Article III Standing — The End of Federal Consumer Litigation[1]

By Manuel H. Newburger* and Brit J. Suttell**

Introduction

Article III of the Constitution grants federal courts the "judicial Power" to resolve only "Cases" or "Controversies." U.S. Const. art. III §§ 1-2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotation marks omitted).

Standing is an essential component of Article III's "case or controversy" requirement. *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1232 (11th Cir. 2019). "Standing is the threshold question in every federal case, determining the power of the court to entertain the suit," and in the absence of standing, "the court is powerless to continue." *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006) (cleaned up).

The "irreducible constitutional minimum" of standing consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the defendant must have caused that injury; and (3) a favorable decision must be likely to redress it. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The party invoking the jurisdiction of a federal court bears the burden of establishing these elements to the extent required at each stage of the litigation. *Id*. at 561.

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Article III.

The "foremost" standing requirement is injury in fact, which consists of "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.*, at 560. A "concrete" injury must be "de facto"—that is, it must be "real, and not abstract." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). A particularized injury "must affect the plaintiff in a personal and individual way", *Id.*, and each subsidiary element of injury (a legally protected interest, concreteness, particularization, and imminence) must be satisfied. *Id*. at 1545; *Lujan*, 504 U.S. at 560.

Recent cases from the Supreme Court and multiple courts of appeals have used Article III as a basis for dismissal of consumer protection suits. The net effect is to close the doors of federal courthouses to consumers who are allegedly aggrieved by technical violations of federal statutes. However, as is explained below, this is not necessarily good for defendants or the business community.

Standing – The Basics

To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*136 S. Ct. at 1547 (2016), as revised (May 24, 2016). "The plaintiff must establish standing at the time suit is filed and cannot manufacture standing afterwards." *Pennell v. Global Trust Mgmt.*, 990 F.3d 1041, 1044 (7th Cir. 2021) (internal quotations omitted). The Article III standing inquiry "remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). The controversy must exist at all stages of the litigation. *Shiyang Huang v. Equifax Inc. (In re Equifax Customer Data Sec. Breach Litig.)*, 999 F.3d 1247 (11th Cir. 2021), citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

These cases require a plaintiff to allege a concrete, particularized, injury-in-fact in order to invoke federal court jurisdiction. However, such assertions are not mere formalities. An attorney who asserts an injury-in-fact, is making a material representation of fact and should keep in mind the provisions of the Texas Disciplinary Rules of Professional Conduct.

3.01 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall

> make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.
>
> (c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

When pleading the existence of an injury-in-fact, an attorney should consider these rules. Apart from the potential ethical consequences, it can be quite painful to invest years of time and effort in a case only to have it dismissed for lack of Article III standing.

Recent Trends

For the first few years following *Spokeo*, federal courts were flooded with motions to dismiss for lack of subject matter jurisdiction based on plaintiffs' alleged lack of Article III standing. However, that trend has changed.

In *Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329 (7th Cir. 2019), then-Circuit Judge Amy Coney Barrett, writing for the Seventh Circuit Court of Appeals, found that the plaintiff had asserted "a bare procedural violation" under Section 1692g of the FDCPA (15 U.S.C. § 1692g) without any allegation of concrete harm; thus, she lacked standing to sue. *Casillas* was a harbinger of things to come, but it was not until 2020 that the Article III rapids started to roil.

In *Frank v. Autovest, LLC*, 961 F.3d 1185 (D.C. Cir. 2020), the plaintiff satisfied her burden at the pleading stage by including "general factual allegations of injury resulting from the defendant's conduct." However, the Court of Appeals reversed the District Court's summary judgment for the defendant and remanded with instructions to dismiss based on lack of Article III standing because the consumer failed to identify a concrete injury-in-fact traceable to the alleged statutory violations. Frank's testimony that she neither took nor failed to take any action because of the conduct at issue was fatal to her case. The consumer did not testify that she was confused, misled, or harmed during the collection action, and although she stated that the suit caused her stress and inconvenience, she never connected those general harms to the alleged violations at issue.

> We agree with Frank that the FDCPA creates statutory rights and remedies designed to protect the unsophisticated consumer. *Cf. Jones*, 830 F.3d at 525. But Congress's effort to protect plaintiffs cannot relieve them of the requirement to establish Article III standing—including a "concrete and particularized" injury-in-fact. *Spokeo*, 136 S. Ct. at 1548 (explaining that a "particularized" injury is "personal" to the plaintiff). "Broad though Congress's powers may be to define and create injuries, they cannot override constitutional limits." *Hagy*, 882 F.3d at 623.

This mismatch between the (objective) merits inquiry and the (subjective) standing inquiry is not unique to the FDCPA, but it can trip up an unsuspecting plaintiff. And case law has not always helped matters. Some courts have characterized the Act as "enlist[ing] the efforts of sophisticated consumers . . . as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others." *Jensen*, 791 F.3d at 419 (quoting *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008)).

> Read too broadly, this view of the FDCPA is incompatible with the Supreme Court's standing jurisprudence. *See Lujan*, 504 U.S. at 577 (explaining that "a subclass of citizens who suffer no distinctive concrete harm" may not sue to enforce statutory rights). Article III's case-or-controversy requirement remains in effect regardless of the doctrinal test that courts apply to FDCPA claims. And as decisions by our sister circuits indicate, the Act is rife with procedural requirements and substantive prohibitions that do not necessarily trigger concrete injuries when violated. *See Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 339 (7th Cir. 2019) (concluding that a debt collector's failure to inform the debtor that a challenge to the debt under section 1692g(a) must be "in writing" did not cause concrete harm); *Hagy*, 882 F.3d at 622 (holding that the plaintiffs lacked standing to bring a claim under section 1692e(11) for failure to disclose debt-collector status because they did not show that "the non-disclosure created a risk of double payment, caused anxiety, or led to any other concrete harm").
>
> After *Spokeo*, a plaintiff must demonstrate a subjective—that is, an actual—personal injury for standing even when his merits argument turns on the perspective of an objective, unsophisticated consumer. On the margin, this rule might hamper the deterrence purpose of the Act by reducing the number of viable civil suits. HN10. Still, an FDCPA plaintiff possesses multiple avenues to standing, *see Hagy*, 882 F.3d at 622, and he need not suffer

> the same harm that underlies his statutory claim. For instance, a plaintiff could submit evidence of investigatory injuries—e.g., resources spent uncovering or confirming the truth—rather than outright deception. In short, there's ample room for consumers of all sorts and levels of sophistication to bring FDCPA suits, but under Article III, they must be proper plaintiffs.

Frank, 961 F.3d at 1189-90.

Shortly after *Frank*, the Eleventh Circuit issued its opinion in *Trichell v. Midland Credit Mgmt.,* 964 F.3d 990 (11th Cir. 2020). In that case, the District Court found that "the 'least sophisticated consumer' would not find the collection letters sent to Mr. Trichell deceptive or misleading," and granted the defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

On appeal, the Eleventh Circuit vacated that order, remanding the case with instructions to dismiss for lack of Article III jurisdiction. The Court of Appeals noted that at the motion-to-dismiss stage, the plaintiffs bore the burden of alleging facts that plausibly establish their standing. *Trichell*, 964 F.3d at 996, citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-84 (2009), and *Salcedo v. Hanna*, 936 F.3d 1162, 1168 (11th Cir. 2019). Finding that "the common law furnishes no analog to the FDCPA claims asserted here" *Trichell*, at 998, the Court of Appeals held that merely alleging the FDCPA violations at issue was insufficient to satisfy Article III's standing requirement.

In December, 2020, the Seventh Circuit issued a series of decisions that expanded upon its earlier decision in *Casillas*. In a single week the Court of Appeals decided *Larkin v. Fin. Sys. of Green Bay*, 982 F.3d 1060 (7th Cir. 2020), followed in rapid succession by *Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274 (7th Cir. 2020); *Spuhler v. State Collection Serv.*, 983 F.3d 282 (7th Cir. 2020); *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067 (7th Cir. 2020); and *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, 982 F.3d 1069 (7th Cir. 2020). Those cases (and the ones that followed) set a bar for Article III standing, particularly in FDCPA cases, that many plaintiffs will have difficulty clearing – even when defendants have violated a consumer protection statute.

Larkin expanded the holding in *Casillas* from the context of a mere procedural provision of the FDCPA and extended the Article III analysis to the substantive provisions of 15 U.S.C. §§ 1692e and 1692f. The Court of Appeals rejected the procedural vs. substantive distinction proposed by Larkin's attorneys as a basis to distinguish *Casillas*, stating:

> We're not persuaded that the distinction makes *Casillas* inapplicable or alters the Article III calculus. An FDCPA plaintiff must allege a concrete injury regardless of whether the alleged statutory violation is characterized as procedural or substantive. *Thole*, 140 S. Ct. at 1621 (concluding that "the plaintiffs have failed to plausibly allege a concrete injury" in a case raising a substantive ERISA violation).

Larkin, 982 F.3d at 1066.

Following *Larkin*, the *Bazile* court determined that a plaintiff must do more than merely allege (or even prove) an FDCPA violation to establish standing.

> Here, the plaintiff's complaint may survive dismissal as a matter of pleading. But that's not enough for the district court to decide the merits of the action; the truthfulness of the facts necessary for standing have been called into doubt, requiring further inquiry into whether the court has subject-matter jurisdiction.

Bazile, 983 F.3d at 277.

The Court of Appeals held that Bazile needed to show personal harm.

> But even when a plaintiff's allegations sufficiently demonstrate standing at the outset of the action, they don't show standing for long. Once the allegations supporting standing are questioned as a factual matter—either by a party or by the court—the plaintiff must support each controverted element of standing with "competent proof," *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936), which we've understood as "a showing by a preponderance of the evidence, or proof to a reasonable probability, that standing exists," *Retired Chi. Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir. 1996).

Bazile, 983 F.3d at 279.

After *Bazile*, the *Spuhler* court reiterated that, especially at summary judgment, "the plaintiff bears the burden of establishing the elements of standing." *Spuhler*, 983 F.3d at 285 (citing *Spokeo,* 136 S. Ct. at 1547). The Court of Appeals further explained:

> As the litigation progresses, the way in which the plaintiff demonstrates standing changes. Initially, a plaintiff may demonstrate standing by clearly pleading allegations that "plausibly suggest" each element of standing when all reasonable inferences are drawn in the plaintiff's favor. But if a plaintiff's standing is questioned as a factual matter—for example, in a motion to dismiss under Rule 12(b)(1)—the plaintiff must supply proof, by a preponderance of the evidence or to a reasonable probability, that standing exists. Once the action reaches the summary-judgment stage, the plaintiff must demonstrate standing by "'set[ting] forth' by affidavit or other evidence 'specific facts'" that, taken as true, support each element of standing. Finally, if those facts are later controverted, the plaintiff must adequately support them with evidence adduced at trial. *Id*

The Court of Appeals clearly distinguished the standard of proof at the motion to dismiss stage from the standard at the summary judgment stage:

> To demonstrate standing at the summary judgment stage of litigation, the plaintiffs must "'set forth' by affidavit or other evidence 'specific facts'" demonstrating that they have suffered a concrete and particularized injury that is both fairly traceable to the challenged conduct and

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likely redressable by a judicial decision.

Id. at 284, citing *Lujan,* 504 U.S. at 561.

In *Brunett*, the Seventh Circuit examined standing for the first time on appeal, holding that neither confusion about the defendant's letter nor intimidation resulting from that letter nor the fact that such confusion or intimidation led Brunett to hire a lawyer was sufficient to meet the concrete injury requirement of Article III standing.

> That Brunett's confusion led her to hire a lawyer does not change the evaluation. Even innocuous statements about tax law may lead people to consult counsel. The proposition that forgiving debt is a form of income is not intuitive to non-lawyers (or even to some lawyers). A desire to obtain legal advice is not a reason for universal standing. The plaintiffs in *Thole*, *Spokeo*, *Hein*, and *Richardson* all had counsel. They had been concerned, confused, disturbed, or upset enough to ask lawyers for help. But the Supreme Court held that only people who can show personal, concrete injuries may litigate. Many people think that an advisory opinion will set their minds at ease, but hiring a lawyer in quest of a judicial answer does not permit a federal court, operating under Article III, to give that answer.

Brunett, 982 F.3d at 1069.

Following *Brunett*, *Gunn* rejected the assertion that annoyance or intimidation is sufficient to constitute concrete harm.

The week after its decisions in *Larkin*, *Bazile*, *Spuhler*, *Brunett*, and *Gunn*, the Seventh Circuit issued its decision in *Nettles v. Midland Funding LLC*, 983 F.3d 896 (7th Cir. 2020). In that case, the court found a lack of standing, even when the collection letter at issue overstated Nettles' balance by about $104. Although misrepresenting the amount of a debt is certainly an enumerated FDCPA violation, that fact, standing alone, did not suffice for Article III purposes.

In January, 2021, the Seventh Circuit decided *Smith v. GC Servs. Ltd. P'ship*, 986 F.3d 708 (7th Cir. 2021), affirming the district court's dismissal for lack of standing. Providing its clearest statement yet on the subject of Article III standing, the Court of Appeals declared: "No harm, no foul." Such a statement flies in the face of decades of case law under the FDCPA (and other consumer protection statutes) that allowed plaintiffs who claimed or proved no actual damages to recover statutory damages.

On March 11, 2021, the Seventh Circuit issued its decision in *Pennell v. Global Trust Mgmt.*, 990 F.3d 1041 (7th Cir. 2021). Pennell asserted that the defendant had violated the FDCPA by, *inter alia*, ignoring her cease-and-desist demand and by communicating with a consumer who was represented by counsel. Pennell claimed that she had suffered "stress and confusion" as her injuries, asserting that the debt collector's letter made her think that "her demand had been futile" and that she did not have rights under the FDCPA "to refuse to pay [her] debt and to demand that collection communications cease." *Pennell*, 990 F.3d at 1043. She also claimed that the defendant's dunning letter led her "to question whether she was still represented by counsel as to this debt, which caused stress and confusion as to whether she was required to pay the debt at issue." *Id.*

After the district court granted summary judgment in favor of the defendant, the Seventh Circuit raised the Article III standing issue *sua sponte*. Vacating the judgment and ordering that the case be dismissed for lack of subject matter jurisdiction, the *Pennell* Court reiterated the need to allege a concrete and particularized injury and noted Pennell's failure to do so:

> Pennell alleged in her complaint that Global Trust's dunning letter caused stress and confusion. But we made clear in *Brunett* that 'the state of confusion is not itself an injury. Nor does stress by itself with no physical manifestations and no qualified medical diagnosis amount to concrete harm. For the alleged injury to be concrete, a plaintiff must have acted 'to her detriment, on that confusion.' Pennell failed to show that receiving Global Trust's dunning letter led her to change her course of action or put her in harm's way. Instead, she merely pointed to a statutory violation, which is not enough to establish standing under Article III.

Id., at 1045 (internal citations omitted).

Pennell's claims had an analog in the common law tort of invasion of privacy (specifically, intrusion upon seclusion). That, however, was insufficient to give rise to Article III standing.

Following the line of Seventh Circuit cases, the Sixth Circuit held that confusion and anxiety are insufficient to meet Article III's injury-in-fact requirement. *Garland v. Orlans, PC*, 999 F.3d 432 (6th Cir. 2021). Furthermore, the termination of federal litigation based on Article III standing is not merely an FDCPA phenomenon. It also extends to FCRA cases. *See, e.g., Beaudry v. TeleCheck Servs*., No. 20-6018, 2021 U.S. App. LEXIS 22488 (6th Cir. July 27, 2021); *Thomas v. Toms King (Ohio II), LLC*, 997 F.3d 629 (6th Cir. 2021). Every type of statutory consumer law claim is subject to challenge based on Article III standing.

Consumer attorneys who thought these cases were likely to be rejected by the Supreme Court had their hopes dashed with that court's decision in *TransUnion LLC v. Ramirez*, ____ U.S. ___, 210 L. Ed. 2d 568, 141 S. Ct. 2190, (2021). In *TransUnion*, the Supreme Court confirmed that a plaintiff

alleging an intangible injury must show that the injury has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 210 L. Ed. 2d at 579.

However, while claims for invasion of privacy have certainly been recognized as a basis for lawsuits in American courts, the Court made it clear that merely invoking privacy rights was not enough to confer standing:

> For the first time in this Court, the plaintiffs also argue that TransUnion "published" the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received. That new argument is forfeited. In any event, it is unavailing. Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation. *See, e.g., Chalkley v. Atlantic Coast Line R. Co.*, 150 Va. 301, 326-328, 143 S. E. 631, 638-639 (1928). Nor have they necessarily recognized disclosures to printing vendors as actionable publications. *See, e.g., Mack v. Delta Air Lines, Inc.*, 639 Fed. Appx. 582, 586 (CA11 2016). Moreover, even the plaintiffs' cited cases require evidence that the defendant actually "brought an idea to the perception of another," Restatement of Torts §559, Comment a, p. 140 (1938), and thus generally require evidence that the document was actually read and not merely processed, *cf. Ostrowe v. Lee*, 256 N. Y. 36, 38-39, 175 N. E. 505, 505-506 (1931) (Cardozo, C. J.). That evidence is lacking here. In short, the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim—publication—and does not bear a sufficiently "close relationship" to the traditional defamation tort to qualify for Article III standing.

TransUnion, at 590 n.6.

The Supreme Court has rejected the notion that sharing information with a vendor is, by itself, sufficient to give rise to Article III standing. The Court also attempted to rein in the exercise of jurisdiction by federal courts, noting that "*Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *TransUnion* at *18.

Furthermore, echoing *Brunett*, the Supreme Court stated:

> But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court. As then-Judge Barrett succinctly summarized, "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *Casillas*, 926 F. 3d, at 332.

TransUnion, at 585.

TransUnion appears to align the Supreme Court with the recent line of cases from various Circuit Courts of Appeals, all of which hold that a bare procedural violation of a consumer protection statute, without any allegation of a concrete harm, is insufficient to invoke Article III jurisdiction. *TransUnion* also limits a federal court's jurisdiction over the claims of absent putative class members. Even if a named plaintiff is ultimately determined to have standing, *TransUnion* requires the plaintiff to establish Article III standing for each member of the putative class. "Every class member must have Article III standing in order to recover individual damages. 'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.'" *TransUnion* quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U. S. 442, 466 (2016) (Roberts, C. J., concurring).

Do These Cases Benefit Defendants?

While the business community has cheered these recent trends in analyzing Article III standing and jurisdiction, those who are cheering have forgotten some fairly recent history. A mere sixteen years ago, Congress passed the Class Action Fairness Act of 2005 ("CAFA"), 119 Stat. 4, which amended 28 U.S.C. §1332(d), 1453, and 1711-1715. CAFA was championed by the business community to make it easier to remove class actions to federal court.

In enacting CAFA, Congress found that "class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." 119 Stat. 4(a)(1). Congress also found that over the decade preceding the enactment of CAFA, there had been numerous abuses of the class action process that had adversely affected interstate commerce and undermined public respect for our judicial system. 119 Stat. 4(a)(2). Particularly relevant to the present is Congress' finding in 2005 that:

> Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

119 Stat. 4(a)(4).

Congress declared that the purpose of CAFA was to:

> (1) assure fair and prompt recoveries

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> for class members with legitimate claims;
>
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and
>
> (3) benefit society by encouraging innovation and lowering consumer prices.

19 Stat. 4(b).

The dismissal of a case for lack of Article III jurisdiction is not a decision on the case's merits. The plaintiff in such a suit may, under appropriate circumstances, re-file in state court. Cases under the FDCPA "may be brought in any appropriate United States district court without regard to the amount in controversy, *or in any other court of competent jurisdiction.*" 15 U.S.C. § 1692k(d) (emphasis added). The FCRA contains identical language (15 U.S.C. § 1681p) and similar jurisdiction provisions are in the Truth in Lending Act (15 U.S.C. § 1640(e)), the Equal Credit Opportunity Act (15 U.S.C. § 1691e(f)), the Electronic Fund Transfers Act (15 U.S.C. § 1693m(g)), and the Real Estate Settlement Procedures Act (12 U.S.C. § 2614). A suit under any of those statutes may be brought in a state court that has jurisdiction over the amount in controversy.

Furthermore, in light of all of the recent cases finding that plaintiffs lacked Article III standing, many plaintiffs' attorneys are now filing suit in state court, sometimes in the "judicial hellholes" that led to the passage of CAFA. (Some other plaintiffs' attorneys are skipping courts altogether and filing arbitration claims.) In a relatively recent trend, when defendants remove cases to federal courts, plaintiffs are moving to remand the cases back to state court, arguing that their claims do not give rise to Article III jurisdiction. *And they are winning those motions*. *See, e.g., Tavarez v. Transworld Sys.*, 2021 U.S. Dist. LEXIS 128956 (E.D. Wis. July 12, 2021); *Winters v. Douglas Emmett, Inc.*, 2021 U.S. Dist. LEXIS 124495 (C.D. Cal. July 2, 2021); *Wittbecker v. Cuptertino Elec., Inc.*, 2021 U.S. Dist. LEXIS 73232 (N.D. Cal. Apr. 14, 2021).

Certainly, some members of the Supreme Court have noted this danger. Justice Thomas, joined by the unlikely trio of Justices Breyer, Sotomayor, and Kagan, wrote, at footnote 9 in his dissent in *TransUnion*:

> Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law," *ASARCO Inc. v. Kadish*, 490 U. S. 605, 617, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989)—as the sole forum for such cases, with defendants unable to seek removal to federal court. *See also Bennett, The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 Minn. L. Rev. 1211 (2021). By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.

Transunion, at 606 n.9 (Thomas, J., dissenting).

Standing may be the beginning of the end of decades of consumer litigation in federal courts. It may, however, usher in a new era of case law from state courts interpreting federal consumer protection statutes. It remains to be seen whether those state courts will build as consistent a body of case law as the federal courts have built. What is almost a certainty is that while the Article III case law is inconvenient for consumers, in the long run it is likely to be devastating to the business community for the very reasons that led to the enactment of CAFA.

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