will likely turn to legal and business strategies to help reduce their liability risk under these statutes. This Note is not premised on the fact that companies should not have any liability under these statutes, but rather that the pendulum has swung too far leaving companies in an unpredictable environment where one mistake can disrupt a company’s financial stability. Section I of this Note will analyze the most recent, relevant case law on standing when the alleged harm is based on a federal statute. Section II will focus on critical portions of the most frequently cited consumer protection statutes in “no-harm” cases. In Section III, this Note will discuss the business and legal solutions companies can use to help reduce liability in the scope of consumer protection statutes given the uncertainty in the courts following *Spokeo*. Finally, Section IV

⁴ David Lender, Eric Hochstadt, and Luna Barrington, *A Circuit Split Emerges as Lower Courts Weigh In On Spokeo*, LAW360, (Sept. 15, 2016), <https://www.law360.com/articles/839978/a-circuit-split-emerges-as-lower-courts-weigh-in-on-spokeo>.

⁵ Petition for a Writ of Certiorari at 14, *Spokeo, Inc. v. Robins.*, 138 S. Ct. 931 (2018) (cert. denied).

⁶ See *Spokeo*, 135 S. Ct. at 1549-50.

⁷ See *U.S. v. Dish Network*, 265 F. Supp. 3d 810, 991-92 (C.D. Ill. 2017) (judgment for \$280 million in penalties including for TCPA violations); see also *Ramirez v. Trans Union LLC*, No. 12-cv-00632-JSC, 2017 U.S. Dist. LEXIS 184560, at *2 (N.D. Cal. Nov. 7, 2017) (uphold jury’s verdict for \$60 million for FCRA violations); *Miller v. Equifax Info. Servs.*, No. 3:11-cv-01231-BR, 2014 U.S. Dist. LEXIS 69450, at *29 (D. Or. May 20, 2014) (original \$18.6 million verdict to one woman for FCRA violations reduced to \$1.8 million).

⁸ *In re Capital One Tel. Consumer Prot. Act*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) (\$75.5 million class action settlement for TCPA violations); *Class Action Settlement Agreement and Release, Chavrat v. Resort Mktg. Grp., Inc.*, No. 1:12-cv-05746 (N.D. Ill. July 7, 2017), ECF No. 569-1 (settlement between cruise lines and class for between \$7 and \$12.5 million for calls which violated TCPA); *Melito v. Am. Eagle Outfitters*, 14-CV-2440 (VEC), 2017 U.S. Dist. LEXIS 146343 (S.D.N.Y. Sept. 11, 2017) (approval of settlement between American Eagle and consumers for text messages which violated the TCPA for \$14.5 million).

⁹ Geoffrey S. Stewart, *Emerging Issues in Statutory Damages*, JONES DAY (July 2011), https://www.jonesday.com/Emerging_Issues_in_Statutory_Damages/#.

will address some of the initiatives introduced by the Federal Communications Commission (“FCC”) and FTC as well as those supported by pro-business groups which could help companies to more easily comply with the consumer protection statutes.

I. Standing Based Solely on Violations of Federal Statutes

As a jurisdictional element, federal courts can only hear cases that are tied to “Cases” and “Controversies”¹⁰ to have Article III standing. To have standing, the plaintiff must prove that he or she has (1) suffered an “injury in fact” or “an invasion of a legally protected interest” that is “concrete and particularized”; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that the injury is likely to be redressed by a favorable judicial decision.¹¹ The Supreme Court had addressed the issue of standing and statutory damages numerous times prior to the recent *Spokeo v. Robins* opinion. However, in this more recent opinion, the Court attempted to further clarify when a “no-harm” injury could meet the standing requirement.¹² In *Lujan v. Defenders of Wildlife*, the Court acknowledged that the “injury required by Article III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”¹³ The Court went on to clarify that “[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.”¹⁴

In *FEC v. Atkins*, the Supreme Court addressed an injury solely based on statutory damages under the Federal Election Commission (“FEC”) Act of 1971.¹⁵ The plaintiff argued that the FEC’s unwillingness to designate the American Israel Public Affairs Committee (AIPAC) as a political

¹⁰ U.S. Const., Art. III, §2.

¹¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

¹² *See Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1549-50 (2016).

¹³ 504 U.S. at 578 (citations omitted).

¹⁴ *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

¹⁵ *FEC v. Atkins*, 524 U.S. 11, 13 (1998).

committee was a violation of the plaintiffs' rights.¹⁶ The Court held that Congress's intent can be used to "cast the standing net broadly" and Article III standing can therefore be satisfied "when the injury asserted by a plaintiff arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question."¹⁷ The Court found that Congress had likely intended the FEC Act to protect voters from the precise injury alleged in the case and therefore standing existed.¹⁸

In the realm of consumer protection statutes, there has been a recent focus on "no-harm injuries," meaning the plaintiff was not physically or financially harmed by the defendant's act, but still has a cause of action for statutory damages under a federal statute.¹⁹ The claim at issue in *Spokeo v. Robins* focused on a federal consumer protection statute—the Federal Credit Reporting Act (FCRA).²⁰ At issue in the case was whether the Ninth Circuit used the proper test in determining if the plaintiff had suffered an injury-in-fact for purposes of standing.²¹ The case was eventually remanded to the Ninth Circuit to apply the Supreme Court's clarified test to determine whether the plaintiff has standing under the theory of a "concrete" injury.²² Notably, the Court held that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."²³ In reviewing these no-harm injury cases, the Court pointed to "both history and the judgment of Congress[, which] play important roles" in determining whether there is a "de facto injury."²⁴ The Court further declared

¹⁶ *Id.*

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 20 (reaffirming that the "plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute").

¹⁹ See Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 9 (2017); See also Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions* (Emory Legal Studies Research Paper, No. 16-402, 2016).

²⁰ See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016).

²¹ *Id.* at 1545.

²² *Id.* at 1550.

²³ *Id.* at 1549.

²⁴ *Id.*

that “a bare procedural violation” will not satisfy the requirements of Article III standing and provided the example of a credit reporting agency providing an incorrect zip code as a statutory violation that would unlikely create concrete harm.²⁵

II. Consumer Protection Statutes & Statutory Damages

“No-harm” class action suits brought under federal consumer protection statutes represent about half of all filings under these statutes.²⁶ According to the Consumer Financial Protection Bureau, based on a data set on consumer financial product cases, 71.7% of all class complaints filed between 2010-2012 were based on the violation of a federal statute.²⁷ However, in the wake of *Spokeo*, a court may not enforce some of these statutory claims given that they have been found to create no harm to the plaintiff and are therefore “bare procedural violations.”²⁸ As discussed above, much of the standing discussion in the realm of consumer protection statutes pivots based on the “legal right” or “legal interest” the statute intends to protect and whether the violation may harm this “legally protected interest” on its own.²⁹ This section provides a high-level overview of the federal consumer protection statutes this Note will consider, the statutory damages available under each statute, and a short review of where each statute falls after the *Spokeo v. Robins* opinion based on the interest the statute intends to protect.

The Telephone Consumer Protection Act (“TCPA”) applies to any company using an “automated telephone dialing system” that calls an individual on a landline without the recipient’s prior express consent, a cellular phone without express consent, or sends an unsolicited

²⁵ *Id.* at 1550.

²⁶ Johnston, *supra* note 19, at 9.

²⁷ See CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY (2015) § 6 fig. 2. See data set description in § 6.4. *Id.*

²⁸ Bassett v. ABM Servs., 883 F.3d 776, 783 (9th Cir. 2018) (finding a retailer’s failure to truncate a credit card expiration date on a receipt as required by the FCRA did not give the plaintiff standing given the injury was “too speculative for Article III purposes”).

²⁹ See Michael McLellan, *Finding a Leg to Stand On: Spokeo, Inc. v. Robins and Statutory Standing in Consumer Litigation*, 31 ANTITRUST ABA 49 (2017) (outlining a three-step test to determine whether a plaintiff has standing when there is a violation of a consumer protection statute).

advertisement via fax without a prior business relationship or if the information is not publicly available.³⁰ The TCPA also controls liability for calling a number listed on the “Do Not Call List.”³¹ For violations of this statute, the company is liable for civil forfeiture penalties and criminal fines, but also provides consumers with a private right of action.³² An individual would be able to sue for the actual monetary loss or up to \$500 in damages for *each* violation, which is then subject to potential trebling if the court finds that the company willfully or knowingly violated the statute.³³ If a company can show it used “reasonable practices and procedures to effectively prevent telephone solicitation in violation of the regulations,” it is granted an affirmative defense when sued under the provision providing a private right of action.³⁴

Companies that are not making reasonable efforts to prevent these solicitations can soon find themselves paying millions of dollars in fines.³⁵ In the wake of *Spokeo*, many courts are having to analyze whether a single unwanted call or text in violation of the TCPA alone will fulfill the requirements of standing.³⁶ The Third Circuit found that in the case of a woman who received one call and respective voicemail on her cell phone, which were not intended for her, there was standing to pursue the claim.³⁷ The case was after the *Spokeo* opinion, and the court found that given the harm incurred, the plaintiff’s loss of privacy was the type of injury that Congress intended to prevent when passing the TCPA.³⁸ But the District Court for the Central District of California found in a similar instance that the “battery drainage, aggravation, and nuisance are tangible and intangible

³⁰ Telephone Consumer Protection Act, 47 U.S.C. § 227(b) (2018).

³¹ *Id.* § 227(c).

³² *See id.* § 227(c), (e).

³³ *Id.* § 227(c)(5).

³⁴ *Id.* § 227(c)(5)(C).

³⁵ In June 2017, a judgment was entered against Dish Network to pay \$168 million to the federal government and an additional \$84 million for federal statute violations including the TCPA. Margaret Cronin Fisk, *Dish Hit with Record \$280 Million Fine for Illegal Robocalls*, BLOOMBERG TECH. (June 6, 2017), <https://www.bloomberg.com/news/articles/2017-06-05/dish-ordered-to-pay-252-mln-to-u-s-states-over-robocalls>.

³⁶ *See* *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017).

³⁷ *Id.*

³⁸ *Id.* at 352.

harms” alleged by the plaintiff and which were caused by just one call were “de minimis,” and therefore failed to meet the standing requirements.³⁹ The Ninth Circuit has agreed with the Third Circuit’s derivation of standing from the congressional intent of the TCPA to protect a phone user’s privacy in the case of text messages sent to users without their consent.⁴⁰ Courts have also struggled in determining where to draw the line on those plaintiffs who seem to be taking advantage of these laws, such as a case where a man had been awarded over \$800,000 in TCPA-based judgments in his favor due to thousands of calls he had tracked on his cellular phone.⁴¹ However, some courts will use standing to weed out claims that are made in bad faith by consumers taking advantage of these regulations.⁴² With more and more companies using text messaging and auto-dialers as part of their marketing programs, companies have to be careful that they are not violating the TCPA in contacting current and potential customers. Unlike other federal consumer protection statutes, TCPA plaintiffs seem to have an easier case under the *Spokeo* holding on the basis that their right to privacy was invaded by the violation of the statute, but there is still a circuit split ripe for Supreme Court review.

Another federal statute that provides plaintiffs with a private cause of action and statutory damages is the Fair Credit Reporting Act (FCRA), which has been used by plaintiffs with increasing frequency.⁴³ The statute applies to any entity that “regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on

³⁹ *Smith v. Aitima Med. Equip., Inc.*, No. ED CV 16-00339-AB (DTBx), 2016 U.S. Dist. LEXIS 113671 (C.D. Cal. Jul. 29, 2016).

⁴⁰ *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (stating “the telemarketing text messages at issue here, absent consent, present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA”).

⁴¹ Josh O’Brien, *Phoney Lawsuits: A ‘Most Probable’ Scheme Has TCPA Plaintiff on Track for One Last Payday*, FORBES (Nov. 27, 2017, 2:35 PM), <https://www.forbes.com/sites/legalnewsline/2017/11/27/phoney-lawsuits-a-most-probable-scheme-has-tcpa-plaintiff-on-track-for-one-last-payday>.

⁴² *Stoops v. Wells Fargo Bank, N.A.*, No. 3:15-83, 2016 U.S. Dist. LEXIS 106793 (W.D. Pa. Aug. 12, 2016).

⁴³ 15 U.S.C. § 1681 (2018); *WebRecon Stats for November 2017: Bizarro Stats*, WEBRECON LLC (Dec. 28, 2017), <https://webrecon.com/webrecon-stats-for-november-2017-bizarro-stats/> (statistics showing FCRA complaints up 9.9% in 2017 compared to 2016).

consumers for the purpose of furnishing consumer reports to third parties.”⁴⁴ The statute also covers employers who use credit reports as part of their hiring process when evaluating prospective employees.⁴⁵ Under the FCRA, if the company willfully did not comply with the statute, damages are set at “not less than \$100 and not more than \$1,000”; but if there was only negligent noncompliance, then the sole available remedy would be actual damages under the statute.⁴⁶

The FCRA was the statute at issue in *Spokeo v. Robins* and has been an ongoing cause of concern for courts in drawing a line as to whether a plaintiff has standing without further showing of a personal harm besides statutory damages.⁴⁷ The statute aims to ensure credit reporting agencies are fair and impartial but also respectful of consumers’ privacy by requiring that credit agencies use reasonable procedures to ensure their reporting is fair and equitable.⁴⁸ A question still remains as to whether a plaintiff whose information is misreported has standing when there is only speculation as to the harm incurred, or rather, if violation of the statute alone gives the plaintiff standing *per se* without additional evidence of the actual damage to plaintiff. This precise question was the subject of *Spokeo’s* second writ of certiorari.⁴⁹ However, failure to abide by these statutes has led to expansive liability for credit reporting agencies⁵⁰ and employers who use credit checks⁵¹ as part of their hiring process.

The FCRA was amended by the Fair and Accurate Credit Transaction Act (“FACTA”), which among other things, required concealment of all but the last five digits of the card number or

⁴⁴ 15 U.S.C. § 1681a.

⁴⁵ *Id.* § 1681b(b).

⁴⁶ *Id.* §§ 1681n - 1681o.

⁴⁷ 136 S. Ct. 1540, 1543 (2016).

⁴⁸ 15 U.S.C. §1681.

⁴⁹ Petition for a Writ of Certiorari at 14, *Spokeo, Inc. v. Robins.*, 138 S. Ct. 931 (2018) (cert. denied).

⁵⁰ *See e.g.*, *Ramirez v. Trans Union, LLC*, No. 12-cv-00632, 2017 U.S. Dist. LEXIS 44778 (N.D. Cal. Mar. 27, 2017) (order denying defendant’s motion for summary judgment). After denying of summary judgment on a claim of violations of § 1681g and § 1681g(c) of the FCRA, the jury awarded \$60 million to plaintiff. *Id.*

⁵¹ *Avis Budget* settled a class action for \$2.7 million for violations of the FCRA in its background check processes for employment purposes. Memorandum of Law in Support of Final Approval of Settlement and Certification of a Settlement Class, *Fuller v. Avis Budget Car Rental, LLC*, No. 2:15-cv-03856 (D.N.J. Nov. 17, 2017), ECF. No. 47-1.

expiration date on a credit card receipt.⁵² While the statutory damages are the same for FACTA as they are under FCRA, the *Spokeo* opinion has created uncertainty about whether the violation alone is enough for standing when there is no further harm.⁵³ Recently, courts have been cautious to find standing in the case of additional numbers being printed on a receipt given there is no increased harm or the risk of harm is based on a speculative chain of events when the receipt remains in the hands of the consumer.⁵⁴ Courts have found that there is no standing, given these violations are more synonymous with the *Spokeo* exception for bare procedural violations than the harm which the statute was developed to remedy.

Another consumer protection statute most commonly used in “no-harm” cases is the Fair Debt Collection Practices Act (“FDCPA”), which impacts any person or entity which primarily participates in consumer debt collection or which “regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”⁵⁵ There is an important exception for officers or employees seeking to collect “in the name of the creditor”; however if a trade name is used by the company, this exception may be lost.⁵⁶ The statute seeks to “eliminate abusive debt collection practices” and also seeks to validate debt information similar to the FCRA.⁵⁷ There are statutory damages available under this provision of up to \$1,000 or the actual damage sustained.⁵⁸ For class actions brought under the FDCPA, there is a limit on recovery of \$500,000 or one per centum of the net worth of the debt collector.⁵⁹ There is also a presumption that the debt

⁵² 15 U.S.C. § 1681c.

⁵³ Ezra Church, *Spokeo 6 Months Later: An Undeniably Dramatic Impact*, LAW360 (Dec. 6, 2016), <https://www.law360.com/articles/869153/spokeo-6-months-later-an-undeniably-dramatic-impact>.

⁵⁴ See *Kamal v. J. Crew Grp., Inc.*, No. 2:15-0190, 2017 U.S. Dist. LEXIS 86222, *9-14 n.1 (D.N.J. June 6, 2017) (citing to additional FACTA cases in which courts did not find standing).

⁵⁵ 15 U.S.C. § 1692(a) (2018).

⁵⁶ It is a violation of the FDCPA to use “any business, company, or organization name other than the true name of the debt collector’s business, company, or organization.” *Id.* § 1692(e). See *Levins v. Healthcare Revenue Recovery Grp., LLC*, 902 F.3d 274, 280-81 (3d Cir. 2018) (finding plaintiffs have plausible claim even where trade name is referenced in prior collection efforts).

⁵⁷ 15 U.S.C. § 1692(a).

⁵⁸ *Id.* § 1692(k).

⁵⁹ *Id.*

collector acted with intent, but the individual or company who is collecting on the debt can overcome this presumption and avoid liability if it shows that the violation was not intentional and was the result of a “bona fide error.”⁶⁰ Courts have held that the protection that the TCPA provides “to shield debtors, or alleged debtors, from a debt collector's use of ‘any false, deceptive, or misleading representation[s] or means in connection with the collection of any debt,’ is substantive.”⁶¹ Since *Spokeo*, the Fourth Circuit found that “emotional distress, anger, and frustration” may be enough to fulfill the injury-in-fact requirement of standing in the case of a FDCPA claim.⁶² The Fifth Circuit also found that “real risk of financial harm caused by an inaccurate credit rating” as a result of a FDCPA violation even without proof of actual harm was enough to confer Article III standing.⁶³

The Truth in Lending Act (“TILA”) is an expansive bill covering consumer credit transactions including credit cards, mortgages, and home equity loans and thereby covers all creditors, servicers, and assignees of these obligations.⁶⁴ TILA focuses mostly on disclosures of interest rates and the terms of consumer debt and on protecting consumers from unfair, abusive, and deceptive lending practices.⁶⁵ The statute provides a private cause of action and grants statutory damages tied to the value of the finance charge, lease, credit plan, or other credit transaction to affected consumers.⁶⁶ The statute also provides that a creditor can remedy an error within 60 days to avoid liability and similar to the FDCPA, provides a bona fide error exception.⁶⁷ Given TILA’s focus

⁶⁰ *Id.*

⁶¹ *Bock v. Pressler & Pressler, LLP*, 254 F. Supp. 3d 724, 732 (D.N.J. 2017); *See also Sayles v. Advanced Recovery Sys.*, 865 F.3d 246, 250 (5th Cir. 2017) (finding FDCPA “violation exposed Sayles to a real risk of financial harm caused by an inaccurate credit rating”).

⁶² *Ben-Davies v. Blibaum & Assocs., P.A.*, 695 F. App'x 674, 676-77 (4th Cir. 2017).

⁶³ *Sayles*, 865 F.3d at 250.

⁶⁴ 15 U.S.C. § 1601 et seq.

⁶⁵ CFPB, Truth in Lending Act (April 2015), https://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf.

⁶⁶ 15 U.S.C. § 1640(a)(2)(A) (2018). This section also limits class action to \$1,000,000 or 1% of net worth of creditor under §1640(a)(2)(B) similar to FDCPA. *Id.*

⁶⁷ 15 U.S.C. §1640(b)-(c).

on disclosure of information, the Second Circuit found the failure to meet this right to information to be enough to grant the standing on its own.⁶⁸

The Real Estate Settlement Procedures Act (“RESPA”), which requires mortgage lenders to supply borrowers with required disclosures regarding the nature and costs of a real estate process, was recently amended and supplemented the regulation of TILA as well.⁶⁹ RESPA focuses on making disclosures in federally related mortgage loan transactions⁷⁰ and eliminating kickbacks and referral fees in the closing process.⁷¹ There are multiple provisions for a private cause of action for the borrower, including failure to notify the borrower of an assignment, sale or transfer of the mortgage,⁷² and payment or acceptance of kickback fees.⁷³ There is currently a split as to whether some violations of RESPA are a bare procedural violation or if the statute creates a new stand-alone right.⁷⁴

III. How can businesses engaged in these regulated industries limit their liability?

Given the inconsistencies in Circuits regarding the application of standing to these federal consumer protection statutes, many companies will seek to limit their liability in these “no-harm” cases by using a mix of legal and business techniques. The best way to limit their liability would be to simply comply with the regulations, though there is always a risk of an oversight or human error by an employee or another agent of the company. Further, the error may not originate from act of an employee; for example, an improper call could be placed due to a wireless number being reassigned

⁶⁸ *Strubel v. Comenity Bank*, 842 F.3d 181, 200 (2d Cir. 2016).

⁶⁹ 12 U.S.C. § 2601 (2018).

⁷⁰ *See id.* § 2603.

⁷¹ *See id.* § 2607.

⁷² *Id.* § 2605(f).

⁷³ *Id.* § 2607(d). There is an exception for bona fide errors under this section. *Id.*

⁷⁴ *See* *Bautz v. ARS Nat'l Servs. Inc.*, 226 F. Supp. 3d 131, 146-48 (E.D.N.Y. 2016) (finding a violation of FACTA alone created a right which could support standing); *But see* *Dolan v. Select Portfolio Servicing*, No. 03-CV-3285 (PKC) (AKT), 2016 U.S. Dist. LEXIS 101201, at *24 (E.D.N.Y. Aug. 2, 2016) (finding the violation of RESPA was more synonymous to a mere procedural violation and therefore did not support standing).

without the company’s knowledge and can lead to a TCPA violation.⁷⁵ Another example would be if a third party provided incorrect information which is misreported on a credit report and therefore leads to a FCRA violation if not corrected within a statutorily defined period of notice of the error.⁷⁶ This section analyzes what techniques companies can use to best reduce their liability under the various consumer protection strategies using business processes, legal strategy, and as a last-case scenario, litigation strategies.

A. Business Strategies

Virtually every company doing business in America will be impacted by the TCPA if it seeks to reach a customer by phone, including call, text, or fax as part of a marketing effort.⁷⁷ Any company that has unpaid accounts receivable they are seeking to collect should be aware of the FDCPA, even if the company itself is not a collection agency.⁷⁸ Any company engaged in lending will need to be acutely aware of the TILA and RESPA regulations as well.⁷⁹ The FCRA has now been used seemingly beyond its usual intent, for example, in the case of the Horizon Blue Cross Blue Shield data breach in which customers’ information was unencrypted on a company laptop which was stolen by an ex-employee.⁸⁰ Even the *Spokeo* case did not involve a typical “credit

⁷⁵ The company would have a safe harbor for one call in which a number was recently reassigned; however, as the Commission recognized, this may not allow the company to notice that that number was reassigned. Declaratory Ruling and Order, FCC 15-72 at 49 n. 312.

⁷⁶ 15 U.S.C. §1681s-2 (2018).

⁷⁷ *Complying with the Telemarketing Sales Rule*, FED. TRADE COMM’N (June 2016), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule>.

⁷⁸ Christopher Koegel, *Think Your Company’s Not Covered by the FDCPA? You May Want to Think Again.*, FED. TRADE COMM’N (Dec. 8, 2015), <https://www.ftc.gov/news-events/blogs/business-blog/2015/12/think-your-companys-not-covered-fdcpa-you-may-want-think>.

⁷⁹ See Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 11279 (Feb. 15, 2013) (to be codified at 12 CF.R. pt. 1026).

⁸⁰ See *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017). Note, in a footnote, the court clarifies that:

[I]n its 12(b)(6) motion, which is not before us, Horizon questions whether it is bound by FCRA. In particular, Horizon suggests that it is not a “consumer reporting agency” and therefore is not subject to the requirements of FCRA. At oral argument, Horizon also argued that FCRA does not apply when data is stolen rather than voluntarily “furnish[ed],” 15 U.S.C. § 1681a(f). Because we are faced solely with an attack on standing, we do not pass judgment on the merits of those questions. Our decision should not be read as expanding a claimant’s rights under

reporting agency,” like Experian or Equifax, but rather a company that aggregated personal information on an individual and then reported it online.⁸¹ These statutes will impact numerous segments of a business, but will be especially problematic in customer service, marketing, and accounts receivable collection.

1. Assessing Business Operations & Using Extensive Employee Training

The most obvious way for the companies to limit their liability under these regulations would be to simply comply with these regulations by completing an in-depth review of all business procedures, in particular any consumer-facing forms, in conjunction with intensive training for all employees engaged in these “at-risk” activities. As noted above, some of these statutes provide a defense to a company if there is a bona fide error, but companies must prove that they have reasonable procedures in place given the company’s characteristics.⁸² In the case of the FCRA, there can be a violation by a company based on not having reasonable procedures in place to “assure maximum possible accuracy of information.”⁸³ However, there must also be a causal connection between these procedures and the error on the report.⁸⁴

In relation to the TCPA, companies need to ensure that the appropriate business processes are in place so that a consumer’s consent to company communications is accurately captured and any future revocations of consent are recorded properly.⁸⁵ The FCC has provided clear guidance to

FCRA. Rather, we assume for purposes of this appeal that FCRA was violated, as alleged, and analyze standing with that assumption in mind.

Id. at 633 n. 9.

⁸¹ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016).

⁸² *See* 47 U.S.C. § 277(c)(5)(C) (2018) (TCPA affirmative defense for compliance program); 15 U.S.C. § 1692(c)(k) (2018) (FDCPA limitation to liability if no intent and preventative procedures in place); 15 U.S.C.S. § 1640(b)-(c) (allowing for correction of errors with 60 days and no liability if unintentional error shown under TILA).

⁸³ 15 U.S.C. § 1681e(b).

⁸⁴ *Id.*

⁸⁵ *Complying with the Telemarketing Sales Rule*, FED. TRADE COMM’N (June 2016), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule>; *See also* *Schweitzer v. Comenity Bank*, 886 F.2d 1273, 1277 (11th Cir. 2017) (holding that the TCPA allows consumer to give limited consent and that consent can be revoked for future calls or texts).

companies that consumers can revoke consent “at any time and through any reasonable means.”⁸⁶ Under this guidance, companies are prohibited from defining a specific means for consumers to rescind their consent, which creates more operational difficulties for companies.⁸⁷ Adding further uncertainty in interpreting this guidance arises from a defined split in opinion between commissioners as to how to define “called party.” The majority defined the “called party” as the person who is the current subscriber or customary user of the number dialed.⁸⁸ The minority argues that “called party” should be interpreted to read “intended party” so as to not hold companies liable for numbers that have been reassigned⁸⁹ or when an incorrect number is provided.⁹⁰ This requires companies to spend substantial resources on data management to ensure appropriate tracking of reassigned numbers and the Do Not Call registry across all company platforms.

Companies regulated under the FCRA must also ensure there is a strict focus on certifying the accuracy of all information for any customer whose information is reported to a credit reporting agency and that there is a timely process in place for any inquiries by consumers or credit agencies challenging the correctness of the reported information.⁹¹ Companies need to ensure they have sufficiently staffed and funded systems resources to address and reinvestigate customers’ disputes within thirty days of receipt, including notice to information furnishers within five days and individualized responses to the consumer.⁹² The TILA and RESPA statutes have very similar

⁸⁶ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (Jul. 10, 2015).

⁸⁷ *Id.* at 36.

⁸⁸ *Id.* at 40-41.

⁸⁹ *Id.* (noting an exception for when a caller reached an unintended recipient due to a reassigned number that there is no liability on the first call, but records must be updated accordingly immediately).

⁹⁰ See *Dissenting Statement of Commissioner Ajit Pai*, Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (July 10, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A5.pdf (noting the difficulties for companies in implementing these guidelines given 27 million numbers are reassigned each year and no database exists for companies to easily cross check numbers).

⁹¹ 15 U.S.C. § 1681i (2018).

⁹² *Id.*

response requirements to the FCRA, so ensuring appropriate processes are in place are just as critical for entities covered by those regulations.⁹³

2. *Outsourcing Susceptible Business Operations or Selling Accounts Receivable*

Another business strategy companies may use to avoid the liability and associated costs of compliance due to the strict requirements of federal consumer protection statutes, especially the TCPA and FDCPA, is to outsource riskier processes such as debt collection and large-scale telemarketing campaigns. A company which outsources its marketing efforts could still be liable under the TCPA through vicarious liability,⁹⁴ though a reputable marketing firm will likely be acutely aware of the TCPA guidelines and will be more familiar with phone number screening processes. However, if a company is willing to give up control over these efforts, it may be argued that there is an “independent contractor” relationship rather than an agency relationship, which would allow the company to avoid liability.⁹⁵ The Ninth Circuit has reviewed this precise issue in both *Gomez v. Campbell-Ewald Co.* and *Jones v. Royal Administrative Services* and applied the ten-factor test from the Restatement of Agency and made a determination in each case after an extensive factual review.⁹⁶ There is some inherent business risk in the contracting of these activities given that companies will lose some power over their customers’ experience, and there is also a risk that information is not properly shared between the companies, potentially creating postponed violations of these statutes.

⁹³ 15 U.S.C. §1640(b) (TILA provisions limiting liability if corrections); 12 U.S.C §2605(f)(4) (2018) (RESPA provisions limiting liability if corrections).

⁹⁴ *Campbell-Ewald Co. v. Gomez*, 768 F.3d 871, 878 (9th Cir. 2014), *aff’d*, 136 S. Ct. 663, 674 (2016) (“[U]nder federal common-law principles of agency, there is vicarious liability for TCPA violations.”).

⁹⁵ *Gomez*, 768 F.3d at 878; *Jones v. Royal Admin. Servs., Inc.*, 866 F.3d 1100, 1105 (9th Cir. 2017).

⁹⁶ The ten factors in determining whether there was a principal-agent or independent contractor relationship were:

- 1) the control exerted by the employer,
- 2) whether the one employed is engaged in a distinct occupation,
- 3) whether the work is normally done under the supervision of an employer,
- 4) the skill required,
- 5) whether the employer supplies tools and instrumentalities [and the place of work],
- 6) the length of time employed,
- 7) whether payment is by time or by the job,
- 8) whether the work is in the regular business of the employer,
- 9) the subjective intent of the parties, and
- 10) whether the employer is or is not in business.

Jones, 866 F.3d at 1106 (citing Rest.2d of Agency § 220(2)).

A related strategy to outsourcing these operations would be to sell accounts receivable to avoid having to engage in debt collection efforts, and therefore stay clear of the FCRA and FDCPA requirements altogether. For a smaller company without expertise in this area or without the resources to meet the particular deadlines in the FDCPA statute, outsourcing these activities and avoiding having to expend substantial resources in training and compliance efforts may be worth avoiding statutory damages under the FDCPA depending on the rate procured for these accounts. By selling accounts receivable rather than contracting these activities out, there would be no control over these collection activities by the original entity and therefore, the ten-factor Restatement test could not be met, allowing the original entity to escape liability.

3. Liability Waivers & Indemnification Clauses

In conjunction with contracting out the activities which are highly regulated under these consumer protection statutes, companies should use traditional contract law to help shield liability between themselves and the contractors they use. Courts previously found that there is no right to common law indemnification and contribution from a third party under the TCPA⁹⁷ or FCRA or FDCPA.⁹⁸ However, courts have allowed claims based on indemnification by contract under these statutes.⁹⁹ Indemnification clauses, when using independent contractors in riskier activities, will provide additional protection from liability where the relationship with a contractor resembles a principal-agent relationship. Entities using these indemnification clauses must carefully draft such clauses, given that civil penalties paid to the FTC and other state governments are likely to be classified as punitive in nature.¹⁰⁰ In defining what claims can be indemnified, companies sometimes will allow negligent acts to be indemnified but not gross negligence or willful acts which lead to

⁹⁷ *Desai v. ADT Sec. Sys.*, No. 11 C 1925, 2012 U.S. Dist. LEXIS 137708, at *6 (N.D. Ill. Sept. 26, 2012).

⁹⁸ *Idania Cintron v. Savit Enters.*, No. 07-cv-04389 (FLW), 2009 U.S. Dist. LEXIS 29813, at *6-12 (D.N.J. 2009) (citing strings of cases finding no implied right to indemnification or contribution).

⁹⁹ *Desai*, 2012 U.S. Dist. LEXIS 137708, at *8-10.

¹⁰⁰ *See Ace Am. Ins. Co. v. Dish Network, LLC*, No. 17-1140, 2018 U.S. App. LEXIS 4083, at *10 (10th Cir., 2018).

punitive damages, so indemnification may be limited for these penalties.¹⁰¹ As outlined above, the terms “negligent” and “willful” are used in most of these consumer protection statutory provisions and will affect whether a multiplier can be applied for punitive purposes.¹⁰² Drafting and negotiating these contract provisions is especially important, given that many indemnification clauses may depend on whether there was a negligent or willful violation.

There are limitations on the ability to contract around liability under these statutes. Companies which seek to use liability waivers on form contracts with consumers could find themselves violating the provision they sought to avoid by using these waivers. The Ninth Circuit found that a company’s inclusion of a liability waiver in a “Pre-employment Disclosure Release,” which indemnified the prospective employer was a willful violation of the FCRA.¹⁰³ A mistake on a widely utilized form like the one at issue in that case could lead to a large class action comprised of any past applicants who signed this form, which would lead to substantial liability when multiplied by the \$1,000 potential statutory damages.¹⁰⁴

4. Arbitration Clauses

Many companies are increasingly including mandatory arbitration clauses in their contracts with their consumers as a control to standardize the forum in which these consumer protection disputes may arise.¹⁰⁵ Arbitration clauses could keep consumer protection-related cases out of the courtroom and away from a potentially sympathetic jury, which in many cases better relate to the plaintiff’s outrage and harm. However, these arbitration agreements are often times ineffective in the

¹⁰¹ Linda L. Rhodes, *Limitations on Liability Exceptions for Gross Negligence and Willful Misconduct and the Implications for Outsourcing Agreements*, MAYER BROWN (Summer 2013), <https://www.mayerbrown.com/en/perspectives-events/publications/2013/08/limitations-on-liability-exceptions-for-gross-negl>.

¹⁰² See *infra* p. 8.

¹⁰³ Syed v. M-I, LLC, 853 F.3d 492, 497 (9th Cir. 2017) (finding the inclusion of a liability waiver on the disclosure form violated §1681b(b)(2)(A) which required that the disclosure and authorization be presented in a form that “consists solely of the disclosure”).

¹⁰⁴ 15 U.S.C. §§ 1681n – 1681o.

¹⁰⁵ Frederick L. Miller, *Consumer Law: Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. BAR J. 302 (March 1999).

consumer protection claims because of the limited scope of the arbitration that the dispute must be related to a “claim or controversy arising out of or relating to this Agreement.”¹⁰⁶ For instance, if the arbitration clause in the original customer agreement only covered claims related to a consumer’s interactions with the company related to a credit line, the FCRA claim will not be covered by the arbitration clause, given that the claim was filed due to erroneous information being reported on her credit report.¹⁰⁷ Arbitration agreements likely have more success in instances of violations of agreements describing future contact with a consumer within the scope of the TCPA or with a lending agreement implicating TILA. Broadly written arbitration clauses, which also eliminate class actions, will help companies to ensure that these consumer protection violations do not end up in court.¹⁰⁸

As part of the Consumer Financial Protection Bureau’s (“CFPB”) arbitration study, which was required as part of the Dodd-Frank Wall Street Reform Act, there was a suggested rule change to ban class action waivers in arbitration agreements.¹⁰⁹ However, under the Congressional Review Act, President Trump signed a joint resolution which removed all force and effect from the Arbitration Agreements Rule.¹¹⁰ The Arbitration Study had found 1,245 consumer disputes filed with the American Arbitration Association (“AAA”) related to credit cards, checking, payday loan, and prepaid cards.¹¹¹ Only 32.2% of these disputes were settled on the merits and those who had

¹⁰⁶ Daniel T. Pascucci, *Dissecting Common Basic Arbitration Clauses – You Can Build a Better One*, MINTZ (Mar. 6, 2018), <https://www.mintz.com/insights-center/viewpoints/2196/2018-03-dissecting-common-basic-arbitration-clauses-you-can-build>.

¹⁰⁷ *Johnson v. Branch Banking & Trust Co.*, No. 10-918, 2011 U.S. Dist. LEXIS 2589, at *10 (E.D. Pa. Jan. 10, 2011).

¹⁰⁸ Alan S. Kaplinsky et al., *Sixth Circuit Continues to Expand Class Action Waivers, Following Supreme Court’s Lead*, BALLARD SPAHR LLP (Aug. 17, 2018), <https://www.ballardspahr.com/alertspublications/legalalerts/2018-08-17-sixth-circuit-continues-to-expand-class-action-waivers-following-supreme-courts-lead.aspx>.

¹⁰⁹ Consumer Financial Protection Bureau Arbitration Agreements Rule, 12 C.F.R. §1040 (2017).

¹¹⁰ *Id.* (disapproving the existing rule and hereby removing it from the Code of Federal Regulations).

¹¹¹ CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY (2015) at § 5.

substantive outcomes were awarded around \$2,700 to \$5,400 compared to the claims being between \$19,750 and \$13,000.¹¹²

5. *Liability Insurance*

State governments encourage all new businesses to procure general liability insurance.¹¹³ However, due to public policy concerns, some states will not allow these policies to cover certain costs—such as criminal penalties—that companies must pay for their own wrongdoing.¹¹⁴ Similar to indemnification clauses, the judge or jury’s determination on negligent violations compared to willful violations of these statutes may make a substantial difference for a company’s bottom line given the penalties paid could then be considered punitive damages and will not be covered based on the specific language of some policies.¹¹⁵ The categorization of the violation could also be material in the court’s decision.¹¹⁶

B. Litigation Techniques

Even if companies were to use any of the business strategies to reduce their liability, there is always a chance that they will still end up in court. Many of these statutes are enforced by the FTC, allowing penalties to be sought by the U.S. Attorney General or states’ attorneys general. Additionally, individual plaintiffs could bring suit under the private causes of action as outlined in Section II of this Note. For claims brought under consumer protection statutes, they are often brought as class action suits tied to the company’s business practices rather than a particular

¹¹² *Id.* at 5.2.2.

¹¹³ For example, new businesses in New Jersey are guided that “[t]here are certain types of insurance that all small businesses should have such as fire, general liability, automobile liability, automobile physical damage and automobile collision.” *Guide to Doing Business in New Jersey*, STATE OF NEW JERSEY (Sept. 2010), https://www.nj.gov/njbusiness/documents/Doing_Business_in_New_Jersey08.pdf.

¹¹⁴ *ACE Am. Ins. Co. v. Dish Network, LLC*, 883 F.3d 881, 892 (10th Cir. Feb. 21, 2018) (finding Colorado public policy goes against “insuring intentional or willful wrongful acts” and therefore that the TCPA statutory damages are a penalty under Colorado law and are uninsurable); *but see* *Travelers Prop. Cas. Co. of Am. v. Dish Network, LLC*, No. 12-03098, 2014 U.S. Dist. LEXIS 37914 (C.D. Ill. Mar. 25, 2014) (denying summary judgment on issue of insurability given the jury may find the acts not to be willful under TCPA).

¹¹⁵ *See ACE Am. Ins. Co.*, 883 F.3d at 881.

¹¹⁶ *Whole Enchilada, Inc. v. Travelers Prop. Cas. Co. of Am.*, 581 F. Supp. 2d 677, 704-05 (W.D. Pa. 2008).

incident. Plaintiffs’ attorneys are highly motivated to use these statutory violations to build a large class given attorney’s fees are based on this aggregate value.¹¹⁷ Many of these cases are settled in the end, so final verdicts are hard to find. But many of these litigation techniques discussed below arise in the early stages of litigation, including class certification, motions to dismiss, and cross-motions.

1. Challenging Standing when Statutory Damages are Only Remedy Sought

As discussed in Section I of this Note, there still remains a lot of confusion as to where the line is drawn as to whether a specific violation of a statutory right meets the standing requirement of being a “concrete” injury on its own or whether the violation was a mere “procedural violation” requiring actual harm to be shown.¹¹⁸ Therefore, companies’ litigation teams should challenge any claim which solely relies on statutory violations for damages on the basis of standing at the motion to dismiss stage given the discrepancies which can hinge on how the protected interest is framed. There is a particular concern in courts as to whether harm is concrete and particularized in cases where the harm alleged is purely speculative at the time the complaint was filed. The different Circuits of the Federal Courts of Appeals have shown disagreement as to what types of additional harm¹¹⁹ can meet this threshold and have therefore led to numerous appeals to provide further clarification, including to the Supreme Court in *Spokeo v. Robins*.¹²⁰ It is worth noting, however, that the injury-in-fact requirement is part of Article III standing, and therefore may not control in state

¹¹⁷ See Johnston, *supra* note 19.

¹¹⁸ N.J. Law Journal Editorial Board, ‘*Spokeo*’ is Done, But Article III Guidance Still Needed, N.J. L. J. (Feb. 5, 2018 11:03 a.m.), <https://www.law.com/njlawjournal/sites/njlawjournal/2018/02/05/spokeo-is-done-but-article-iii-guidance-still-needed/>.

¹¹⁹ See *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d at 638 (finding *Spokeo* does not require plaintiff to show the “statutory violation has caused a ‘material risk of harm’ before he can bring suit”); *but see* Braitberg v. Charter Communs., Inc., 836 F.3d 925, 930-31 (2016) (finding plaintiff failed to identify “material risk of harm” and therefore did not have standing given the violation of the statute was “a bare procedural violation”).

¹²⁰ Petition for a Writ of Certiorari at 14, *Spokeo, Inc. v. Robins.*, 138 S. Ct. 931 (2018) (cert. denied).

courts depending on an individual state's standing requirements.¹²¹ Therefore, a plaintiff may be able to pursue a “no-harm” injury in state court even if it does not meet the requirements of *Spokeo*.

2. Objecting to Class Certification

Rule 23 of the Federal Rules of Civil Procedure allows for class certification if “there are questions of law or fact common to the class.”¹²² A class action that would arise under a consumer protection statute would be considered a Rule 23(b) class action and requires that the common issues “predominate over any questions affecting only individual members.”¹²³ In bringing a class action under one of the prior mentioned consumer protection statutes, there are undoubtedly factors which are common to the class when cases focus on the reasonable procedures and processes the company undertakes to meet these statutory requirements.¹²⁴ However, individualized consent will also arise, so it becomes a balancing test as to what predominates. Some lower courts have considered factors such as the “proportionality of the potential liability to actual harm” but have been overturned by their respective Court of Appeals.¹²⁵

In class actions under the TCPA, courts have routinely denied certification due to these cases required “mini-trials” to focus on when each individual consented to receiving calls from the

¹²¹ Roger Perlstadt, *Learning The Limits (And Irony) of Spokeo*, LAW360 (Dec. 12, 2016) <https://www.law360.com/articles/871191/learning-the-limits-and-irony-of-spokeo>; *See also* ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989); *Nichlaw v. Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016). For example, in New Jersey, the standing requirement is “less rigorous than the federal standing requirements” given there is no “actual cases and controversies” requirement. *In re Camden County*, 170 N.J. 439, 448 (2002). “To possess standing in a case, a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision.” *Id.* at 449.

¹²² FED. R. CIV. P. 23(a)(2).

¹²³ FED. R. CIV. P. 23(b)(3).

A class action may be maintained if Rule 23(a) is satisfied and if: . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id.

¹²⁴ *See* *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 713 (9th Cir. 2010).

¹²⁵ *See id.*

company as well as if there was a revocation of consent.¹²⁶ For FCRA class actions seeking relief, the Fifth Circuit has held that classes could only be certified if they sought declaratory relief instead of monetary damages given precedent that “[m]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief.”¹²⁷

3. *Picking off a Lead Plaintiff*

Prior to *Campbell-Ewald Co. v. Gomez*, defendants would attempt to “pick off” the lead plaintiff by presenting a settlement offer with just that individual in hope that this would end the class action all together by eliminating plaintiff’s standing.¹²⁸ However, the Supreme Court found that when this settlement offer was not accepted, the case could continue, given an unaccepted offer would have no operative effect.¹²⁹ The Supreme Court did not issue an opinion as to what would happen if the judgment were entered by the court in the case of a deposit made in an account under plaintiff’s control.¹³⁰ After *Campbell-Ewald*, in a slight variation of the facts, an alleged TCPA violator attempted to deposit the maximum statutory damages with the court that the lead plaintiff could claim under the statute to “make the plaintiff whole.”¹³¹ However, the Ninth Circuit was quick to reverse the District Court and found this to be an improper use of Rule 67 and further found the payment did not moot the plaintiff’s claim given the payment was not accepted.¹³² The Ninth Circuit also reviewed this issue when the full settlement amount was placed in an escrow account for the plaintiff.¹³³ It held that until the class is certified, each claim remains individualized and so, as long as

¹²⁶ *Sandusky Wellness Ct. LLC v. ASD Specialty Healthcare Inc.*, 863 F.3d 460, 468-70 (6th Cir. 2017); *Newhart v. Quicken Loans Inc.*, No. 9:15-CV-81250, 2016 U.S. Dist. LEXIS 168721 (S.D. Fla. 2016).

¹²⁷ *Washington v. CSC Credit Servs.*, 199 F.3d 263, 269 (5th Cir. 2000).

¹²⁸ 136 S. Ct. 663 (2015).

¹²⁹ *Id.* at 669-70.

¹³⁰ *Id.* at 672 (“We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.”).

¹³¹ *Fulton Dental LLC v. Bisco, Inc.*, 860 F.3d 541, 546 (7th Cir. 2017).

¹³² *Id.* at 546.

¹³³ *Campbell*, 136 S. Ct. at 672.

the lead plaintiff has a claim, she can continue forward with the class action certification process.¹³⁴ However, once the full amount of the claim is received by the plaintiff, there is no longer a “case” and the claim cannot move forward.¹³⁵ Additionally, the court could enter judgment for the plaintiff even against the plaintiff’s objections, which would meet plaintiff’s claim.¹³⁶

4. *Lobbying for Strict Readings & Interpretations*

As evidenced by the hundreds of pages of guidance on these statutes, there are clearly competing interpretations on certain key terms which will substantially affect the results of litigation. As seen in the TCPA guidance, the definition of an “auto-dialer” or “called party” can significantly change the scope of these statutes.¹³⁷ The Chamber of Commerce recently took legal action against the FCC for its guidance and the D.C. Circuit found that the FCC unreasonably expanded the statute’s intent in its guidance.¹³⁸ Another example where the statutory intent may be found persuasive is in the ongoing *In re Horizon Healthcare Servs. Data Breach Litig.*, given the FCRA’s intent of regulating credit monitoring agencies to ensure accurate information is reported on consumer’s credit reports was being brought against a health insurance company in light of a data breach.¹³⁹ Other companies hope to use the FCRA in its claim against Equifax for its recent data breach, but the entire claim could come down to the word “furnish” and whether a breach by a third party can be classified as the company furnishing information.¹⁴⁰ These are just a few of the numerous opportunities in which companies could argue that these statutes cannot be applied to them, that

¹³⁴ *Id.*

¹³⁵ *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144-45 (9th Cir. 2016).

¹³⁶ *Id.* at 1146 (citing *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J. dissenting)).

¹³⁷ *See infra* in Section III. A. 1.

¹³⁸ *See ACA Int’l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018).

¹³⁹ *See In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 629 (3d Cir. 2017).

¹⁴⁰ John J. Delionado, Esq. & Jason M. Beach, Esq., *Efficacy of FCRA Claims Based on Stolen Data in Data Breach Cases*, WESTLAW J. COMPUTER & INTERNET, Vol. 33, Issue 5 (Aug. 14, 2015), https://www.hunton.com/images/content/3/2/v2/3219/Efficacy_of_FCRA_claims_based_on_stolen_data_in_data_breach_case.pdf.

there is an exception to the statute that should apply, or that there was a bona fide error defense which they can use as part of a 12(b)(6) motion.

IV. Looking Forward for Solutions

A. Continued Guidance from the FTC and FCC

The FTC and FCC have been working together to help address the uncertainties companies are facing in the wake of the rapid increase in high-stakes claims under these consumer protection statutes. Both the FTC and FCC have been providing guidance to companies to help analyze whether they are at risk under consumer protection statutes especially in regard to some of the more growing causes of actions, like employers using background checks.¹⁴¹ Organizations can seek regulatory advisory opinions from the FCC or FTC on a specific course of action they are considering.¹⁴² There are also recent pushes for the FCC to provide other resources for companies which seek to comply with these consumer protection statutes despite not having the necessary resources to. For instance, the FCC is seeking to create a new database of reassigned phone numbers to help businesses identify when a consumer who it is attempting to reach has changed its number.¹⁴³ While companies are obviously pushing for these types of solutions to help with compliance, lawmakers and their constituents have been calling for stricter penalties.¹⁴⁴

B. Aligning Incentives

¹⁴¹*What Employment Background Screening Companies Need to Know About the Fair Credit Reporting Act*, FED. TRADE COMM'N. (March 2016), <https://www.ftc.gov/tips-advice/business-center/guidance/what-employment-background-screening-companies-need-know-about>.

¹⁴² 16 C.F.R. §§ 1.1-1.4.

¹⁴³ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, FCC Rcd., CG Docket No. 17-59 (Mar. 1, 2018), https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0301/DOC-349522A1.pdf.

¹⁴⁴ See Bryan Koenig, *Schumer Wants Robocallers Subject to Prison Time*, LAW360 (July 6, 2015), <https://www.law360.com/articles/675923/schumer-wants-robocallers-subject-to-prison-time>.

As evidenced by commentators at regulatory agencies, in the press, and in legal studies, plaintiffs' attorneys have been the overwhelming winners in consumer protection suits.¹⁴⁵ Studies have shown that in these large consumer protection class action suits, proceeds are largely attributed to legal fees and expenses, leaving consumers with a small fraction of the statutory damages they are promised under these statutes.¹⁴⁶ With no-harm statutory violations leading to enormous class sizes, there is virtually a guarantee that lead counsel can increase its payout by expanding the class further when statutory damages are available.¹⁴⁷ Attorneys have begun to specialize in counseling TCPA plaintiffs and can earn quick and easy payouts with minimal expenses.¹⁴⁸

V. Conclusion

The case of DISH Network's litigation over 51,000 calls made to phone numbers that were on the Do Not Call list shows just how damaging TCPA litigation can be to a company.¹⁴⁹ The company had to pay \$280 million in penalties as part of a civil action brought by the U.S. Attorney General and several other states and an additional \$61 million in a private class action.¹⁵⁰ In 2017, these litigation expenses totaled \$296 million which was over 18% of the company's operating income.¹⁵¹ Compared to 2016, where the litigation expenses only accounted for 0.9% of operating income,¹⁵² it is clear to see that this will create substantial difficulties for a company in its forecasting if judgments like these are always looming. Even though DISH had general liability insurance in place, the court ruled the damages paid were uninsurable given the insurance of these punitive

¹⁴⁵ See Johnston, *supra* note 19, at 7; Adonis Hoffman, *Does TCPA Stand for "Total Cash for Plaintiffs' Attorneys"?*, THE HILL (Feb. 17, 2016), <http://thehill.com/blogs/pundits-blog/technology/269656-does-tcpa-stand-for-total-cash-for-plaintiffs-attorneys>.

¹⁴⁶ See Johnston, *supra* note 19, at 5.

¹⁴⁷ Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 250 (2010).

¹⁴⁸ See Johnston, *supra* note 19.

¹⁴⁹ *Krakauer v. Dish Network, LLC*, No. 1:14-CV-333, 2017 U.S. Dist. LEXIS 163446, at *2 (M.D.N.C. Oct. 3, 2017).

¹⁵⁰ Dish Network Corp., Annual Report (Form 10-K) at F-65-67 (Feb. 21, 2018).

¹⁵¹ *Id.* at F-5 (This percentage was determined using the EBIT of DISH Network of \$1,567,765,000.).

¹⁵² *Id.*

damages went against public policy.¹⁵³ In addition to financial penalties, if DISH Network fails to meet certain requirements, it is barred from conducting any outbound telemarketing for two years, which will also undoubtedly affect its marketing efforts.¹⁵⁴

With the court's recent denial of the writ of *certiorari* of *Spokeo*, it seems litigants are left to deal with the uncertainty of whether a violation of a consumer protection statute leads to a "legally protected interest" on their own. A court's interpretation of the TCPA as the right to privacy or the right to information under the FDCPA or TILA may be enough to grant standing to a plaintiff or class action. However, under other consumer protection statutes, the court may find the plaintiff not to have standing to bring his or her case due to the speculative nature of a receipt landing in the wrong hands in a FACTA case or no economic damage when a credit report shows inaccurate information which the credit reporting agency fails to reinvestigate under the FCRA. Companies can also take proactive steps to avoid liability under these consumer protection statutes using business strategies including investing in compliance measure, using basic contract law to limit liability, or relying on insurance to help distribute costs. If a plaintiff is found to have standing to pursue his or her claim, companies can argue for certain statutory interpretations which may make these statutes inapplicable to the particular situation. For class actions, picking off the lead plaintiff may no longer be a viable option, but attacking the commonality of a particular issue can lead to class certification being denied. Using these techniques, hopefully companies will be able to at minimum limit their liability under these consumer protection statutes to provide a more predictable risk environment.

¹⁵³ See *infra* Section II.A.5.

¹⁵⁴ Dish Network Corp., Annual Report (Form 10-K) at F-67 (Feb. 21, 2018).