Class Actions and Statutory Damages for Procedural Violations: Navigating Between Stranded Consumers and Corporate Wreckage

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ABSTRACT

Financial benefits from class actions and statutory damages incentivize consumers to sue. In combination, these legal institutions pose immense financial threats to defendants, especially when they are based on procedural violations. It is the legal system's role to balance the protection of consumers while ensuring proportional liability for minor noncompliance. With the standing requirement, the class certification requirements, and liability caps, courts can use three different tools to achieve the right balance. This article is the first to address all of them. It shows that, under the standing doctrine, a Probability Magnitude Test is the best way to decide upon injuries that have not yet occurred. Moreover, it analyzes recent decisions on the class certification requirements that have yet to be covered. Though commentators suggest that courts should grant class certification unreservedly when plaintiffs allege procedural violations, courts should instead use flexible liability caps to avoid an overburdening liability. Finally, this article concludes with a discussion on the application of these concepts to the public enforcement of statutes.

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INTRODUCTION

Over the past few years, plaintiffs increasingly claimed statutory damages for procedural violations of consumer protection statutes. Combined with the mighty instrument of the class action, these lawsuits often result in substantial awards for damages, ranging from the low millions up to $29 billion.[2] Courts are forced to decide whether the mere procedural violation of a statute carries enough weight to justify exorbitant damages that could potentially drive companies into insolvency[3] or induce tremendous pressure to settle.[4] Judge Wilkinson described this phenomenon as a "perfect storm in which two independent provisions combine to create commercial wreckage far greater than either could alone."[5] However, the text of these statutes and the prevailing notion of efficient consumer protection suggest that plaintiffs are entitled to these damages.[6] Refusing judicial enforcement leaves consumers stranded. The challenge is to find a navigational route that avoids the negative externalities that exist at the extreme end of both outcomes.

Throughout the voyage, each court inherently encounters three critical buoys. First, it can affirm or deny a plaintiff's standing. Second, it has to deal with class certification. Finally, it has to decide upon the amount of damages.[7] This article is the first to address all three navigational markers and to provide a coherent solution for the difficult problems courts regularly face. Part I systematizes recent court decisions in consumer class actions based on the types of procedural violations that statutory damages can be awarded for.

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[2] *See In re* Toys "R" Us–Del., Inc.–Fair & Accurate Credit Transactions Act (FACTA) Litig., 300 F.R.D. 347, 359 (C.D. Cal. 2013); *see also* Stillmock v. Weis Mkts., Inc., 385 F. App'x 267, 279 (4th Cir. 2010) (Wilkinson, J., concurring) ("Weis Markets would thus be subject to a massive payout of between $ 1.4 and $ 14 billion."); Scheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 106 (2009) (for an overview).

[3] *See* Scheuerman, *supra* note 2, at 106; *see also* Joan Steinman, *Spokeo, Where Shalt Thou Stand?*, 68 VAND. L. REV. EN BANC 243, 251–52 (2015); *Stillmock*, 385 F. App'x at 276 (Wilkinson, J., concurring) ("Certainly nothing in 15 U.S.C. § 1681n(a)(1) would lead us to believe that Congress intended the modest range of statutory damages to be transformed into corporate death by a thousand cuts through Rule 23.").

[4] Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) ("[S]uch a distortion could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements.").

[5] *Stillmock*, 385 F. App'x at 276 (Wilkinson, J., concurring).

[6] *See* Steinman, *supra* note 3, at 249.

[7] *See* Scheuerman, *supra* note 2, at 131–51.

Part II then shows that the standing doctrine helps protect the courts from answering questions of general public interest so that instead, they can focus on questions that affect plaintiffs individually.

In particular, the first element of the standing doctrine, the injury-in-fact requirement, shields courts against suits in the public interest. After discussing several theories, the article advocates a *Probability Magnitude Test* to deal with injuries that have not yet occurred. This Test presents a simple but effective way to sieve out those cases that are undeserving of the judiciary's scarce resources. Moreover, the Test provides a legal framework that explains why certain circuit courts reached different conclusions in recent data breach and dissemination of information cases.[8]

Part III analyzes the central class certification requirements of Fed. R. Civ. P. Rule 23(a) and (b)(3). In the context of class actions based on procedural violations, these requirements have barely received any attention. The article fills this attention gap by discussing several recent decisions and presenting new arguments as to why courts should grant class certification. It then outlines the controversy about how to reduce the huge liability risks caused by the combination of class actions and statutory damages. Part IV advocates for an economic perspective to this controversy and recommends flexible liability caps aimed at existing statutory liability limitations. Courts should be empowered to determine these caps during the class certification stage to ensure fair settlements. Finally, Part V demonstrates that many of the discussed concepts can apply to the public enforcement of statutes.

I. TYPOLOGY OF STATUTORY DAMAGES FOR PROCEDURAL VIOLATIONS IN CLASS ACTIONS

Of the U.S. statutes that provide for statutory damages, the most notable are consumer protection statutes[9] Generally, statutory

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[8] *See* Fero v. Excellus Health Plan, Inc., 236 F. Supp. 3d 735 (W.D.N.Y. 2017); *see also* Thomas Martecchini, *A Day in Court for Data Breach Plaintiffs: Preserving Standing Based on Increased Risk of Identity Theft After Clapper v. Amnesty International USA*, 114 MICH. L. REV. 1471, 1486 (2015–2016); Jordan Z. Dillon, *Standing on the Wrong Foot: The Seventh Circuit's Eccentric Attempt to Rescue Risk-Based Standing in Data Breach Litigation [Remijas v. Neiman Marcus Grp., 794 F.3d 688 (7th Cir. 2015)]*, 56 WASHBURN L.J. 123, 132 ff. (2017); *infra* Part II(B)(2)(b).

[9] Six of the seven subchapters of the Consumer Credit Protection Chapter of Title 15 of the United States Code provide for statutory damages: Consumer Credit Disclosure, Credit Reporting Agencies, Equal Credit Opportunity, Debt Collection

damages provisions, such as class actions, exist to incentivize private individuals to sue.[10] Since the statute determines the amount of damages, plaintiffs do not need to show an exact amount of actual damages.[11] Moreover, if the actual harm is economically insignificant, the plaintiff can still receive the statutorily fixed amount.[12] The tremendous risk of liability serves to ensure that wrongful conduct becomes an impermissibly costly endeavor, thus, promoting actors to comply with the law.[13] However, when a defendant only violates a procedural rule, it is questionable whether the ensuing consequences are proportional.[14] This is because it is not always clear whether the respective statute aims at protecting a *legally protected interest*. Additionally, as long as the defendant did not *violate* such an interest, courts cannot place the burden of liability on him.[15] Unfortunately, courts give very different answers to the questions whether a legally protected interest is at stake and whether it has been violated.[16]

A. Dissemination of False Information

Consumers often sue credit reporting agencies for providing false information to third parties.[17] The most prominent example of

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Practices, Electronic Fund Transfers, and Truth in Lending Regulations. *See* Sande Buhai, *Statutory Damages: Drafting and Interpreting*, 66 Kan. L. Rev. 523, 528 (2018) (for an overview); *see also* 17 U.S.C. § 504(c) (2012) (providing for statutory damages); *see generally* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy In Need of Reform*, 51 WM. & MARY L. REV. 440 (2009).

[10] Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003); *Perrone v. GMAC*, 232 F.3d 433, 436 (5th Cir. 2000).

[11] *Perrone*, 232 F.3d at 436.

[12] Scheuerman, *supra* note 2, at 131–51 (citing several statutes and Congressional reports); Buhai, *supra* note 9, at 542.

[13] Dryden v. Lou Budke's Arrow Fin. Co., 630 F.2d 641, 647 (8th Cir. 1980); *see also* Davis v. Werne, 673 F.2d 866, 869 (5th Cir. 1995); Tyler J. Domino, *Certifying Statutory Class Actions in the Shadow of Due Process*, 92 N.Y.U. L. Rev. 1977, 2005 (2017).

[14] Buhai, *supra* note 9, at 547, 553.

[15] *See* Patricia W. Hatamyar Moore, *Spokeo, Inc. v. Robins: The Illusory "No-Injury Class" Reaches the Supreme Court*, 2 ST THOMAS J. OF COMPLEX LITIG. 2016, 1, 26; *see also infra* Section II. B.

[16] *See* Daniel Bugni, *Standing Together: An Analysis of the Injury Requirement in Data Breach Class Actions*, 52 Gonz. L. Rev. 59, 66-84 (2016); *see also* Patric J. Lorio, *Access Denied: Data Breach Litigation, Article III Standing, and a Proposed Statutory Solution*, 51 Colum. J. L. & Soc. Probs. 79, 91 (2017).

[17] *See, e.g.*, Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 340–41 (4th Cir. 2017); *see also* Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 512–13 (D.C. Cir. 2016).

this is the recent U.S. Supreme Court decision in *Spokeo v. Robins*.[18] Spokeo ran a "people search engine" that gathered information about consumers from various sources as a basis for a credit rating.[19] However, some of the information gathered and disseminated about the lead plaintiff, Mr. Robins, was inaccurate.[20] Mr. Robins filed a federal class action complaint against Spokeo, contending that the company violated several requirements of the Fair Credit Reporting Act of 1970 (FCRA).[21]

In particular, Mr. Robins alleged that Spokeo violated 15 U.S.C. § 1681e(b) of the FCRA, which compels consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of consumer reports. According to 15 U.S.C. § 1681n(a)(1)(A) of the FCRA, the agency is liable to an individual for "either actual damages or statutory damages of $100 to $1,000" if it "willfully fails to comply with any requirement [of the Act]."[22] The Ninth Circuit held that because Spokeo violated Mr. Robins' statutory rights, he had standing to sue.[23]

However, the U.S. Supreme Court adopted a different approach. It held that to have standing, the plaintiff must first allege a harm that is both concrete *and* particularized, as well as actual or imminent.[24] Particularization means that the injury must "affect the plaintiff in a personal and individual way."[25] Concreteness requires the injury to be "real, and not abstract."[26] Moreover, the Court held that even a material risk of future harm could constitute a concrete injury.[27] All of the Justices agreed that Mr. Robins met the particularization requirement; however, the majority refused to take a stance on whether Spokeo's procedural violations resulted in a concrete harm to Mr. Robins. Therefore, the Court vacated and

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[18] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).
[19] *Id.* at 1544.
[20] *Id.*
[21] *Id.*
[22] In Fair and Accurate Credit Transactions Act (FACTA) cases, the willful standard encompasses knowing and intentional violations as well as those due to reckless disregard. *See* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007).
[23] *See* Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014).
[24] *See Spokeo*, 136 S. Ct. at 1548 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).
[25] *Id.*; *see also* Steinman, *supra* note 3, at 246.
[26] *See Spokeo*, 136 S. Ct. at 1548.
[27] *Id.* at 1549.

remanded the case.[28] On remand, the Ninth Circuit found that Robins suffered a concrete injury.[29]

B. Unauthorized Disclosure of Information

Before and after the *Spokeo* decision, the issue of concrete injury reached several circuit courts, typically in the context of data breaches. In *Remijas v. Neiman Marcus Group, LLC*,[30] hackers stole the credit card numbers of approximately 350,000 Neiman Marcus customers and utilized the data of 9,200 individuals to commit fraud.[31] The Seventh Circuit held that the plaintiffs suffered a concrete injury based on the loss of time and money required to resolve the fraudulent charges and protect themselves against future identity theft.[32]

Moreover, the court treated the "objectively reasonable likelihood" of future identity theft as a sufficient risk of harm, qualifying it as a concrete injury.[33] The Court used the same reasoning to affirm standing in other data breach cases such as *Lewert v. P.F. Chang's China Bistro, Inc.*[34] and *Pisciotta v. Old National Bancorp*[35]. The Ninth Circuit agreed with the Seventh Circuit's approach in *Krottner v. Starbucks Corp.*,[36] as did the D.C. Circuit in *Attias v. Carefirst, Inc*.[37] The Third Circuit also applied this reasoning in *Galaria v. Nationwide Mutual Insurance Co.*[38] and *In re Horizon Healthcare Services Data Breach Litigation*.[39]

Even though the Third Circuit ruled that a risk of harm could constitute a concrete injury, it denied standing in *Reilly v. Ceridian Corp.*[40] The different outcome is due to different facts: The Court held

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[28] *Id.* at 1550. *But see id.* at 1556 (Ginsburg, J., dissenting) (disagreeing with the Court reasoning that "Robins would not qualify. . . if he alleged a 'bare' procedural violation. . . ").
[29] *See Robins*, 867 F.3d at 1118.
[30] Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015).
[31] *Id.* at 689–90.
[32] *Id.* at 694; *see also* Resnick v. AvMed, Inc., 693 F.3d 1317, 1323 (11th Cir. 2012).
[33] *See* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 694, 693 (7th Cir. 2015).
[34] Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 967 (7th Cir. 2016).
[35] Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007).
[36] Krottner v. Starbuck Corp., 628 F.3d 1139, 1143 (9th Cir. 2010).
[37] Attias v. Carefirst, Inc., 865 F.3d 620, 629 (D.C. Cir. 2017), *cert. denied*, 136 S. Ct. 981 (2018) (mem.).
[38] Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384, 390 (6th Cir. 2016).
[39] *In re* Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 640 (3d Cir. 2017).
[40] Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011).

that the alleged risk of harm was too *speculative*[41] because "there [was] no evidence that the intrusion was intentional or malicious."[42] Also referring to mere speculations, the First Circuit likewise denied standing in *Katz v. Pershing, LLC*,[43] followed by the Second Circuit in *Katz v. Donna Karan Company*,[44] the Fourth Circuit in *Beck v. McDonald*,[45] and the Eighth Circuit in *In re SuperValu, Inc.*[46] This article proposes that it may seem as if courts have adopted different legal standards, but in reality, they all apply a Probability Magnitude Test. Since the facts of the cases differ, the courts reach different conclusions under this single test.

Similarly, under the Fair and Accurate Credit Transaction Act (FACTA),[47] plaintiffs are eligible for statutory damages when defendants provide customers with receipts that display excessive credit card information, namely the expiration date and the full credit card number.[48] As *Leysoto v. Mama Mia I., Inc.*[49] exemplifies, the aforementioned type of claim can impose damage amounts that are

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[41] *Id.* at 42; *see also* Braitberg v. Charter Commc'ns., Inc., 836 F.3d 925, 930 (8th Cir. 2016).

[42] *Reilly*, 664 F.3d at 44; *see* Whalen v. Michaels Stores, Inc., Nos. 16-260 (L), 16-352 (XAP), 2017 U.S. App. LEXIS 7717, at *5 (2d Cir. May 2, 2017).

[43] *See* Katz v. Pershing, LLC, 672 F.3d 64, 80 (1st Cir. 2012).

[44] Katz v. Donna Karan Co. Store, No. 15-464, 2017 U.S. App. LEXIS 18086, at *19 (2d Cir. Sept. 19, 2017).

[45] Beck v. McDonald, 848 F.3d 262, 274 (4th Cir. 2017).

[46] Alleruzzo v. SuperValu, Inc., 870 F.3d 763, 770 (8th Cir. 2017); *see also* Kuhns v. Scottrade, Inc., 868 F.3d 711, 718 (8th Cir. 2017).

[47] FACTA amended the FCRA in 2003. It requires that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). If a defendant willfully does not comply with this requirement, he must pay for "any actual damages sustained by the consumer as a result of the failure [actual damages] or damages of not less than $100 and not more than $1000 [statutory damages]." 15 U.S.C. § 1681n(a)(1)(A). Additionally, a prevailing plaintiff is entitled to recover attorneys' fees and costs. *See* § 1681n(a)(3).

[48] *See* Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 725 (7th Cir. 2016); Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 710 (9th Cir. 2010); Cruper-Weinmann v. Paris Baguette Am., Inc., 2017 U.S. Dist. LEXIS 13660, at *2 (S.D.N.Y. Jan. 30, 2017); Bassett v. ABM Parking Servs., Inc., No. 16-35933, 2018 WL 987954, at *5–6 (9th Cir. Feb. 21, 2018); Noble v. Nevada Checker Cab Corp., No. 16-16573, 2018 WL 1223484, at *2 (9th Cir. Mar. 9, 2018); Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 694 (S.D. Fla. 2009); Kesler v. Ikea U.S., Inc., No. SACV 07-00568-JVS (RNBx), 2008 U.S. Dist. LEXIS 97555, at *3 (C.D. Cal. Feb. 4, 2008).

[49] 255 F.R.D. 693 (S.D. Fla. 2009).

substantial enough to drive defendants into bankruptcy.[50] The economic threat imposed by these lawsuits have caused several courts[51] and scholars[52] to conclude that courts should not grant class certification. Other courts, however, have held that they will not preclude class certification even in instances that resulted in high economic costs for the defendant.[53] As a result, class certification stands at the forefront of the debate on procedural violations.

C. Failure to Disclose Information

Consumers are also entitled to sue when another party does not properly disclose essential information. In *Strubel v. Comenity Bank*,[54] the Second Circuit ruled that a consumer suffers a concrete injury when a creditor does not disclose to the consumer his obligations under the credit agreement.[55] The Court argued that these disclosure requirements aim to ensure that the consumer can use the credit in an informed way, which is one of the main goals of the Truth in Lending Act (TILA).[56] Likewise, the Ninth Circuit in *Syed v. M-I, LLC*,[57] held that 15 U.S.C. § 1681b(b)(2)(A)(ii) of the FCRA[58] seeks to ensure the

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[50] *Id.* at 697 ("On the other hand, Plaintiff seeks potential class damages of between $ 4.6 million to $ 46 million, even though the record reflects that (1) the Defendant's net worth is approximately $ 40,000; and (2) this lawsuit has already achieved FACTA's public policy goal in bringing Plaintiff's receipt system into compliance with federal law.").

[51] *See* Campos v. ChoicePoint, Inc., 237 F.R.D. 478, 490 (N.D. Ga. 2006); *In re* Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 351 (N.D. Ill. 2002). *But see* Ticknor v. Rouse's Enters., LLC, No. 12-1151, 2014 U.S. Dist. LEXIS 61371, at *28 (E.D. La. May 2, 2014); Rowden v. Pac. Parking Sys., 282 F.R.D. 581, 585–86 (C.D. Cal. 2012) (cases where court denied predominance).

[52] *See* Scheuerman, *supra* note 2, at 146–47; Holly S. Hosford, *Avoiding Annihilation: Why Trial Judges Should Refuse to Certify a Class Action for Statutory Damages Where the Recovery for Statutory Damages Would Likely Leave the Defendant Facing Imminent Insolvency*, 81 MISS. L.J. 1941, 1964 (2012).

[53] *See Bateman*, 623 F.3d at 721; Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006); *see also* Stillmock v. Weis Mkts., Inc., 385 F. App'x 267, 275 (4th Cir. 2010); Domonoske v. Bank of Am., N.A., Civil Action No. 5:08cv066, 2010 U.S. Dist. LEXIS 7242, at *47 (W.D. Va. Jan. 27, 2010).

[54] Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016).

[55] *Id.* at 190–91.

[56] *Id.*

[57] 853 F.3d 492 (9th Cir. 2017).

[58] FCRA § 1681b(2)(A) provides the following:

> Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

consumer's ability "to meaningfully authorize the credit check."[59] If a consumer does not receive sufficient information to understand that he is waiving his right to withhold the permission, such a procedural violation constitutes a concrete injury-in-fact.[60]

The same rationale seems to underpin the Eleventh Circuit's decision in *Church v. Accretive Health, Inc.*,[61] holding that when a debt collector fails to make certain required disclosures to a debtor under the Fair Debt Collection Practices Act (FDCPA),[62] the debtor suffers from a concrete injury.[63] In contrast, in *Nicklaw v. Citimortgage, Inc.*,[64] the same Court ruled that if a mortgage holder fails to record the discharge of a mortgage in time, the mortgagor lacks standing.[65] The Court reasoned that even though the relevant statute creates a legal obligation and grants a private right of action, absent any demonstration of harm or risk of harm, the plaintiff does not fulfill the concreteness requirement.[66]

Furthermore, in *Ratner v. Chemical Bank New York Trust Co.*,[67] Judge Frankel denied class certification, arguing that the threat of excessive liability precludes the superiority of class litigation.[68] Several courts since then have adopted this doctrine[69] while others

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> (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
> (ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person . . . .

[59] *See* Syed v. M-I, LLC, 853 F.3d 492, 499 (9th Cir. 2017).
[60] *Id.* at 499–500.
[61] Church v. Accretive Health, Inc., 654 F. App'x 990 (11th Cir. 2016).
[62] 15 U.S.C. §§ 1692e(11), 1692g(a)(1)–(5), 1692k(a) (creating a private right of action).
[63] *See Church*, 654 F. App'x at 995.
[64] Nicklaw v. Citimortgage, Inc., 839 F.3d 998 (11th Cir. 2016); *see also* Hagy v. Demers & Adams, 882 F.3d 616, 623 (6th Cir. 2018).
[65] 839 F.3d at 1003.
[66] *Id.*; *see also* N.Y. REAL PROP. LAW § 275; N.Y. REAL PROP. ACTS. LAW § 1921 (stating that a mortgage holder must file a certificate of discharge with the county clerk to record that the mortgagor satisfies his mortgage within 30 days); Lyshe v. Levy, 854 F.3d 855, 860 (6th Cir. 2017) (embracing the arguments from *Nicklaw*).
[67] Ratner v. Chem. Bank N.Y. Tr. Co., 54 F.R.D. 412 (S.D.N.Y. 1972).
[68] *Id.* at 416.
[69] *See* Parker v. Time Warner Entm't Co., 331 F.3d 13, 27 (2d Cir. 2003) (Newman, J., concurring); Wilcox v. Com. Bank of Kan. City, 474 F.2d 336, 348 (10th Cir. 1973); Katz v. Carte Blanche Corp., 52 F.R.D. 510, 517 (W.D. Pa. 1971) (holding

have granted class certification.[70] Due to this split, the issue of excessive liability deserves more attention.[71]

II. THE STANDING REQUIREMENT FOR PLAINTIFFS ALLEGING PROCEDURAL VIOLATIONS

As the cases discussed above demonstrate, courts may either deny or affirm standing to plaintiffs alleging procedural violations. Since courts will examine standing at the earliest stage of litigation, it provides the initial opportunity for courts to reject the combination of class actions and statutory damages. It consists of three distinct elements: (1) The plaintiff must have suffered an *injury-in-fact* (2) caused by the defendant (*causation*) and (3) it must be likely that a court could redress the injury (*redressability*).[72] The standing doctrine limits access to courts to plaintiffs who are able to satisfy all three elements.

A. The Constitutional Paradigm: Justifications and Foundations of the Standing Doctrine

The standing requirement essentially rests on three different notions. First, it promotes high quality judgments because parties with personal interests at stake usually present more and better arguments than those with no personal interest.[73] Second, by limiting access to courts, judges can focus on important cases instead of those cases encumbered by pedestrian debates.[74]

Finally, standing protects the executive's discretion from judicial interference and thereby preserves the separation of powers.[75] Although these justifications may not seem directly related to each

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that further exploration is required); *see also* John E. Oster, *Class Actions under the Truth-In-Lending Act*, 47 NOTRE DAME L. REV. 1305, 1309–10, 1319 (1972).

[70] *See Parker*, 331 F.3d at 22 (vacating and remanding for further proceedings); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1162, 1162–63 (7th Cir. 1974).

[71] *See infra* Part IV.

[72] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

[73] *See* Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1005–06 n.12 (1924).

[74] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000); *see also* Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3 (2010).

[75] *See Lujan*, 504 U.S. at 577; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881, 894–95 (1983).

other, they are in fact closely intertwined. In order to understand their interconnectedness, it is important to recognize that protecting the executive can harm the legislative branch. However, in the context of statutory damages provisions, the standing doctrine serves to protect defendants and courts against frivolous lawsuits.

1. Preserving Separation of Powers and Enforcement by the Executive

In the past, the U.S. Supreme Court has repeatedly emphasized that the standing doctrine protects the executive's law enforcement discretion from judicial interference.[76] Justice Scalia, in particular, was very concerned that, by allowing citizens to enforce every law through the courts, the judiciary's power would expand to the detriment of the executive.[77] In his view, the standing doctrine works as a means to preserve a sacrosanct area of executive discretion.[78] Consequently, the standing issue relates directly to the fundamental

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[76] *Lujan*, 504 U.S. at 577 ("It would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department,' Massachusetts v. Mellon, (citation omitted), and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.'"). *See also Id.* at 581 (Kennedy, J., concurring). Justice Kennedy opined:

> This requirement [injury-in-fact] is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that 'the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.' (citation omitted). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

[77] *Id.* at 576. Justice Scalia—writing for the majority—explains:

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

[78] *Id.* at 578 (discussing Scalia's acceptance of Congress' power to add "concrete, de facto injuries that were previously inadequate in law"); *see also* Scalia, *supra* note 75, at 894–95.

question of what it means to have proper separation of powers as originally expressed in the Constitution.[79]

Scalia expounded the aforementioned idea in his famous majority opinion in *Lujan v. Defs. Of Wildlife*.[80] In *Lujan*, environmental organizations sued the U.S. Secretaries of Interior and Commerce alleging that they wrongfully changed their interpretation of the scope of the Endangered Species Act.[81] According to the plaintiffs, the duty to protect endangered species promulgated in 16 U.S.C. § 1536(a)(2)[82] was *not* limited to actions taken in the United States or in the high seas.[83] When the case came before the Supreme Court, the question was whether the environmental organizations had standing.[84]

Writing for the majority, Justice Scalia first demonstrated that the standing doctrine emanates from the fundamental principle of separation of powers.[85] He then argued that one must differentiate between a plaintiff alleging his own injury and a plaintiff alleging someone else's injury. In the latter case, the court can neither control nor predict how the injured party might behave.[86] Since the plaintiffs failed to show that they themselves directly suffered from the change of the statutory interpretation, they did not satisfy the injury-in-fact

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[79] *See* Maxwell L. Stearns, *Spokeo, Inc. v. Robins and the Constitutional Foundations of Statutory Standing*, 68 VAND. L. REV. En Banc 221, 241 (2015) ("[C]ase that goes to the heart of our system of governance."); *see* Daniel E. Rauch, *Fractional Standing*, 33 YALE J. ON REG. 281, 284–86 (2016) (for a concise overview over the different justifications of standing doctrine).

[80] *Lujan*, 504 U.S. at 576.

[81] 16 U.S.C. § 1531 *et seq*.

[82] 16 U.S.C. § 1536(a)(2). This section states:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

[83] *Lujan*, 504 U.S. at 558–59.

[84] *Id*. at 559.

[85] *Id*. at. 555, 559–60.

[86] *Id.* at 562 ("The existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict' (citation omitted)").

requirement.[87] Moreover, Scalia explicitly rejected the view that Congress conferred to any person the right to force the Executive to comply with statutorily mandated procedures.[88] Referring to *Marbury v. Madison*,[89] Scalia emphasized that courts only decide upon *individual* rights while decisions regarding the public interest fall within the competence of Congress and the Executive.[90] More specifically, Scalia rejected the idea of a general right to sue, a so-called *actio popularis*, on the premise that granting anyone the right to sue the executive might, at least to some degree, give the right to exercise control over it.[91]

In *Spokeo*, both Justice Alito and Justice Thomas employed Scalia's reasoning from the seminal *Lujan* case.[92] However, at the same time, they emphasized that Congress has the power to establish new injuries in facts and thereby grant standing.[93] In fact, Scalia conceded in *Lujan* that Congress possesses this power.[94] Against this background, Scalia's call for judicial restraint[95] seems inconsistent.

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[87] *Id.* at 562–67.

[88] *Id*. at 573.

[89] Marbury v. Madison, 5 U.S. 137 (1803).

[90] *Lujan*, 504 U.S. at 576. The Court writes:

> "The province of the court," as Chief Justice Marshall said in Marbury v. Madison, (citation omitted) "is, solely, to decide on the rights of individuals." Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.

[91] *Id.* at 577.

[92] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) ("[t]he law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches, Clapper v. Amnesty Int'l USA, 568 U.S. 133 (2013)."); *Spokeo*, 136 S. Ct. at 1552–53 (Thomas, J., concurring) ("And by limiting Congress' ability to delegate law enforcement authority to private plaintiffs and the courts, standing doctrine preserves executive discretion."); *see also Lujan*, 504 U.S. at 576–77.

[93] *See Spokeo*, at 1549 ("[T]hus, we said in *Lujan* that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'") (citing *Lujan*, 504 U.S. at 578); *see also* Fed. Election Comm'n v. Akins, 524 U.S. 11, 20 (1998); Warth v. Seldin, 422 U.S. 490, 500 (1975) ("[T]he actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)); *Linda R.S.*, 410 U.S. at n.3 ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

[94] *See Lujan*, 504 U.S. at 578.

[95] *Id.*; Scalia, *supra* note 75, at 895.

Furthermore, Scalia's view seems to account only for an incomplete picture of paradigm; thereby, rending it misleading. If the courts refuse to enforce the law, Congress is limited in its ability to monitor the executive branch.[96] Without judicial review, Congress would have to rely blindly on the executive enforcement of the law. If Congress became unsatisfied with executive legal enforcement, it would have no recourse to change this unsatisfying situation.[97] If, in contrast, Congress were to grant standing to citizens to sue in courts, congressional laws would be applied and ultimately enforced.[98] This result entails no negative consequences, as discussed by Justice Blackmum's dissenting opinion in *Lujan*: allowing Congress to confer statutory rights and let courts enforce them strengthens the system.[99]

The private citizen enforcement of statutes ensures that the law does not merely stay in the books but also becomes real, allowing consumers to protect themselves.[100] The only challenge for the executive is to accept that courts also have the power to define legal terms and limit the scope of statutes and powers. All branches must work together when dealing with intricate legal questions, and to a certain extent, they must accept each other's decisions. However, this is not an extraordinary proposition. On the contrary, courts and the executive branch have different perspectives on the law all the time, yet these bodies continue to cohesively work together.[101]

2. Protecting the Judiciary Against Abusive Lawsuits

While at a first glance the decisions of *Lujan* and *Spokeo* appear to be motivated by the desire to protect the executive branch, it is actually the *Judiciary* that the Supreme Court is trying to protect. These decisions seem to be motivated by a desire to ensure that courts have administrable caseloads; thus, a statute that grants everyone standing, with very limited restrictions on the party's ability to establish the standing element, would open the floodgates to litigation,

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[96] *See* Stearns, *supra* note 79, at 225.
[97] *Id.* (criticizing courts for ignoring this aspect and overstating protection against judicial interference).
[98] *See Lujan*, 504 U.S. at 602 (Blackmun, J., dissenting).
[99] *Id.* at 603–04.
[100] Lexi Rubow, *Standing in the Way of Privacy Protections: The Argument for Relaxed Article III Standing Requirement for Constitutional and Statutory Causes of Action*, 29 BERKELEY TECH. L.J. 1007, 1026 (2014).
[101] Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1305–06 (2008).

so that courts would face an extremely high number of cases.[102] Simultaneously, the lack of meaningful restrictions might incentivize plaintiffs to file frivolous lawsuits as a means of extracting settlements. Thus, legal institutions must implement a sieve to prevent an *actio popularis* and demarcate abusive lawsuits.[103]

Justice Alito's opinion in *Spokeo* can be read entirely in light of this sieve metaphor; he acknowledges Congress' power to define new socially desirable interests and new types of injuries, which grant affected parties the necessary standing to bring suit.[104] Similarly, Justice Alito wants to ensure that plaintiffs do not simply use a "bare procedural violation, divorced from any concrete harm"[105] as a means of achieving standing to file a lawsuit in federal court. Justice Alito aims to immunize the courts against claims for which a legitimate legal interest cannot be identified.

By combining a class action with statutory damages, the plaintiff can exert immense pressure on the other party.[106] If every bare procedural violation automatically constituted an injury-in-fact, plaintiffs could easily use the combined leverage of class actions[107] and statutory damages to force defendants to settle for large sums of money without having a legitimate interest justifying the settlement.[108] Subjecting the judicial system to such frivolous claims would transform the judiciary into an involuntary accessory in the hands of ruthless plaintiffs. Thus, failing to implement significant safeguards

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[102] *See, e.g.*, *Lujan*, 504 U.S. at 576–77; Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 912 (7th Cir. 2017) ("[T]he standing rule reduces the workload of the federal judiciary . . . . ").

[103] Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982). The Court writes:

> Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary. But the 'cases and controversies' language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

[104] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (referencing *Lujan*, 504 U.S. at 578).

[105] *Spokeo*, 136 S. Ct. at 1549.

[106] *See* Scheuerman, *supra* note 2, at 110 (pointing out that plaintiffs are highly incentivized to sue).

[107] *See* Lewis v. Casey, 518 U.S. 343, 357 (1996) (citations omitted) (internal quotation marks omitted) (finding that in class actions, only the lead plaintiff has to show standing); *see also* Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015).

[108] Scheuerman, *supra* note 2, at 110.

against frivolous lawsuits enhances the risk of abuse that the judiciary branch strives to minimize.[109]

3. Distinguishing Between Private and Public Rights

The idea of separation of powers also appears prominently in Justice Thomas' distinction between private and public rights in *Spokeo*. While the violation of a *private* right qualifies as a concrete injury-in-fact, a plaintiff invoking a *public* right must show an injury that lies behind the pure violation of the statute.[110] In his concurring opinion, Justice Thomas defined public rights as those "rights that involve duties owed to the whole community,"[111] which includes "general compliance with regulatory law."[112] According to Justice Thomas, while the enforcement of private rights usually does not interfere with other branches, it does interfere when public rights are at stake. To preserve the discretion of the executive, courts should use the standing doctrine to disallow lawsuits that only involve general policy questions.[113]

Justice Thomas seemed to fear that a broad public statute that grants standing to a vast group of people will inevitably result in an *actio popularis*, which the judiciary is ill-equipped to handle.[114] In contrast, private rights usually are related to one specific individual or entity. Consequently, if a private right of a particular person is violated, he can then bring a lawsuit. Therefore, private rights do not carry the risk of people invoking them without their interests being violated in any significant way.[115]

Notably and correctly, Justice Thomas adopted a flexible approach to determine whether a right is public or private: even if a statute is regulatory and thereby public on its face, it can create a

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[109] *Id.* at 111–15.
[110] *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring). For a lengthy discussion *see* William S. C. Goldstein, *Standing, Legal Injury without Harm and the Public/Private Divide*, 92 N. Y. U. L. Rev. 1571 (2017).
[111] 136 S. Ct. at 1551 (internal quotations omitted).
[112] *Id.* at 1551 (citing Ann Woolhander & Caleb Nelson, *Does History Defeat Standing?*, 102 MICH. L. REV. 689, 693 (2004)).
[113] *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring).
[114] *Id.* at 1552 ("[S]tanding doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of government action.").
[115] *Id.* at 1553 ("But where one private party has alleged that another private party violated his private rights, there is generally no danger that the private party's suit is an impermissible attempt to police the activity of the political branches . . . .").

private right if specifically invaded, which would then easily satisfy the injury-in-fact requirement. For example, in considering 15 U.S.C. § 1681e(b) of the FCRA, Justice Thomas pointed out that the provision might be aimed at protecting the information of the individual consumer and, in that way, a private right would be at stake.[116] This approach preserves Congress' power to decide whether a statute shall be enforced by the executive branch exclusively or also by private attorney generals in the courts.

B. Defining the Injury-in-Fact

Accepting the standing doctrine as a constitutionally permissible sieve to distinguish among meritorious and frivolous lawsuits poses the question of how fine such a sieve should be. As *Spokeo* makes clear, its first and most important element, the *injury-in-fact* requirement, consists of two elements: (1) the alleged harm must be both "concrete and particularized" and (2) "actual or imminent, not conjectural or hypothetical."[117] While the particularization requirement can be easily determined,[118] the concreteness requirement poses a superior challenge. Hence, the decisive question is whether an injury is concrete or not.[119]

Spokeo provides the following roadmap[120] for courts to find the answer: if the injury is tangible, courts can easily affirm a concrete injury-in-fact.[121] If, in contrast, the injury is intangible, a court must first examine whether it has a "close relationship to a harm that has traditionally"[122] been acknowledged in common law suits. Second, it has to then analyze Congress' judgment when passing the statute.[123] Finally, it can assess whether a material risk of real harm is a

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[116] *Id.*

[117] *Id.* at 1548 (citing Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted)).

[118] *See Lujan*, 504 U.S. at 560 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."); *Spokeo*, 136 S. Ct. at 1548; *see also* Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014) (arguing that Mr. Robins himself is affected by the dissemination of false information about him).

[119] Note, *Justiciability—Class Action Standing—Spokeo, Inc. v. Robins*, 130 HARV. L. REV. 437, 445 (2016).

[120] *See generally* Craig Konnoth & Seth Kreimer, *Spelling Out Spokeo*, 165 U. PA. L. REV. Online 47, 62 (2016) (for a good overview whether an injury is concrete and particularized).

[121] *Spokeo*, 136 S. Ct. at 1549 ("Although tangible injuries are perhaps easier to recognize . . . .").

[122] *Id.*

[123] *Id.*

sufficiently concrete injury-in-fact.[124] In both scenarios, a plaintiff must ascertain a legally cognizable interest[125] before a court can address the issue of whether a concrete violation has occurred.[126]

1. Identifying a Legally Cognizable Interest

The challenge of defining legally cognizable interests is anything but new. Almost twenty years ago, William A. Fletcher expounded that, despite its wording, determining the "injury-in-fact" is a normative question.[127] Out of all the interests people have, one must select those that deserve judicial protection in case they are violated.[128] As long as one of those elevated interests is not violated, there is no injury-in-fact.

According to *Spokeo*, the mere existence of a statutory right does not automatically create a legally cognizable interest of a person. Thus, if the plaintiff relies on a procedural violation, he must demonstrate that this procedural violation protects a *concrete interest*.[129] In *Spokeo*, all Justices refered to the various different provisions of the FCRA,[130] yet none of them explain which interest each provision aims to protect.[131] Instead, Justice Alito briefly

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[124] Justice Alito first uses the term "risk of real harm", but later refers to a "material risk of harm." *Id.* at 1549, 1550.

[125] *See Lujan*, 504 U.S. at 578 ("legally cognizable injuries"); *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) (mentioning a "privately held right"); *see also* Hagy v. Demers & Adams, 882 F.3d 616, 623 (6th Cir. 2018); Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 346 (4th Cir. 2017) (referring to interest not protected by FCRA); *Robins*, 867 F.3d at 1113–14 (mentioning legally protected interests); Patricia W. Hatamyar Moore, *Spokeo, Inc. v. Robins: The Illusory "No-Injury Class" Reaches the Supreme Court*, 2 ST. THOMAS J. OF COMPLEX LITIG. 1, 26 (2016) (positing the difference between injury and harm).

[126] *See* Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016); *see also* Bassett v. ABM Parking Servs., Inc., No. 16-35933, 2018 WL 987954, at *3-4 (9th Cir. Feb. 21, 2018); *Robins*, 867 F.3d at 1113. This requires careful statutory interpretation *see Buhai*, *supra* 9, at 550 f.

[127] *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231 (1988).

[128] *Id.* at 232.

[129] *Spokeo*, 136 S. Ct. at 1549 (citing Summers v. Earth Island Inst., 555 U.S. 488, 496–97 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Art. III standing.")).

[130] *See Spokeo*, 136 S. Ct. at 1550 ("A violation of one of the FCRA's procedural requirements may result in no harm."); *Id.* at 1553 (Thomas, J., concurring) ("The Fair Credit Reporting Act creates a series of regulatory duties."); *Id.* at 1556 (Ginsburg, J., dissenting) ("The FCRA's procedural requirements aimed to prevent such harm.").

[131] *Id.* at 1550, 1553, 1556.

mentioned Congress' goal to "curb the dissemination of false information" about consumers before he stresses that not all inaccurate information harms consumers.[132] Since the Supreme Court vacated and remanded the case, one can infer that it does not *per se* deny that the FCRA protects a legally cognizable interest.[133] Thus, the holding in *Spokeo* requires us to carefully examine the respective statute to identify a legally cognizable interest.[134]

a. Fundamental Rights of Privacy and Autonomy

In *In re Horizon Healthcare Services Inc. Data Breach Litigation*,[135] the Third Circuit Court ruled that the legally cognizable interest protected by the procedural rule of 15 U.S.C. § 1681(b) of the FCRA[136] is an interest comparable with a privacy right.[137] The court argued that since the FCRA requires authorization by a consumer, it protects the consumer's autonomy in deciding whether information should be disseminated.[138] If a third party gets access to the information without the necessary authorization,[139] the credit agency fails to meet its obligation to protect this autonomy.[140] In a way, the agency acts as a guardian of the consumer information. The Ninth

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[132] *Id.* at 1550.

[133] *Id.* at 1554 (Thomas, J., concurring) ("If Congress has created a private duty owed personally to Robins to protect his information, then the violation of the legal duty suffices for Article III injury-in-fact.").

[134] *Id.*

[135] *In re* Horizon, 846 F.3d at 639-40.

[136] 15 U.S.C. § 1681(b) (stating intent of chapter to require reasonable procedures to keep sensitive information confidential).

[137] *See In re Horizon*, 846 F.3d at 639; *see also* Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017) (TCPA claim).

[138] *See In re Horizon*, 846 F.3d at 639. The court writes:

> And since the "intangible harm" that FCRA seeks to remedy "has a close relationship to a harm [i.e. invasion of privacy] that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," (citation omitted), we have no trouble concluding that Congress properly defined an injury that "give[s] rise to a case or controversy where none existed before."

(quoting Spokeo, Inc. v. Robbins, 136 S. Ct. 1540, 1549 (2016)).

[139] The Court cites 15 U.S.C. §§ 1681a(d)(3) and 1681b(g)(1) to show that an agency cannot share medical information (which is stolen here) easily. *See In re Horizon,* 846 F.3d at 631 n.7.

[140] *In re Horizon*, 846 F.3d at 636 (referring to *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 274 (3d Cir. 2016)).

Circuit explicitly refers to this argument in its second *Spokeo* decision.[141]

The argument of consumer autonomy also appears prominently in cases in which a consumer did not receive essential information about a waiver or a contractual obligation. In *Syed v. M-I, LLC*,[142] the Ninth Circuit explained that the FCRA wants to ensure the consumer's ability "to meaningfully authorize the credit check."[143] For instance, if a consumer does not receive enough information to understand that he waives his right to withhold his permission, a concrete injury-in-fact has been imposed upon the consumer in question.[144] Thus, *Syed* does not merely stand for the proposition that the authorization requirement aims to protect consumer autonomy. It also suggests that to waive the authorization requirement effectively, the consumer must have received all the necessary information related to it. *Strubel v. Comenity Bank*[145] extends this rationale to contractual obligations: a consumer must be informed about his own contractual obligations to avoid the "uninformed use of credit."[146]

These cases prove that courts in fact apply Fletcher's idea of standing as a normative question.[147] They look at the substantive law to identify a legally cognizable interest.[148] This approach deserves support since it preserves Congress' power to define new rights and strengthens the protection of citizens by the courts.[149] Of course there is one caveat: courts must not simply assume that a legally cognizable interest, such as a privacy interest, exists. Instead, they have to look closely at the statute and Congress' intention when passing it.[150] When passing statutes that grant new rights, Congress must "identify the injury it seeks to vindicate and relate it to the class of people entitled to bring suit."[151] Since an injury always requires the existence of an interest, Congress must also specify which legally cognizable interest

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[141] *See* Robins v. Spokeo, Inc., 867 F.3d 1108, 1114 (9th Cir. 2017).
[142] *Syed*, 853 F.3d 492.
[143] *Id.* at 499 (the procedural rule is the authorization requirement of FRCA at 15 U.S.C. § 1681b(2)(A)(ii)).
[144] *Id*. at 499–500.
[145] Strubel v. Comenity Bank, 842 F.3d 181, 189–95 (2d Cir. 2016).
[146] *Id.* at 190.
[147] Fletcher, *supra* note 127, at 231-32.
[148] Howard M. Wasserman, *Fletcherian Standing, Merits, and Spokeo, Inc. v. Robins*, 68 VAND. L. REV. EN BANC 257, 268 (2015).
[149] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 604–05 (1992) (Blackmun, J., dissenting).
[150] Buhai, *supra* note 9, at 542, 551.
[151] *Id.* at 580 (Kennedy, J., concurring).

it aims to protect. Data breach cases easily meet these requirements: all persons whose data have been accessed form a clearly identifiable group and the protected interest is the protection of consumers against the misuse of their private information.[152]

b. Dissemination of False Information as Example

As *Spokeo* illustrates, finding a legally cognizable interest in cases where false information has been disseminated is challenging.[153] Notably, Mr. Robins did not allege that the reporting agency neglected the exclusivity of his information. On the contrary, the agency was allowed to disclose information to third-parties in compliance with 15 U.S.C. § 1681b(a) of the FCRA. Nevertheless, the idea of consumer autonomy also applies with full force in *Spokeo*. The reason is that the reporting agency is allowed to furnish a consumer report either if the consumer approves it by written instructions pursuant to § 1681b(a)(2) or in cases when the State or a private individual can demonstrate a credible interest in the report in accordance to §§ 1681b(a)(1), (3)–(6). Thus, in practice the statute treats consumer authorization and third-party interests as equal justifications for a disclosure of the consumer's information.

However, if a consumer authorization is not always required, then the consumer is denied a means of deciding who gets his personal information. The accuracy requirement of 15 U.S.C. § 1681e(b) provides the necessary compensation: if the consumer cannot avoid a disclosure, the disclosed information shall at least be accurate. In this way, the consumer is not worse off than if he had disclosed the information himself. In other words, the accuracy requirement at least ensures that persons who receive the information without justification do not get a wrong impression and make wrong decisions at the expense of the consumer.

Consequently, the accuracy requirement can be regarded as a functional substitute for the authorization requirement. Since the authorization requirement protects the autonomy and privacy of the consumer, it follows that the same must be true for the accuracy requirement. Additionally, the consumer needs this kind of protection since the reporting agency is not required to extensively examine the person demanding a consumer report. In this way, the consumer is not protected against the "illicit or abusive use of information" provided

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[152] *See* Steinman, *supra* note 3, at 249; Wasserman, *supra* note 148, at 268–70.

[153] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1555–56 (2016) (Ginsburg, J., dissenting).

to third-parties from the reporting agency.[154] Given how widespread consumer reports are, inaccuracies pose a huge threat to the autonomy of consumers.[155] Thus, consumer autonomy[156] is the legally cognizable interest of the FRCA.[157]

2. Assessing the Concrete Injury of the Protected Interest

Once a legally cognizable interest that is protected by a statute has been identified, the next step is to examine whether the procedural violation results in a concrete, tangible or intangible injury to this interest.[158] As the U.S. Supreme Court rightly emphasized in *Spokeo*, not every violation of a statute automatically "cause[s] harm or present[s] any material risk of harm."[159] In the majority of cases, the challenge is to define when a procedural violation crosses the threshold of representing a harm or a material risk of harm. This article suggests a two-step process. First courts should ask whether the alleged harm or risk of harm could have *ever* occurred. Secondly, if the answer to step one is affirmative, then courts should apply a Probability Magnitude Test.

a. First Step: Determining Whether an Injury Ever Occurred

A plaintiff lacks a concrete injury-in-fact if the court concludes that the alleged violation did not have any detrimental effect to the statutorily protected interest of the plaintiff in general or under the specific circumstances of the case.[160] This is determined by a two-prong test.[161] A court must first ask whether the flawed procedure or

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[154] Henry v. Forbes, 433 F. Supp. 5, 10 (D. Minn. 1976).

[155] *See Robins*, 867 F.3d at 1114 ("The threat to a consumer's livelihood is caused by the very existence of inaccurate information in his credit report and the likelihood that such information will be important to one of the many entities who make use of such reports.").

[156] *See* George Ashenmacher, *Indignity: Redefining the Harm Caused by Data Breaches*, 51 WAKE FOREST L. REV. 1, 8 (2016).

[157] *See* Steinman, *supra* note 3 (citing several precedents affirming an injury-in-fact).

[158] *Spokeo*, 136 S. Ct. at 1549.

[159] *Id.* at 1550. Harm and injury are not the same, *see* Moore, *supra* note 15, at 26, but one can use both terms interchangeably, if one defines harm as a violation of a legally protected interest whose violation gives rise to a legal action, as it is suggested in this article.

[160] *See* Crupar-Weinmann v. Paris Baguette Am., Inc., No. 14-3709, 2017 U.S. Dist. LEXIS 13660, at *8, *10 (S.D.N.Y. Jan. 30, 2017), *aff'd* Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76, 81 (2d Cir. 2017).

[161] Such a test has also been applied in Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 726 (7th Cir. 2016) and Braitberg v. Charter Commc'ns, Inc., 836 F.3d

false information could adversely affect the legally protected interest of the plaintiff at all.[162] If the court answers inquiry in the affirmative, it must then ask whether this effect could still not occur without the specific facts of the case. If the court affirms this second inquiry, it must deny standing.

This approach applies to every alleged harm and risk of harm, regardless of whether the plaintiff claims that the harm or risk has already occurred or will occur. It allows courts to sort out cases that lack a substantial interference with the plaintiff's protected interest.[163] Therefore, plaintiffs are required to present sufficient and factual evidence that a harm or risk of harm might have occurred. This approach consequently can lower the bar for a motion to dismiss.[164]

b. Second Step: Evaluating Risks of Harm

In the remaining cases it is not yet clear what the exact consequences of a procedural violation are. For instance, in *Reilly v. Ceridian Corp.*,[165] *Beck v. McDonald*[166] and *Khan v. Children's Nat'l Health Sys.*,[167] data breaches occurred, but it was uncertain whether the breaches would ever materialize to identity thefts.[168] Similarly, in *Spokeo*, false information was disseminated but there was no proof that a third party had ever accessed and exploited the information.[169] In these cases, consumers can only argue that a risk of injury exists or existed in the past. A court then must decide whether the alleged risk

925, 929 (8th Cir. 2016). *See also* Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 343 (4th Cir. 2017); Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 514 (D.C. Cir. 2016).

[162] It can be argued that this test asks whether the probability of an injury is zero and therefore is part of the Probability Magnitude Test suggested below. *See Meyers*, 843 F.3d at 726.

[163] *Meyers*, 843 F.3d at 727 (explaining that this happened to the FACTA claim); s*ee also* Noble v. Nev. Checker Cab Corp., No. 16-16573, 2018 WL 1223484, at *2 (9th Cir. Mar. 9, 2018); Bassett v. ABM Parking Servs., Inc., No. 16-35933, 2018 WL 987954, at *5‑6 (9th Cir. Feb. 21, 2018); *Dreher*, 856 F.3d at 345–46; Nicklaw v. Citimortgage, Inc., 839 F.3d 998, 1003 (11th Cir. 2016).

[164] *See* Katz v. Donna Karan Co. Store, No. 15-464, 2017 U.S. App. LEXIS 18086, at *16 (2d Cir. Sept. 19, 2017); *see also* J. Patrick Redmon, *Plausibly Willful – Tightening Pleading Standards in FACTA Credit Card Receipt Litigation Where Only an Expiration Date Is Present*, 94 N.C. L. REV. 1314, 1316 (2016).

[165] *Reilley*, 664 F.3d 38 (W.D.N.Y. 2018).

[166] *Beck*, 848 F.3d 262 (4th Cir. 2017).

[167] Khan v. Children's Nat'l Health Sys., 188 F. Supp. 3d 524 (D. Md. 2016).

[168] *See Reilly*, 664 F.3d at 42; *Beck*, 848 F.3d at 274; *Khan*, 188 F.Supp.3d at 532; *see also* Storm v. Paytime, Inc., 90 F.Supp.3d 359, 363, 366 (M.D. Pa. 2015).

[169] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546 (2016).

equals the occurrence of the injury itself, thus constituting a concrete injury.[170]

Although the Supreme Court in *Spokeo* declared that a "material risk of harm"[171] can constitute a concrete injury,[172] it provided little guidance on how to make this difficult projection. Justice Alito referred to the Court's decision in *Clapper v. Amnesty International USA*,[173] to establish that a speculative allegation is not enough to satisfy the concreteness requirement.[174] In *Clapper*, the plaintiffs, employees of Amnesty International USA and other human rights organizations, communicated regularly with individuals living outside of the United States.[175] According to the plaintiffs, their contacts might have been subject to surveillance by the Attorney General and the Director of National Intelligence pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1881a).[176]

In this way, the U.S. government could receive sensitive information about the human rights activists themselves.[177] The plaintiffs alleged that "an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future"[178] is sufficient to prove injury-in-fact. Writing for the majority, Justice Alito held that the plaintiffs did not suffer a concrete injury because they could only make assumptions about the government's

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[170] *See Beck*, 848 F.3d at 274–75; *Reilly*, 664 F.3d at 42; *Khan*, 188 F. Supp. at 532; *see also* Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76, 81–82 (2d Cir. 2017); Strubel v. Comenity Bank, 842 F.3d 181, 189–95 (2d Cir. 2016).

[171] *Spokeo*, 136 S. Ct. at 1549–50 (Justice Alito first uses the term "risk of real harm" and later "material risk of harm.").

[172] *Id.* at 1549. Justice Ginsburg only dissents with regard to the specific facts of the case, but not with regard to the abstract rules. *Id.* at 1555 (Ginsburg, J., dissenting) ("I part ways with the Court, however, on the necessity of a remand to determine whether Robins' particularized injury was "concrete.").

[173] Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

[174] *See Spokeo*, 136 S. Ct. at 1543–44 ("Article III standing requires a concrete injury even in the context of a statutory violation. This does not mean, however, that the risk of real harm cannot satisfy that requirement."); *see, e.g.*, *Clapper*, 568 U.S. at 401–02.

[175] *Clapper*, 568 U.S. at 401–02.

[176] *Id.* at 401-03.

[177] *Id.* at 407 ("[R]espondents filed this action seeking (1) a declaration that § 1881a, on its face, violates the Fourth Amendment, the First Amendment, Article III, and separation-of-powers principles . . . .").

[178] *Id.* at 401.

surveillance practice[179] and the decisions of others involved.[180] However, numerous courts[181] and scholars[182] have observed that the unique facts of *Clapper* make it difficult to extract a general rule from the holding of the case.

Finally, there is an underlying policy conflict. Granting standing for material risks of harm functions as an effective safety valve as it incentivizes companies to invest in precautionary measures to protect the interests of millions of people.[183] On the other hand, the prospect of combining statutory damages and class certification based only on a heightened risk increases the possibility that plaintiffs will exploit defendants.[184]

c. Proposed Solutions to Deal with Risks of Harm

Some scholars call for a comprehensive regulation of privacy rights by Congress to solve the standing issues presented by this area of law.[185] As desirable as such a regulation might be, it is unlikely that Congress will be able to pass such legislation in the near future. One therefore must find a solution *de lege lata*.[186] In this context, the different theories suggested mark a spectrum of possible solutions:

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[179] *Id.* at 410-11.
[180] *Id.* at 413-14.
[181] Attias v. Carefirst, Inc., 865 F.3d 620, 628 (D.C. Cir. 2017); Beck v. McDonald, 848 F.3d 262, 272 (4th Cir. 2017); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 694 (7th Cir. 2015) ("Clapper was addressing speculative harm based on something that may not even have happened to some or all of the plaintiffs."); *In re* Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014).
[182] Ariel Emmanuel, *Standing in the Aftermath of a Data Breach*, 4 J.L. & CYBER WARFARE 150, 178 (2015); Thomas Martecchini, *A Day in Court for Data Breach Plaintiffs: Preserving Standing Based on Increased Risk of Identity Theft After Clapper v. Amnesty International USA*, 114 MICH. L. REV. 1471, 1486 (2016). For a discussion of Clapper's implications, *see* Nicolas Greene, *Standing in the Future: The Case for a Substantial Risk Theory of "Injury in Fact" in Consumer Data Breach Class Actions*, 58 B.C. L. REV. 287, 305 (2017).
[183] Davis v. Werne, 673 F.2d 866, 869 (5th Cir. 1995); Dryden v. Lou Budke's Arrow Fin. Co., 630 F.2d 641, 647 (8th Cir. 1980).
[184] *See* Joan Steinman, *Spokeo, Where Shalt Thou Stand?*, 68 VAND. L. REV. EN BANC 243, 252 (2015); *see also* Reilly v. Ceridian Corp., 664 F.3d 38, 46 (3d Cir. 2011).
[185] *See, e.g.*, Patrick J. Lorio, *Access Denied: Data Breach Litigation, Article III Standing, and a Proposed Statutory Solution*, 51 COLUM. J. L. & SOC. PROBS. 79, 112 (2017); Patricia Cave, *Giving Consumers a Leg to Stand On: Finding Plaintiffs a Legislative Solution to the Barrier from Federal Courts in Data Security Breach Suits*, 62 CATHOLIC U. L. REV. 765, 769 (2013).
[186] De lege late means under current law.

One can treat every data breach as a present invasion of an interest and affirm a concrete injury regardless of the probability that identity theft occurs.[187] One can also demand that actual identity theft be required to meet the concreteness requirement[188] or choose a conciliatory solution by requiring a material or substantial risk of harm.

A conciliatory solution deserves support not only because it appears in numerous court decisions,[189] but also because scholars have explained its benefits.[190] It also finds the right balance between the interests of all parties involved. It avoids unnecessary litigation: if every data breach or dissemination of false information in itself represented a concrete injury, then courts would be confronted with considerably more lawsuits.[191] Of course, the data breach or the misinformation adversely affects the autonomy of the consumer since the consumer does not know what is happening to his data. But this does not automatically render every contact with an interest a concrete injury.

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[187] *See In re* Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 639 (3d Cir. 2017) (arguing this approach consequently denies the need to look into the future); Daniel Bugni, *Standing Together: An Analysis of the Injury Requirement in Data Breach Class Actions*, 52 GONZ. L. REV. 59, 87–88 (2016-2017); Michael B. Jones, *Uncertain Standing: Normative Applications of Standing Doctrine Produce Unpredictable Jurisdictional Bars to Common Law Data Breach Claims*, 95 N.C.L. REV. 201, 204 (2016); Clara Kim, *Granting Standing in Data Breach Cases: The Seventh Circuit Paves the Way Towards a solution to the Increasingly Pervasive Data Breach Problem*, 1 COLUM. BUS. L. REV. 544, 588–89 (2016).

[188] *See* Thomas Martecchini, *A Day in Court for Data Breach Plaintiffs: Preserving Standing Based on Increased Risk of Identity Theft After Clapper v. Amnesty International USA*, 114 MICH. L. REV. 1471, 1493 (2016).

[189] *See* Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688, 692 (7th Cir. 2015); Krottner v. Starbuck Corp., 628 F.3d 1139, 1140 (9th Cir. 2010); Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 640 (7th Cir. 2007); Corona v. Sony Pictures Entm't, Inc., No. 14-CV-09600 RGK (Ex), 2015 U.S. Dist. LEXIS 85865, at *9 (C.D. Cal. June 15, 2015).

[190] *See* Julie E. Cohen, *Information Privacy Litigation as Bellwether for Institutional Change*, 66 DEPAUL L. REV. 535, 545–50 (2017); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 65-73 (2013); Michael B. Jones, *Uncertain Standing: Normative Applications of Standing Doctrine Produce Unpredictable Jurisdictional Bars to Common Law Data Breach Claims*, 95 N.C. L. REV. 201, 203 (2016); Adam Lamparello, *Online Data Breaches, Standing, and the Third Party Doctrine*, 2015 CARDOZO L. REV. DE NOVO 119, 121 (2015); Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1306 (2013); Daniel E. Rauch, *Fractional Standing*, 33 YALE J. ON REG. 281, 290 (2016).

[191] *See* Heather Elliot, *Balancing as Well as Separating Power: Congress's Authority to Recognize New Legal Rights*, 68 VAND. L. REV. EN BANC 181, 191–92 (2015).

Instead, courts can establish a *de minimis* limit to protect themselves against lawsuits that do not yet show any adverse effects. Even though a risk evaluation is never easy and must be employed thoroughly, courts ordinarily engage in these type of analysis when they decide on bail and preliminary injunction matters.[192] It is therefore not uncommon for courts to deal with situations of uncertainty.

d. Using a Probability Magnitude Test

The decisive question becomes a procedural one: how can the courts be equipped with the means to make sound evaluations? Andrew Hessick[193] and Jonathan Remy Nash[194] have advocated a Probability Magnitude Test where the material risk of harm shall be determined by both the probability and the magnitude of the future harm identified by the plaintiff.[195] If the expected value of the risk of harm equals the value of an actual harm that meets the concreteness requirement, courts should find a concrete injury for the future harm as well.[196] If the actual harm is too low to grant standing, the material risk should be treated the same thus representing the *de minimis* limit aimed at protecting courts against frivolous lawsuits.[197]

This approach serves to eliminate judicial inconsistency. When courts exclusively focus on the probability of a risk and ignore its magnitude, trivial harms regularly pass the concreteness test. In contrast, severe injuries with a low probability are treated as insignificant, even though the expected value of both scenarios can be the same.[198] However, Hessick and Nash do not elaborate on which factors a court should base its analysis of the probability and magnitude of the future harm.[199]

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[192] *See* Nash, *supra* note 190, at 1316-17.
[193] *See* Hessick, *supra* note 190, at 92-93.
[194] *See* Nash, *supra* note 190, at 1306.
[195] *Id.* ("In deciding whether there is an 'injury in fact', the court should decide whether the plaintiff has identified a harm with a positive expected value. The expected value is calculated by multiplying the magnitude of the harm by its probability. If a positive expected value would be sufficient to support standing were it to arise as a typical 'actual harm,' then the expected value should be deemed to support standing.").
[196] *Id.*
[197] *Id.* at 1309.
[198] *See* Hessick, *supra* note 190, at 66–67.
[199] Presumably, this is one of the reasons why courts have not used this approach regularly.

Considering the *magnitude* of the future harm present in cases of data breaches, the sensitivity of the information is by far the most important factor.[200] Information about one's medical state or credit card is highly sensitive. Also, the extent of exposure plays an important role; the more sensitive the information that has been compromised, the higher the potential damage.[201] In contrast, for example, the dissemination of a false zip code by itself, does not have the same severe consequences.[202] Nevertheless, as Justice Ginsburg argued in her *Spokeo* dissent, if dissemination of false information about a person's education, family status, and economic situation occurs, it can perpetrate a harmful impression resulting in fewer opportunities for employment.[203] In contrast, Justice Alito did not elaborate on the impact or magnitude of dissemination of this sort of false information. The disagreement between these two justices illustrates the challenges that courts face when evaluating scenarios involving future harm.

To eliminate the inconsistencies, courts should evaluate how sensitive the information is and what impact, notwithstanding how remote, its misuse can have on the consumer.[204] The sensitivity of information is positively correlated with emotional distress.[205] Consequently, courts can inquire into whether a reasonable consumer would be emotionally distressed if the unauthorized information is disclosed to third parties. In other words, the degree of emotional distress indicates the sensitivity and ultimately the magnitude of the respective information.

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[200] *See* Attias v. Carefirst, Inc., 865 F.3d 620, 628 (D.C. Cir. 2017); Corona v. Sony Pictures Entm't, Inc., No. 14-CV-09600 RGK (Ex), 2015 U.S. Dist. LEXIS 85865, at *9 (C.D. Cal. June 15, 2015); Kim, *supra* note 169, at 582.

[201] *See Corona*, No. 14-CV-09600 RGK (Ex), at *9.

[202] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016); *see also* Robins v. Spokeo, Inc., 867 F.3d 1108, 1117 n.4 (9th Cir. 2017) ("We caution that our conclusion on Robins's allegations does not mean that every inaccuracy in these categories of information (age, marital status, economic standing, etc.) will necessarily establish concrete injury under FCRA. There may be times that a violation leads to a seemingly trivial inaccuracy in such information (for example, misreporting a person's age by a day or a person's wealth by a dollar).").

[203] 136 S. Ct. at 1556 (Ginsburg, J., dissenting). The Ninth Circuit Court uses exactly the same argument in Robins v. Spokeo, Inc., 867 F.3d 1108, 1117 (9th Cir. 2017).

[204] *See Corona*, No. 14-CV-09600 RGK (Ex), at *9–10.

[205] *See* Reilly v. Ceridian Corp., 664 F.3d 38, 44–5 (3d Cir. 2011). Plaintiffs often claim that emotional distress constitutes a harm, but courts reject this argument. *See, e.g.*, Anderson v. Hannaford Bros. Co., 659 F.3d 151, 158 (1st Cir. 2011).

With regard to the *probability* of the future harm, courts must also examine a number of factors. In the data breach case of *Reilly,*[206] the Third Circuit based its probability analysis on the following factors: (1) the hacker accessing and understanding the information; (2) his intention to misuse the information; and (3) his ability to make unauthorized transactions.[207] The general inquiry at stake is whether someone received, or could receive, the information at all.[208]

As Judge Rakoff pointed out in *Crupar-Weinmann*, if nobody wrongly accessed the information, there would be no further need to investigate.[209] While showing intention can be difficult for a plaintiff in a data breach case, the burden is not substantial enough to preclude meritorious suits. It is important to note that a third party rarely accesses the personal information of thousands of consumers by accident.[210] In accordance to the precedent set in *Spokeo*, courts should examine to what extent third parties misuse the information in their decision-making process.

For example, if a third party relies entirely on the false information received from the credit agency in its assessment of a loan or employment application, there would be a high probability of harm to consumers.[211] Additionally, timing represents an important

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[206] *See Reilly*, 664 F.3d at 42.

[207] A very similar test is applied in Khan v. Children's Nat'l Health Sys., 188 F. Supp. 3d 524, 532 (D. Md. 2016) ("The Court therefore concludes that in the data breach context, plaintiffs have properly alleged an injury in fact arising from increased risk of identity theft if they put forth facts that provide either (1) actual examples of the use of the fruits of the data breach for identity theft, even if involving other victims; or (2) a clear indication that the data breach was for the purpose of using the plaintiffs' personal data to engage in identity fraud."); *see also In re* Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d 1197, 1214–17 (N.D. Cal. 2014) (using similar framework).

[208] *Cf. Reilly*, 664 F.3d at 42 ("Appellants' contentions rely on speculation that the hacker: (1) read, copied, and understood their personal information; (2) intends to commit future criminal acts by misusing the information; and (3) is able to use such information to the detriment of Appellants by making unauthorized transactions in Appellants' names. Unless and until these conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm.").

[209] *See* Crupar–Weinmann v. Paris Baguette Am., Inc., 235 F. Supp. 3d 570, 575 (S.D.N.Y. 2017).

[210] *See* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693 (7th Cir. 2015) ("Why else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities.").

[211] *Cf.* Robins v. Spokeo, Inc., 867 F.3d 1108, 1114 (9th Cir. 2017).

consideration. Namely, the longer the information has been released, the higher the probability that one or more parties have misused it.[212] Conversely, in data breach cases, the defendant can argue that the more time that has passed since the data breach, the more unlikely the probability of identity theft becomes.[213]

e. Present Impacts of a Risk of Harm

There are certain cases in which the risk of future harm is so pervasive that it affects the decision-making process of consumers in the present. This scenario manifests itself in data breach cases where a hacker undoubtedly accessed the data to commit fraud and identity theft.[214] As soon as a consumer realizes that a hacker caused a data breach, the consumer will be incentivized to take steps to protect himself against further misuse of his information. For instance, he might invest in identity theft insurance and heightened credit monitoring.[215] In those cases, plaintiff investments represent an economic loss,[216] directly imposed upon them by the failure of the defendant to adequately secure the information.[217] Thus, plaintiffs not only allege a sufficient risk of harm because the probability of misuse of their information is high, but also a tangible economic injury.[218] Alternatively, companies might take precautionary measures themselves and pass the costs on to consumers. If these measures are insufficient and data is stolen, the consumers do not benefit from the transaction the way they are supposed to. This also represents a concrete injury.[219]

These cases stand for the proposition that statutory liability aims to compensate consumers for incurred losses and serves to

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[212] *Cf.* Andrea Peterson, *Data Exposed in Breaches Can Follow People Forever*, WASH. POST, June 15, 2015, 2015 WLNR 17606628.

[213] *See In re* Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d 1197, 1215 n.5 (N.D. Cal. 2014).

[214] *See Remijas*, 794 F.3d at 692; Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384, 388 (6th Cir. 2016); *In re* Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 630 (3d Cir. 2017); Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 967 (7th Cir. 2016); *In re Adobe Sys.*, 66 F. Supp. 3d at 1215–16.

[215] *See Remijas*, 794 F.3d at 694*; see also Galaria*, 663 F. App'x at 388–89.

[216] *See, e.g.*, *Remijas*, 794 F.3d at 692 ("The complaint also alleges a concrete risk of harm . . . .").

[217] Insofar they represent a negative externality that needs to be internalized. For a detailed discussion of liability issues, see below IV. A and B.

[218] *See Remijas*, 794 F.3d at 692 ("The complaint also alleges a concrete risk of harm . . . .").

[219] Resnick v. AvMed, Inc., 693 F.3d 1317, 1328 (11th Cir. 2012).

incentivize companies to adopt measures that protect consumers.[220] In particular, the requirement of reasonable procedures[221] aims to prevent data breaches from happening so that consumers do not need to invest in anti-identity theft measures. When it becomes evident that a data breach has occurred and that further identity thefts might ensue, consumers become affected in more ways than they can account for. Regardless of whether identity theft is likely, every consumer must monitor and adjust his data accordingly. The costs incurred by the consumer would not exist but for the defendant's failure to implement reasonable procedures to protect the data of the consumer. This applies *a fortiori*[222] when the hacker has already used some of the obtained information.[223] Consequently, the data breach, if combined with the proven threat of identity theft, constitutes a *present* injury.[224] In other words, the probability and the magnitude of the future harm are so high that the risk equals the occurrence of the harm.[225] At the same time, the statutory liability scheme ensures that companies are incentivized to invest in reasonable procedures to ensure that nobody can access consumer information without authorization.[226] Therefore,

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[220] Statutory damages have a compensating function, especially when plaintiffs can only claim them instead of actual damages like in FACTA. *See* Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1313 (11th Cir. 2009); *see also* Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 718 (9th Cir. 2010). However, when the statutory damages exceed the actual damages significantly, this changes. *See* Part. IV.

[221] § 1681e(b) of the FCRA compels consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. 15 U.S.C. § 1681e(b).

[222] All the more.

[223] In this case, courts readily affirm an injury-in-fact. *See* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 690 (7th Cir. 2015) ("9,200 of those 350,000 cards were known to have been used fraudulently."); *In re* Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d 1197, 1206 (N.D. Cal. 2014); *In Re* Sony Gamy Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 955–58, 962–63 (S.D. Cal. 2014).

[224] *See, e.g.*, Lambert v. Hartman, 517 F.3d 433, 437 (6th Cir. 2008); Resnick v. AvMed, Inc., 693 F.3d 1317, 1323 (11th Cir. 2012).

[225] The Third Circuit Court, however, goes far beyond that. *See In re* Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 639 (3d Cir. 2017) ("Congress established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself—whether or not the disclosure of that information increased the risk of identity theft or some other future harm.").

[226] *See* Sarver v. Experian Information Solutions, 390 F.3d 969, 971-72 (7th Cir. 2004); *see also* Henson v. CSC Credit Servs., 29 F.3d 280, 287 (7th Cir. 1994); Cushman v. Trans Union Corp., 115 F.3d 220, 225-26 (3d Cir. 1997). For a more general discussion of the effects of liability on behavior *see* ROBERT COOTER &

the reporting agency must bear the risk and compensate the consumer for the losses incurred. These losses constitute a concrete injury-in-fact.

Many courts have argued that *Clapper* precludes this outcome because the U.S. Supreme Court ruled that one must disregard any mitigation or monitoring costs when deciding upon the injury-in-fact requirement.[227] However, a closer analysis of the *Clapper* decision might yield a different outcome. First, the court found that the harm Amnesty alleged, namely the surveillance by the government, was too speculative to be concrete.[228] Fearing that a plaintiff could easily circumvent this result by claiming that he suffered a tangible harm in the form of mitigation costs, the Court wanted to distribute risks fairly.[229] A plaintiff who simply alleges a negative impact cannot pass the costs of protecting himself to the defendant.[230] This means that *e contrario*,[231] if a plaintiff can demonstrate that he suffered from an injury the defendant caused, he must be allowed to pass on the incurred costs to the defendant.[232] If the defendant's failure to promulgate safeguards to protect consumer information results in harm to plaintiffs and propels them to invest in precautionary measures, then the defendant should bear the cost of reasonable measures adopted by consumers.

Additionally, courts can and should employ a reasonable consumer standard to avoid abuses by potential plaintiffs. In *Corona v. Sony Pictures Entm't, Inc.*, the California Central District Court

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THOMAS ULEN, LAW & ECONOMICS 201 (6th ed. 2010); Richard Posner, ECONOMIC ANALYSIS OF LAW 180 (5th ed. 1998) (noting that as soon as an agency has invested in technologies, which comply with the industry standard, it meets the reasonableness requirement and thus cannot be held liable).

[227] *See* Reilly v. Ceridian Corp., 664 F.3d 38, 46 (3d Cir. 2011); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 694 (7th Cir. 2015); *In re* SuperValu, Inc., No. 14-MD-2586 ADM/TNL, 2016 U.S. Dist. LEXIS 2592, at *20 (D. Minn. Jan. 7, 2016); Khan v. Children's Nat'l Health Sys., 188 F. Supp. 3d 524, 533 (D. Md. 2016).

[228] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410–12 (2013).

[229] *Id.* at 1151 ("In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

[230] Therefore, plaintiffs cannot use incurred costs as an argument when it is uncertain whether the data breach would ever result in an identity theft or the dissemination of false information had any consequences.

[231] From the contrary.

[232] *See* Robins v. Spokeo, Inc., 867 F.3d 1108, 1118 (9th Cir. 2017)*; see also* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 694 (7th Cir. 2015); *In re* SuperValu, Inc., No. 14-MD-2586 ADM/TNL, 2016 U.S. Dist. LEXIS 2592, at *20 (D. Minn. Jan. 7, 2016).

provided an entire list of criteria courts can consider. Namely, the extent of personal information that has been stolen, the relative increase of the risk of identity theft, and the seriousness of the consequences of identity theft.[233] Taken together, these factors advance a proportionality rule: the more information the hackers accessed and the more sensitive the nature of the information, the more severe the data breach was. The more severe the data breach was, the more a reasonable consumer will invest in protective measures. Vice versa, if the data breach only affected insignificant information, no reasonable consumer would invest hundreds of dollars to protect himself. This proportionality rule should ensure that plaintiffs do not intentionally spend a well-calculated amount of money to claim an economic loss and satisfy the standing requirement. If the investment is in proportion to the primary harm, the plaintiff must bear the costs himself and thus is denied standing. Consequently, the reasonable consumer standard ensures that defendants are only potentially liable for actual costs.

C. Defining the Imminence of Future Risks of Harm

Not only must the alleged risk of harm be concrete, but it must also be "actual or imminent, not conjectural or hypothetical."[234] Whether the risk of harm is concrete depends entirely on the size and likelihood of the future harm. The imminence requirement adds an additional filter by restricting the relevant time period; not every risk of harm qualifies as injury-in-fact, but only those risks that are imminent.[235] Consider the following hypothetical example: a plaintiff alleges that an airline uses a defective airplane that has a ten percent probability of crashing. Since the plaintiff can identify the air route, the flight schedule and the chance of a deadly crash based on the Probability Magnitude Test, he satisfies the concreteness

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[233] Corona v. Sony Pictures Entm't, Inc., No. 14-CV-09600 RGK (Ex), 2015 U.S. Dist. LEXIS 85865, at *9–10 (C.D. Cal. June 15, 2015) ("[T]hose factors are: (1) the significance and extent of the compromise to Plaintiffs' PII; (2) the sensitivity of the compromised information; (3) the relative increase in the risk of identity theft when compared to (a) Plaintiffs' chances of identity theft had the data breach not occurred, and (b) the chances of the public at large being subject to identity theft; (4) the seriousness of the consequences resulting from identity theft; and (5) the objective value of early detection.").

[234] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

[235] *See, e.g.*, Torres v. Wendy's Co., 195 F. Supp. 3d 1278, 1284 (M.D. Fla. 2016).

requirement.[236] Suppose now that the plaintiff wants to take a flight with this particular airplane in six months.[237] While the probability and magnitude of the alleged harm do not change over the six months, the alleged harm does not threaten the plaintiff at present. He therefore does not meet the imminence requirement. Of course, one can argue whether this assessment changes if he wants to take the flight in one month or one week. Courts must define the relevant time frame. The point here is that the Probability Magnitude Test considers events that occur in the future. According to the imminence requirement, such defined risk of harm then must be imminent. Put differently, a concrete threat does not help the plaintiff unless it looms on the horizon.[238] This distinction is concealed as long as courts use the term "speculative" without specifications. The speculations of the plaintiff can refer to the existence of a material harm (concreteness), the occurrence of this harm in the near future (imminence), or both. Courts therefore must state the exact element of the injury-in-fact requirement to which they attribute the speculations.

D. The Probability Magnitude Test Solves the (Purported) Circuit Split

Courts must distinguish between cases in which the alleged harm could not occur and those in which a risk of harm exists. To determine whether this risk constitutes a concrete injury, they should use the Probability Magnitude Test. If, for instance, someone undoubtedly breached private data to commit identity theft, the high likelihood of the harm, especially when combined with the investments in precautionary measures, constitutes a (present) concrete injury-in-fact. Hence, several Circuit Courts rightfully granted standing in those

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[236] A 10% chance would be remarkably high compared to the industry average. In 2016, there were less than 0.4 fatal air plane accidents per one million flights. *See* Aviation Safety Network, Air Line Accidents per 1 Million Flights, https://aviation-safety.net/graphics/infographics/Fatal-Accidents-Per-Mln-Flights-1977-2016.jpg (last visited May 7, 2018).

[237] Assume that no crash happens in the meantime and the additional time does not increase the probability.

[238] The time horizon played a role in *In re* Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d 1197, n.5 (N.D. Cal. 2014). The longer the information is out, the more unlikely it is that there is an identity theft. Consequently, the probability of the alleged harm decreased by the day. One can argue that, at the same time, the risk of harm became less imminent. In this way, probability and imminence are positively correlated.

types of data breach cases.[239] Likewise, if a materially inaccurate credit report was published and had an impact on the public perception of this consumer, this causes a sufficiently concrete (intangible) harm.[240]

If, in contrast, the circumstances of the data breach (or the false dissemination of information) are unknown, the reduced probability of harm might not cross the threshold of representing a concrete injury. These were the facts in *Reilly v. Ceridian Corp.,*[241] *Katz v. Pershing, LLC,*[242] *Katz v. Donna Karan Co. Store, L.L.C.,*[243] *Beck v. McDonald*[244] and *Alleruzzo v. SuperValu, Inc.,*[245] which is why the respective Circuit Courts correctly denied standing.

In sum, different courts have reached different conclusions simply because they had to deal with different *facts*.[246] The Probability Magnitude Test provides an explanation[247] for the seemingly opposite conclusions. It shows that there is no circuit split, or at least a circuit split that can easily be solved,[248] and thereby contradicts those courts

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[239] *In re* Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 640 (3d Cir. 2017); Attias v. Carefirst, Inc., 865 F.3d 620, 629 (D.C. Cir. 2017); Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 967 (7th Cir. 2016); Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384, 390 (6th Cir. 2016); Remijas v. Neiman Marcus Grp., 794 F.3d 688, 689–90 (7th Cir. 2015); Krottner v. Starbuck Corp., 628 F.3d 1139, 1143 (9th Cir. 2010); Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007).

[240] *See* Robins v. Spokeo, Inc., 867 F.3d 1108, 1118 (9th Cir. 2017).

[241] *See* Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011).

[242] *See* Katz v. Pershing, LLC, 672 F.3d 64, 80 (1st Cir. 2012).

[243] *See* Katz v. Donna Karan Co. Store, 872 F.3d 114, 117–18 (2d Cir. 2017).

[244] *See* Beck v. McDonald, 848 F.3d 262, 274 (4th Cir. 2017).

[245] *See* Alleruzzo v. SuperValu, Inc., 870 F.3d 763, 770–72 (8th Cir. 2017).

[246] *See, e.g.*, Attias v. Carefirst, Inc., 865 F.3d 620, 627 (D.C. Cir. 2017) ("Nobody doubts that identity theft, should it befall one of these plaintiffs, would constitute a concrete and particularized injury. The remaining question, then, keeping in mind the light burden of proof the plaintiffs bear at the pleading stage, is whether the complaint plausibly *alleges* that the plaintiffs now face a substantial risk of identity theft as a result of CareFirst's alleged negligence in the data breach.").

[247] The Third Circuit did not apply a Probability Magnitude Test in *In re* Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 640 (3d Cir. 2017). Instead, it held that the mere unauthorized dissemination of private information constitutes an injury. Thus, the Court only focused on the magnitude, but not on the probability.

[248] In Kuhns v. Scottrade, Inc., 868 F.3d 711, 718 (8th Cir. 2017), the court first affirmed a concrete injury, but did not find any fraud or identity theft causing a financial loss necessary for a breach of contract claim. According to the test proposed here, the court should have denied standing.

and commentators who have claimed otherwise.[249]

III. PAVING THE WAY FOR CLASS CERTIFICATION

After standing, class certification is the next important navigational marker when statutory damages are combined with class actions. Class certification is particularly important because once a class is certified, the overwhelming majority of cases are settled rather than litigated.[250] Standing and class certification are two completely separate procedural institutions; one does not predetermine the other.[251] Courts regularly hold that plaintiffs meet the four class certification requirements of Fed. R. Civ. P. Rule 23(a) as well as the additional two requirements of Rule 23(b)(3) when they claim damages for procedural violations.[252] The following section discusses the central issues that occur when plaintiffs seek class certification for procedural violations. The section concludes that courts should grant certification when all requirements are met, but in doing so, must remain mindful of the composition of the class and the relevant time period.

A. Using the Procedural Violation as Common Ground

First, plaintiffs must meet the numerosity requirement of Rule

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[249] *See* Fero v. Excellus Health Plan, Inc., 236 F. Supp. 3d 735, 749 (W.D.N.Y. 2017); *see also* Thomas Martecchini, *A Day in Court for Data Breach Plaintiffs: Preserving Standing Based on Increased Risk of Identity Theft After Clapper v. Amnesty International USA*, 114 MICH. L. REV. 1471, 1486 (2015–2016); Jordan Z. Dillon, *Standing on the Wrong Foot: The Seventh Circuit's Eccentric Attempt to Rescue Risk-Based Standing in Data Breach Litigation [Remijas v. Neiman Marcus Grp., 794 F.3d 688,* 693 *(7th Cir. 2015)]*, 56 WASHBURN L.J. 123, 132 n. 84 (2017); Patrick J. Lorio, *Access Denied: Data Breach Litigation, Article III Standing, and a Proposed Statutory Solution*, 51 COLUM. J. L. & SOC. PROBS. 79, 91 (2017).

[250] For concrete numbers, *see* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUDIES 811, 816–25 (2010); *see also* Ticknor v. Rouse's Enters., LLC, No. 12-1151, 2014 U.S. Dist. LEXIS 61371, at *38 (E.D. La. May 2, 2014).

[251] Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015) ("[U]nnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class.").

[252] *See* Clark v. Trans Union, LLC, No. 3:15cv391, 2017 U.S. Dist. LEXIS 29738, at *23 (E.D. Va. Mar. 1, 2017); Kesler v. Ikea U.S., Inc., No. SACV 07-00568-JVS (RNBx), 2008 U.S. Dist. LEXIS 97555, at *9 (C.D. Cal. Feb. 4, 2008); *see also In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 29 (D. Me. 2013).

23(a). A class is usually considered to be so numerous that joinder is impracticable if it has more than forty members.[253] Because of the thousands of consumers involved in a data breach or dissemination case, plaintiffs meet this requirement easily.[254] In contrast, the question whether "there are questions of law or fact common to the class"[255] constitutes a bigger obstacle.[256] In *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court defined this commonality requirement as "[d]issimilarities within the proposed class [that] have the potential to impede the generation of common answers."[257] Such dissimilarities do not exist in the cases discussed herein because all members of the class assert a claim under the same statutory provision and the same procedural violation.[258] The question is whether a credit reporting agency's failure to *implement reasonable procedures* to protect personal information of consumers relates to all consumers.[259] Determining what "reasonable" means is a question of statutory interpretation that is separated from the individual consumer.[260] Thus, the courts must focus on the defendant's behavior. Put differently, all consumers are considered victims of the defendant's alleged failure to protect their personal information. The breach of data, the dissemination of false information, or the failure to disclose important information all qualify as a potential foundation for a class action lawsuit.[261] From a judicial efficiency point of view,[262] it follows to permit a single court, instead of several, to adjudicate the alleged failure. Moreover, because the procedural violation represents an event that connects all plaintiffs, the lead plaintiff must be an adequate and typical representative of the entire class as required by Rule

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[253] WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS 1 § 3:12 (5th ed. 2017).
[254] *In re Hannaford Bros.*, 293 F.R.D. at 25.
[255] Fed. R. Civ. P. Rule 23(a).
[256] Commonality is the second basic requirement of a class action, *see* Rubenstein, *supra* note 253, at 35 § 3:18.
[257] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (citing Richard A. Nagareda, *Class Certification in The Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).
[258] In *Spokeo*, this was § 1681n(a) and § 1681e(b) of the FCRA. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544–46 (2016).
[259] *See In re Hannaford Bros.*, 293 F.R.D. at 27.
[260] Domonoske v. Bank of Am., N.A., No. 5:08cv066, 2010 U.S. Dist. LEXIS 7242, at *26 (W.D. Va. Jan. 27, 2010).
[261] *See In re Hannaford Bros.*, 293 F.R.D. at 27, 28.
[262] S*ee In re* Modafinil Antitrust Litig., 837 F.3d 238, 254 (2016) (explaining that judicial efficiency is a central argument for class actions).

23(a).[263]

B. Satisfying Predominance Through the Consequences of the Procedural Violation

When plaintiffs claim statutory damages, they must demonstrate that the common questions "predominate over any questions affecting only individual members."[264] The predominance requirement sets a higher bar than the commonality requirement.[265] Defendants regularly argue that although the procedural violation connects all consumers, its consequences are highly individualized such that the plaintiffs do not satisfy the predominance requirement. For example, in data breaches cases, defendants regularly claim that not every consumer[266] has suffered fraudulent charges or invested in the same protective measures; as such, actual damages differ substantially among the different plaintiffs.[267] A similar argument has been made with regard to *Spokeo*. Because every consumer has, to some extent, a unique profile and the reporting agency uses a wide array of data sources, the compilation and dissemination of information differs from consumer to consumer.[268]

This *prima facie* argument is weak for two reasons. First, individualized damages do not per se render class certification impossible. On the contrary, courts accept differences in damages

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[263] *See* Fed. R. Civ. P. Rule 23(a); Campos v. ChoicePoint, Inc., 237 F.R.D. 478, 486 (N.D. Ga. 2006); *Clark*, 2017 U.S. Dist. LEXIS 29738, at *22–23.

[264] Fed. R. Civ. P. Rule 23(b)(3).

[265] Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) ("If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)") (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623–624, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997)); s*ee also* Rubenstein, *supra* note 255, at 1 § 3:27 (stating that Rule 23(a) sets a lower bar for predominance than Rule 23(b)(3)).

[266] *See* Ticknor v. Rouse's Enters., LLC, No. 12-1151, 2014 U.S. Dist. LEXIS 61371, at *8 (E.D. La. May 2, 2014) (explaining that some courts denied predominance arguing that questions of whether someone was a consumer, a cardholder and received a receipt are individual ones. However, they indicated that they would decide differently if the plaintiff presented some proof of a class of people satisfying the above-mentioned criteria. Thus, it is just a question of burden of proof); Rowden v. Pac. Parking Sys., 282 F.R.D. 581, 585–86 (C.D. Cal. 2012).

[267] *See In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 31 (D. Me. 2013); s*ee also* Meyers v. Nicolet Rest. of De Pere, Ltd. Liab. Co., No. 15-C-444, 2016 U.S. Dist. LEXIS 44699, at *21 (E.D. Wis. Apr. 1, 2016).

[268] *See* Joan Steinman, *Spokeo, Where Shalt Thou Stand?,* 68 VAND. L. REV. EN BANC 243, 253 (2015) (discussing *Spokeo*).

when they certify a class.[269] Second, when plaintiffs claim statutory damages, the statute does not require them to show their exact actual loss. Instead, the statute itself provides a range of potential losses.[270] This statutory lump sum consolidation implies that courts do not need to determine the individual and economic consequences for every single consumer.[271] They only have to find an amount that lies within the statutory range.[272]

C. Applying the Probability Magnitude Test to the Entire Class to Satisfy Predominance

In data breach cases, the risk of identity theft concerns the entire group of affected consumers. It is difficult to assess how likely one consumer is to fall victim to an identity theft. Thus, when thousands of consumers' data have been accessed, all affected members share the same statistical risk of becoming a victim.[273] Instead of determining the risk for every consumer individually, courts

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[269] Ward v. Dixie Nat. Life Ins. Co., 595 F.3d 164 (4th Cir. 2010); Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087 (9th Cir. 2010); Beattie v. CenturyTel, Inc., 511 F.3d 554 (6th Cir. 2007); Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004); *In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 31 (D. Me. 2013); s*ee also* Lemire v. Wolpoff & Abramson, LLP, 256 F.R.D. 321, 330 (D. Conn. 2009) (arguing that the issue of liability predominates individual factual differences).

[270] 15 U.S.C. § 1681n(a):

> (a) In general: Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
> (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater.

[271] *See* Kesler v. Ikea U.S., Inc., No. SACV 07-00568-JVS (RNBx), 2008 U.S. Dist. LEXIS 97555, at *18 (C.D. Cal. Feb. 4, 2008) ("[T]he damages inquiry here is notably not individualized, because recovery is primarily predicated on statutory, not actual, damages."); Eugene J. Kelley & John L. Ropiequet, *Actual Damages under the TILA: Collapsing Class Actions*, 55 CONSUMER FIN. L.Q. REP. 200, 200 (2001).

[272] Posner, *supra* note 226, at 217 and accompanying text (As pointed out before Courts should apply a reasonableness test to inquire whether the consumer suffered and an injury in form of the incurred cost and can claim compensation based on them. The question whether a reasonable consumer would have made the investments is also detached from the fate of an individual consumer.)

[273] *See Stillmock*, 385 F. App'x at 273.

deciding class litigation cases should make a group-wide assessment.[274] This could be achieved by applying the Probability Magnitude Test to the entire putative class.

The Probability Magnitude Test has several benefits. Since courts must determine the risk for all consumers, it facilitates judicial efficiency. Based on the experiences of other consumers, the court is well-positioned to assess the overall risk and size of the data breach by looking at the entire class, rather than by looking at one single consumer. Taking a group-wide perspective allows the court to see the broader picture. If the court finds that the group-wide risk is low, the amount of damages will reflect that, which conversely benefits the defendant. If the risk is *de minimis*, the court will deny standing and the class certification stage is never reached. Regardless, the predominance requirement is typically met in data breach cases because the breach itself links all consumers and everyone shares the risk of becoming the victim of an identity theft.[275]

In contrast, plaintiffs in data dissemination cases, like *Spokeo*, cannot easily overcome the predominance requirement. The Probability Magnitude Test is based on the premise that all consumers are affected in a comparable way. For instance, if some consumers live under seemingly worse conditions than what is true, while others appear in a more favorable light, they do not necessarily all share the same risks. Consequently, the risk of suffering an actual harm by the misrepresentation is not spread evenly throughout the group. It is therefore difficult to treat all consumers as one group.

On the other hand, the consumer reporting agency might have committed the exact same erroneous acts with regard to every consumer credit report. For example, it might have stated a false zip code in every report. This failure renders all cases highly comparable. Moreover, if one consumer is hired because of his falsely good credit report, his employer might soon find out the truth and fire him.[276] As a result, this consumer might be in the same position as one who has not been hired in the first place because of his false credit report. Put more generally, the economic cost of a false credit report might be very similar, regardless of whether the report falsely stated positive or negative information. The statutory damage provision of the FCRA

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[274] *Id.*

[275] *See* Rauch, *supra* note 79, at 291–92 (this approach shows that even though standing and class certification are strictly to be separated, there are interconnections. To some extent, it parallels the idea of "Fractional Standing").

[276] *See Robins*, 867 F.3d at 1117.

aims to compensate consumers for such costs.[277] For courts, it thus might be feasible to first identify all those actions and omissions committed by the credit reporting agency which led to the false dissemination of consumer information. In a second step, courts should ask whether these actions or omissions resulted in falsely positive or negative consumer reports. If they conclude that there are substantial differences between the respective credit reports, they should consider to certify sub-classes[278] according to Fed. R. Civ. P. Rule 23(c)(5).

D. Statistics and Lump Sum Awards

Even though the idea of a common statistical risk strongly supports class certification, courts should look at this argument with heightened scrutiny. This is particularly true when a plaintiff asks for a lump sum payment to be distributed to the class members. This happened in the data breach case of *In re Hannaford*[279] where the plaintiffs claimed, but were unable to statistically prove, the total amount of class-wide damages.[280] Plaintiffs argued that an expert would "be able to testify by statistical probability what proportion of the fees incurred are attributable to the Hannaford intrusion, as distinguished from other causes (like card loss, card theft, other things in the news, marketing of services, etc.)."[281] This approach strongly resembles a class-wide Probability Magnitude Test where class members aggregate the costs they incurred within a certain period of time and an expert determines how probable it is that these costs were caused by the data breach and the subsequent actions of a third party. While the court did not reject the idea of a lump sum award in general, it held that plaintiffs did not meet the predominance requirement because they had not presented a single expert supporting their argument.[282]

The recent U.S. Supreme Court decision in *Tyson Foods, Inc. v. Bouaphakeo* sheds some light on how courts should deal with statistical evidence and lump sum awards in the future. First, the Court

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[277] *Id.*
[278] *See* Scott Dodson, *Subclassing*, 27 CARDOZO L. REV. 2351, 2362 (2006) (for a lengthy discussion of subclasses).
[279] *In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 32 (D. Me. 2013).
[280] *Id.* at 31–32.
[281] *Id.* at 32.
[282] *Id.* at 33.

pointed out that a plaintiff can use a representative sample as evidence for showing class-wide liability.[283] The Court also emphasized that the admissibility of statistical evidence depends on the circumstances of the individual case.[284] Plaintiffs thus must identify the right persons and the right period of time. In *Tyson Foods*, this was difficult because the employees performed different tasks over a long interval.[285] In contrast, a data breach represents a single event that usually results in immediate consequences and the statistical evidence is more reliable.

IV. LIMITING LIABILITY TO AVOID OVER-DETERRENCE

Once a court has certified the class, thousands of consumers can accumulate their statutory damages claims. This poses a massive financial threat to small businesses.[286] Liability limitations appear to be a simple and effective way to protect these businesses. However, establishing liability limitations might prove to be counterproductive for consumers. The liability threat imposed by the damage limitations might be insufficient to incentivize businesses to take the necessary steps to comply with the law. This article argues that liability caps are justifiable and courts should be allowed to take liability risks into consideration at the class certification stage of the litigation process.

A. Efficiency of Liability Caps

Proponents of liability caps contend that when statutory damages are combined with class action suits, the aggregated amounts exceed actual damages, resulting in over-deterrence.[287] Consequently,

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[283] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1048 (2016) ("Wal-Mart does not stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability.").

[284] *Id.* at 1049. Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. . . . The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases.

[285] *Id.* at 1044; *see also Tyson*, 136 S. Ct. at 1054 (Thomas, J., dissenting) (arguing that errors made at trial prejudiced employer and warranted reversal).

[286] *See* Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 697 (S.D. Fla. 2009) ("Plaintiff seeks potential class damages of between $4.6 million to $46 million, even though the record reflects that (1) the Defendant's net worth is approximately $40,000; and (2) this lawsuit has already achieved FACTA's public policy goal in bringing Plaintiff's receipt system into compliance with federal law.").

[287] Scheuerman, *supra* note 2, at 115; Scheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880, 885–94 (2008) (discussing the question of deterrence

statutory damages have the same impact on defendants as punitive damages.[288] Even if defendants can assert valid defenses, they might feel compelled to settle and impart the cost on to the consumers, making it a zero-sum-game for the consumers.[289]

But these concerns are unwarranted because liability caps generally reduce the efficiency of liability rules.[290] The Kaldor-Hicks principle and the famous Learned Hand formula provide a functional definition of efficiency by minimizing the sum of the expected damages and the costs of preventing damages.[291] Accordingly, an optimal level is reached when the costs of an additional unit of loss prevention equals the extent to which the expected value of damage is reduced.[292] If a potential defendant expects the loss to be high, he will invest in precautionary measures to reduce the potential for liability up to the amount of actual costs. Liability caps reduce precautionary efforts because they exclude certain expected damages. The standard of care declines and third-parties are exposed to greater risks.[293]

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extensively in the context of punitive damages); *see also* Hosford, *supra* note 52, at 1979; *cf. Bateman*, 623 F.3d at 718 ("In addition to that compensatory function, FACTA's actual and statutory damages provisions also effectuate the Act's deterrent purpose."). *Contra Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1313 (11th Cir. 2009) (arguing that even if statutory damages can only be claimed in lieu of actual damages, the vast difference between their amounts shows that statutory damages go far beyond compensation. It is too formalistic to argue that because § 1681n(a) FACTA contains a statutory and a punitive damage provision, the statutory damages must be compensating in nature. Therefore, the 11th Circuit erred in this case).

[288] *E.g.* 15 U.S.C. § 1681n(a)(2); *see Parker*, 331 F.3d at 22 (noting that some consumer statutes provide for statutory damages and punitive damages); *see also Bateman*, 623 F.3d at 718 ("We further note that Congress provided for punitive damages in addition to any actual or statutory damages, see 15 U.S.C § 1681n(a)(2), which further suggests that the statutory damages provision has a compensatory, not punitive, purpose.") (noting however, if the statutory damages drastically exceed the actual damages, one can no longer regard them as only compensating).

[289] *Stillmock*, 385 F.App'x at 281.

[290] Cooter, *supra* note 226, at 199–201; *see also* Andrew F. Popper, *Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits in Civil Liability*, 60 DEPAUL L. REV. 975, 995–97 (2011) (discussing liability caps for medical malpractices).

[291] Posner, *supra* note 226, at 180.

[292] Cooter, *supra* note 226, at 201; Posner, *supra* note 226, at 180.

[293] *See, e.g.,* Popper, *supra* note 290, at 995–97; Brandon Van Grack*, The Medical Malpractice Liability Limitation Bill*, 42 HARV. J. LEGIS. 299, 311 (2005); Colleen P. Murphy, *Statutory Caps and Judicial Review on Damages*, 39 AKRON L. REV. 1001, 1001 n.1 (2006).

Therefore, liability caps adversely affect the core liability rules, particularly deterrence.[294]

In some situations, however, it is more cost effective to violate the procedural rule and compensate those affected for the actual harm instead of investing in more expensive precautionary measures. But when statutory damages are combined with class actions, they aggregate to amounts that massively exceed the actual harm.[295] As a result, injurers invest in precautionary measures even in the absence of costs they should internalize.[296] In other words, statutory damages impose avoidance costs that no longer correspond with the expected value of the *actual* harm. If violating the procedural rule and paying the actual damages is more cost effective than bearing the artificially high avoidance cost, then statutory damages produce inefficient results. Therefore, it is imperative to adjust the amount of statutory damages to equal the amount of the expected actual harm.[297] Implementing liability caps can achieve efficient outcomes in the risk allocation decisions of businesses.

The above-mentioned proposition is subject to two limitations. First, courts must determine whether the actual harm caused by the procedural violation is less than the avoidance costs in form of the statutory damages. This proves to be particularly difficult when plaintiffs claim intangible losses such as those posed by privacy violations. Courts then face the challenge of translating the alleged injury into a quantified economic loss.[298] Second, liability caps establish fixed upper limits for damages claims. Depending on the individual case, these limits can be lower than the actual harm, leading to inefficient results.[299] Therefore, strict liability caps are not desirable. Nevertheless, several consumer protection statutes contain

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[294] Cooter, *supra* note 226, at 199–01; *see also* Popper, *supra* note 290, at 995–97.
[295] *Id.* at 278 (Wilkinson, J., concurring); *see also In re* Toys "R" Us, 300 F.R.D. 347, 359 (C.D. Cal. 2013) (referencing the impressive claim of $ 29 billion in damages).
[296] *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 879–80, 884–85 (1998) (noting that the same happens with punitive damages).
[297] *Id.* at 880–82 (explaining that it is widely accepted that the amount of damages to be paid should equal the harm caused by the injurer).
[298] Cooter, *supra* note 226, at 192; Posner, *supra* note 226, at 215 (referring to pain and suffering).
[299] *See* Polinsky, *supra* note 296, at 888–90.

strict liability caps.[300] The statutes stipulate that the aggregated damages must not "exceed the lesser of $500,000 or 1 per centum of the net worth of the [defendant]."[301] However, Congress has not implemented strict liability caps into every consumer protection statute. For instance, the FCRA and FACTA do not contain any statutory damages in class actions suits.[302] The absence of strict liability caps in these two important statues imposes upon courts the responsibility of striking the right balance.

B. Determining the Right Liability Cap

Four different proposals have been made to define liability caps. The first theory, the Due Process Limitation theory, emphasizes that statutory damages resemble punitive damages.[303] The Due Process Limitation theory stands for the proposition that courts should apply to statutory damages the same liability limitations that have been developed for excessive punitive damages under the Due Process Clause.[304]

The second theory is based on the premise of "Annihilating Liability." This theory proposes that courts protect defendants when the amount of their liability becomes annihilating in accordance with the standard of imminent insolvency.[305] The Due Process Limitation theory is broader than the Annihilating Liability theory because

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[300] *See* Scheuerman, *supra* note 2, 145–46 (quoting H.R. REP. No. 93-1429 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 6148, 6153).

[301] *See* Fair Debt Collection Practices Act § 1692k; Equal Credit Opportunity Act § 1691e; Electronic Funds Transfer Act § 1693m; Truth in Lending Act § 1640(a)(2)(B) provides the following:

> [I]n the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $1,000,000 or 1 per centum of the net worth of the creditor.

[302] *Bateman*, 623 F.3d at 718.

[303] *Murray*, 434 F.3d at 954 ("An award that would be unconstitutionally excessive may be reduced."); *Parker*, 331 F.3d at 22 (leaving open the possibility to use the due process clause); Scheuerman, *supra* note 2, at 132–33; Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601, 619 (2005).

[304] *Murray*, 434 F.3d at 954; *Parker*, 331 F.3d at 22; Scheuerman, *supra* note 2, at 132–33; Evanson, *supra* note 303, at 132–33.

[305] *Stillmock*, 385 F. App'x at 278*; Bateman*, 623 F.3d at 723 (some courts use related terms like "ruinous liability); Hosford, *supra* note 52, at 1964.

liabilities can be unconstitutionally high without being annihilating to the defendant.[306]

A third theory suggests that the trial judge should use his Fed. R. Civ. P. Rule 23(b) discretion to reduce the aggregated damages to a reasonable amount.[307]

Finally, according to the fourth theory, judges should examine the statute containing the statutory damages provision to ensure that the imposed liability is proportional to the alleged violation.[308]

Taken in isolation, each of the four theories has its own weaknesses. Applying the Due Process Clause to statutory damages brings difficult constitutional considerations into an already complicated process.[309] Moreover, statutory damages provisions provide a clear range of possible damages that Congress itself has created. The decision to award them is not as erratic as the decision to award punitive damages.[310] It is therefore desirable to find a limitation for statutory damages within the statutes themselves, rather than within the Due Process Clause.[311]

When the statutory language is silent, courts are left with little guidance to determine appropriate liability limitations[312] and may feel compelled to construe the statute verbatim.[313] In that case, the theory of Annihilating Liability seems preferable. But since it only applies to extraordinary circumstances, it allows for excessive damages and fails to prevent defendants from transferring the incurred costs to consumers.[314] While granting judges wide discretion provides flexibility, it also places substantial responsibility on judges to find the

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[306] Hosford, *supra* note 52, at 1966 n.13.

[307] *Stillmock*, 385 F. App'x at 282; *Parker*, 331 F.3d 13, 29 (Newman, J., concurring) (noting that this theory consequently allows a trial judge to take the liability risks into account at class certification stage).

[308] *Bateman*, 623 F.3d at 716; *Parker*, 331 F.3d at 27 (Newman, J., concurring) (noting that this idea is indicated in Ratner v. Chem. Bank N.Y. Tr. Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972)).

[309] *See Stillmock*, 385 F. App'x at 278.

[310] Daniel R. LeCours, *Steering Clear of the "Road to Nowhere": Why the BMW Guideposts should not be used to Review Statutory Penalty Awards*, 63 RUTGERS L. REV. 327, 339–42 (2010).

[311] Hosford, *supra* note 52, at 1973–74.

[312] Evanson, *supra* note 303, at 621, 634.

[313] *Bateman*, 623 F.3d at 719 ("But the plain text of the statute makes absolutely clear that, in Congress's judgment, the $ 100 to $ 1000 range is proportionate and appropriately compensates the consumer.").

[314] *See Stillmock*, 385 F. App'x at 281 (Wilkinson, J., concurring).

right balance between protecting the defendants, avoiding seemingly arbitrary results, and ensuring that statutes are sufficiently enforced.[315]

If courts apply one of these theories in isolation, their decision will be constrained by the disadvantages of that particular theory. To solve that issue, courts should combine the theories. When they apply the Due Process Clause, they should first ask whether the amount of statutory damages is compatible to other sanctions included in the respective statue and whether the damages reflect congressional intent.[316] As a result, courts need to analyze the governing statue[317] and ask what Congress intended when it promulgated the governing statue.[318]

In the case of FCRA and FACTA, courts face challenges when interpreting these statutes because they do not contain any liability limitations for statutory damages. To help solve that problem, courts should look to other statutes that actually do contain a liability cap,[319] such as TILA and the other consumer protection statutes. Since these statutes all include a limitation, courts can find guidance as to how they should limit liability in FCRA and FACTA cases.[320] Some scholars have opposed this approach, arguing that since Congress deliberately implemented the liability limitations for TILA and the other statutes, but not for FCRA and FACTA, the silence must be interpreted as refusal to accept any statutory liability limitations for those two statutes.[321] As Judge Easterbook explained, "[w]hile a statute remains on the books, however, it must be enforced rather than subverted."[322]

Nevertheless, this argument can be doubted because the congressional record does not articulate a reason for the decision to exclude liability caps from these statues. Congress did not expressly oppose liability limitations for FCRA and FACTA claims.[323] Moreover, the congressional silence on the matter might indicate that Congress intended to defer to courts the decision of establishing liability limitations. In this way, Congress' silence gives the courts

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[315] *Id*. at 282.
[316] Scheuerman, *supra* note 2, at 133–46; *see also* BMW of N. Am. v. Gore, 517 U.S. 559, 583 (1996).
[317] Scheuerman, *supra* note 2, at 135–36.
[318] *Id*. at 136.
[319] Hosford, *supra* note 52, at 1968.
[320] Scheuerman, *supra* note 2, at 146.
[321] *Bateman*, 623 F.3d at 722–23.
[322] *Murray*, 434 F.3d at 954.
[323] Hosford, *supra* note 52, at 1968.

greater decision-making latitude. Although courts must interpret the law consistent with congressional intent, courts must also have the ability to adapt the law when the law fails to achieve just and efficient outcomes. For example, when the textual interpretation of a statute results in excessive liability courts must have the ability to intervene.

With the range of damages provided by comparable statutes in mind, courts can compute the appropriate amount of statutory damages by using actual harm. This ensures that the sanction is proportional to the severity of the statutory violation.[324] If the actual harm is difficult to assess, courts should again apply a class-wide Probability Magnitude Test. They should inquire into how likely it is that several class members will be victims of the procedural violation. Specifically, in data breach cases, courts can refer to statistical proof. Based on actual or previous fact patterns they can assess the damages for the entire class.[325]

At the same time, courts should carefully examine how likely it is that consumers will detect relevant procedural violations and sue. If the probability of being held liable for a procedural violation is low, potential defendants are unlikely to invest sufficiently in consumer protection measures even if these measures were cheaper than the actual harm caused.[326] To overcome under-deterrence, the damage caps imposed upon violators should be proportional to the actual harm.[327] Since both the probability and the magnitude of liability differ from case to case, courts should not use strict liability rules but rather they should exercise their discretion under Fed. R. Civ. P. Rule 23(b).

In conclusion, the advantage of adopting a multi-prong approach based on the theories discussed above enhances legal certainty while equipping courts with the necessary flexibility to adjudicate on a case-by-case basis. Moreover, since plaintiffs can get more than just a strictly limited amount of damages, it does not discourage them to sue.[328] Thus a flexible approach does not over-deter private enforcement. Courts can utilize the guidance of existing statutes as a starting point when determining the optimum level of liability caps in

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[324] Evanson, *supra* note 303, at 626–28.
[325] *See* Stillmock *v.* Weis Mkts., Inc., 385 F. App'x at 273; *In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 33 n.20 (D. Me. 2013).
[326] Polinsky, *supra* note 296, at 888–90.
[327] *Id*. (stating that since expected damage is based on the probability and the magnitude of liability, courts again must apply a Probability Magnitude Test).
[328] *See Murray*, 434 F.3d at 954.

FCRA and FACTA cases.[329]

C. *Consider Liability Caps at Class Certification Stage*

Granting courts discretion to determine liability limitations inevitably poses the following inquiry: at what point of the litigation process is it appropriate to determine the damage caps? Should courts make the determination at the class certification stage, or afterwards? Those who aim to protect potential defendants propose the following argument: if the claimed statutory damages are so high that the defendant can barely compensate for them, then individual lawsuits are the superior option to adjudicate the controversy.[330] Since superiority is one of the requirements of Rule 23(b)(3), the liability risk accordingly can preclude class certification.[331] Several courts have opposed this theory arguing that neither the text of Rule 23(b)(3) nor the wording in FACTA or FCRA mention liability risks at all.[332] Moreover, courts indicate that individual litigation obstructs the efficient private enforcement of the statute.[333]

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[329] *See* Colleen P. Murphy, *Statutory Caps and Judicial Review on Damages*, 39 AKRON L. REV. 1001, 1008 (2006) (discussing the difficult problem of how to allocate multiple awards).

[330] *See* Ratner v. Chem. Bank N.Y. Tr. Co., 54 F.R.D. at 416; Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 699 (S.D. Fla. 2009); Scheuerman, *supra* note 2, at 146–51, 146 n.340 (giving an overview of court decisions).

[331] *See, e.g.*, *Leysoto*, 255 F.R.D. at 699; *Ratner*, 54 F.R.D. at 416; Scheuerman, *supra* note 2, at 146 n.340 (giving an overview of court decisions).

[332] *See, e.g.*, Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 713, 719 (9th Cir. 2010); Domonoske v. Bank of Am., N.A., No. 5:08CV066, 2010 U.S. Dist. LEXIS 7242, at *47–48 (W.D. Va. Jan. 27, 2010); Medrano v. WCG Holdings, Inc., No. SACV 07-0506 JVS (RNBx), 2007 U.S. Dist. LEXIS 95693, at *15 (C.D. Cal. Oct. 15, 2007).

[333] *See, e.g.*, *Bateman*, 623 F.3d at 719 ("Allowing denial of class certification because of the sheer number of violations and amount of potential statutory damages would allow the largest violators of FACTA to escape the pressure of defending class actions and, in all likelihood, to escape liability for most violations. In other words, whatever risk of overdeterrence class certification poses, refusing to certify a class on these grounds poses the risk of significant underdeterrence."); *Murray*, 434 F.3d at 954; Parker v. Time Warner Entm't Co., L.P., 331 F.3d 13, 22 (2d Cir. 2003); Kesler v. Ikea U.S., Inc., No. SACV 07-00568 JVS (RNBx), 2008 U.S. Dist. LEXIS 97555, at *23 (C.D. Cal. Feb. 4, 2008) (citing White v. E-Loan, Inc., No. C 05-02080 SI, 2006 U.S. Dist. LEXIS 62654, at *8 n.8 (N.D. Cal. Aug. 18, 2006)); Campos v. ChoicePoint, Inc., 237 F.R.D. 478, 490 (N.D. Ga. 2006).

Rule 23(b)(3) contains a non-exhaustive list of factors that courts should consider when certifying a class.[334] Consequently, courts can look beyond the procedural rule to assess whether a class action is the preferable form of litigation.[335] The superiority requirement is related to other forms of litigation that are "fair[ly] and efficient[ly]" adjudicated.[336] Compared to individual lawsuits, class actions have one distinct disadvantage for defendants because they create immense pressure to settle.[337] If courts restrict themselves to apply liability limitations only to settlements, plaintiffs will claim exorbitant amounts of damages to increase the settlement figure.

In contrast, by limiting the amount of damages at the class certification stage, courts give parties a clear roadmap for settlements.[338] While plaintiffs and defendants under TILA are able to negotiate settlements that accord with the prescribed statutory caps, the same condition is not present for disputes governed by FCRA and FACTA. Settlement discussions under FCRA and FACTA occur under a shadow of uncertainty, exacerbating settlement negotiations significantly. This shadow should disappear as soon as courts establish a flexible liability cap at the class certification stage.[339] Both defendants and plaintiffs would internalize the boundaries wherein an agreement can be reached. In this way, courts create legal certainty and ensure that the avoidance costs do not rise to unreasonably high levels.[340]

Finally, this approach does not eliminate the private enforcement of consumer protection statutes, but only puts a necessary and economically useful safety valve to prevent against meritless lawsuits. In this regard, it significantly differs from other approaches that demand that once the liability is excessive or annihilating, class

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[334] *In re* Hannaford Bros. Co. Customer Data Sec. Breach, 293 F.R.D. 21, 33 (D. Me. 2013).

[335] *See E.g., In re* Hannaford Bros. Co. Customer Data Sec. Breach, 293 F.R.D. 21, 33 (D. Me. 2013); *see also* Ratner v. Chem. Bank N.Y. Tr. Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972); Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 699 (S.D. Fla. 2009). *But cf. Murray*, 434 F.3d at 954 (arguing that courts should not use procedural tools to undermine substantive law).

[336] Rule 23(b)(3).

[337] *See* Scheuerman, *supra* note 2, at 149.

[338] Domino, *supra* note 13, at 2005.

[339] *Id*. at 2007.

[340] *See, e.g.*, Stillmock v. Weis Markets, Inc., 385 F. App'x 267, 278 (4th Cir. 2010) (Wilkinson, J., concurring).

certification must be denied.[341] Moreover, based on the experiences with existing statutory limitations, such as TILA, one can project that plaintiffs will continue to bring class actions to courts.[342] The fear of undermining the enforcement aspect of litigation does not hold ground under this approach.[343] In conclusion, courts should be allowed to address liability risks at class certification stage and use flexible liability limitations to properly address individual hardships.

V. PARALLELING PRIVATE AND PUBLIC ENFORCEMENT

Thus far, this article has only dealt with private enforcement of consumer protection statutes. Many of the concepts discussed above can be applied to public enforcement as well. A perfect illustration is the recent decision of the Eleventh Circuit Court in *LabMD, Inc. v. FTC*.[344] In this case, LabMD stored personal information of thousands of patients.[345] When the FTC learned that the data might be subject to a security breach caused by improper safety measures, it initiated a complaint against LabMD, demanding that it invest thousands of dollars into compliance measures.[346] The FTC argued that LabMD's failure to provide the necessary security for the data either caused or was likely to cause substantial consumer injury, which constitutes an unfair act in violation of 15 U.S.C. § 45(a),(n).[347] The Eleventh Circuit rejected this view, holding that an intangible harm, as opposed to monetary harm, usually does not render an action unfair.[348] Moreover, the court construed the statutory term "likely" in a way that excludes every event with a low likelihood of occurrence.[349]

In the wake of *Spokeo,* courts need to reexamine these two arguments. If one regards public enforcement as functionally equivalent to private enforcement, there is no reason why one should apply different standards to them. Accordingly, if the U.S. Supreme Court acknowledges that both intangible harm and "material risk of

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[341] *See, e.g.*, Scheuerman, *supra* note 2, at 146.
[342] Hosford, *supra* note 52, at 1983.
[343] *Contra* Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 719 (9th Cir. 2010).
[344] LabMD, Inc. v. Federal Trade Commission, 678 F. App'x 816 (11th Cir. 2016).
[345] *Id.* at 818.
[346] *Id.* at 818, 821.
[347] *Id.* at 818.
[348] *Id.* at 820.
[349] *Id.* at 821 ("However, we read both 'probable' and 'reasonably expected,' to require a higher threshold than that set by the FTC.").

harm"[350] suffice to grant consumers standing then the same should be true for the authority to enforce the law by an agency like the FTC.

However, *Spokeo* emphasized that the history and congressional purpose behind the statute are factors in determining whether a statute protects intangible interests or not. As the Eleventh Circuit Court points out, FTCA § 45(a) has not been crafted with the specific goal to protect consumer privacy. Instead, it is a very broad provision that is primarily based on monetary harm.[351] Consequently, if a court reaches the conclusion that FTCA § 45(a) is not related to privacy issues, the FTC does not have authority in this matter. Ultimately, this is a question of statutory interpretation.[352]

Furthermore, courts should adopt the Probability Magnitude Test, as postulated by the FTC, when determining the contours of the term "likely to cause" where the future probability of harm is low.[353] When courts focus only on the low likelihood of injuries to review the enforcement actions of the FTC, they overlook the fact that small injuries with a high probability and large injuries with a low probability are the same. This parallels the situation plaintiff consumers face under the standing doctrine.[354]

Additionally, FTCA § 45(a) requires a substantial consumer injury. If an agency could only act when both the injury and its likelihood are substantial, its ability to prevent future harm would be very limited. As illustrated in *LabMD*, an agency does not look at the single affected consumer but rather at the collective harm to all

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[350] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016).

[351] LabMD, Inc. v. Federal Trade Commission, No. 16-16270-D, 2016 U.S. App. LEXIS 23559, at *9 (11th Cir. Nov. 10, 2016) (citing Federal Trade Commission, *Policy Statement on Unfairness* (Dec. 17, 1980), https://www.ftc.gov/publicstatements/1980/12/ftc-policy-statement-unfairness).

[352] Some scholars doubt that the FTC has broad authority. *See, e.g.*, Timothy E. Deal, *Moving Beyond "Reasonable": Clarifying the FTC's Use of Its Unfairness Authority in Data Security Enforcement Actions*, 84 FORDHAM L. REV. 2227, 2256 (2016); Michael D. Scott, *The FTC, The Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?*, 60 ADMIN. L. REV. 127, 171–182 (2008). Others argue in favor of it. S*ee* Robert W. Dibert, *United States Cybersecurity Enforcement: Leading Roles of the Federal Trade Commission and State Attorneys General*, 43 N. KY. L. REV. 1, 27 (2016); Woodrow Hartzog & Daniel J. Solove, 83 GEO. WASH. L. REV. 2230, 2232, 2234 (2015); *see also* FTC v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015).

[353] *See* In the Matter of LabMD, Inc., No. 9357, 2016 WL 4128215 at *17 (F.T.C. July 28, 2016).

[354] *See* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 66–67 (2012).

affected consumers. The amount of collective harm might be exposed to a significantly higher risk than the single consumer as in a class action. As a result, there might be a high need for public enforcement. The real reason why *LabMD* was rightfully decided is because the FTC could not present any proof of an existing risk to the information of patients.[355] In other words, the probability of a security breach was close to zero. Thus, in *LabMD,* the Probability Magnitude Test yields the same result as the Eleventh Circuit Court's narrow understanding of the term "likely."[356]

In summary, courts should apply the same or at least similar principles when determining standing to sue and the authority of agencies to enforce the law. *Spokeo* provides the essential guidelines for judicial interpretation. A Probability Magnitude Test is the most efficient method to deal with the problem of future harm in both private and public enforcement actions.

CONCLUSION

When class actions combine with statutory damages for procedural violations, courts find themselves in troubled waters. While the wind of consumer protection strongly blows in one direction, courts must ensure that defendants do not drown, especially when plaintiffs allege a risk of harm. This article is the first to cover all three essential navigational markers that consumers encounter. Such markers include standing, class certification and liability limitations. Applying a Probability Magnitude Test to the standing doctrine allows courts to sieve out frivolous lawsuits while also granting class certification to consumers who face an actual risk of harm.

This article advances a workable framework for courts to strike a balance between making injured plaintiffs whole and imposing liability amounts that lead defendants to insolvency. As illustrated in *LabMD*, many of these concepts apply to public enforcement actions as well. These measures taken as a whole, ensure that neither the consumers nor the companies fall overboard.

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[355] *See* In the Matter of LabMD, Inc., No. 9357, 2015 WL 7575033 at *52–53 (F.T.C. Nov. 13, 2015) (the Initial Decision of the Administrate Judge).

[356] LabMD, Inc. v. Federal Trade Commission*,* No. 16-16270-D, 2016 U.S. App. LEXIS 23559, at *10-11 (11th Cir. Nov. 10, 2016).