LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, DECEMBER 8, 2022

PERSPECTIVE

GUEST COLUMN

Your Honor, please drop *my* case

By Stefan Bogdanovich

In recent years, plaintiffs in data privacy class actions have devised a new tactic to remand cases to state court: arguing they lack standing to sue.

In *Thornley v. Clearview AI, Inc.*, the Seventh Circuit recently shined a light on this new, and somewhat unusual, argument: "Ordinarily, it is the plaintiff who bears the burden of demonstrating that the district court has subject-matter jurisdiction over her case and that it falls within 'the Judicial Power' conferred in Article III," and the defendant argues jurisdiction is improper. (984 F.3d 1241, 1244 (7th Cir. 2021).) But in *Thornley*, roles were reversed: "Thornley insists that she lacks standing, and it is the defendant, Clearview AI, Inc., that is championing her right to sue in federal court." (*Id.* at 1242.)

The gambit worked, and Thornley's case was remanded to Illinois state court, the forum Thornley wanted all along. (*Id.* at 1249.) As another Indiana District Court Judge put it: "If all of this seems a little odd, that's because it is. [Plaintiff] is trying to convince me she has no concrete injury, while the defendant insists [Plaintiff] has indeed been injured by its conduct. It's a bit topsy-turvy." *Hustedt v. Hunter Warfield, Inc.*, No. 4:21CV59-PPS/JEM, 2022 WL 214483, at *1 (N.D. Ind. Jan. 24, 2022). And this maneuver is not unique to a few clever Midwestern lawyers – data privacy class action plaintiffs all across the country have been successfully urging federal courts to throw their cases out because they lack standing. (*See, e.g., Orpilla v. Schenker, Inc.*, No. 19-CV-08392-BLF, 2020 WL 2395002, at *4 (N.D. Cal. May 12, 2020); *Siglin v. Sixt Rent a Car, LLC*, No. 20CV503 DMS (BLM), 2020 WL 3468220, at *2 (S.D. Cal. June 25, 2020); *Kamel v. Hibbett, Inc.*, No. 8:22-CV-01096-RGK-E, 2022 WL 2905446, at *2 (C.D. Cal. July 22, 2022); *Ferriol v. Receivable Performance Mgmt., LLC*, No. 22-CV-20249, 2022 WL 4376007, at *2 (S.D. Fla. Sept. 22, 2022).)

The argument these plaintiffs all raise is the same. Citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) – tongue in cheek – plaintiffs all argue they've only alleged "a bare procedural violation, divorced from any concrete harm," which, according to Spokeo, is not enough to plead Article III injury-in-fact. When it was decided, many observers predicted Spokeo would be a positive development for defendants, because data privacy cases often hinge on procedural violations of various state and federal laws and actual privacy injuries can be difficult to prove on a class-wide basis. (*See e.g., Standing-Class Actions-Ninth Circuit Allows Fair Credit Reporting Act Class Action to Proceed Past Standing Challenge.-Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), 131 Harv. L. Rev. 894, 901, n.46 (2018); *Big Data's Exploitation of Social Determinants of Health: Human Rights Implications*, 22 Colum. Sci. & Tech. L. Rev. 63, 81–82 (2020).) Yet in this recent trend of cases, plaintiffs have repurposed *Spokeo* for their own ends.

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In each of these cases, plaintiffs artfully drafted complaints that alleged technical violations of various state and federal privacy laws and general injuries, without allegations of concrete or particularized harms. (*Thornley*, 984 F.3d 1241 (Illinois Biometric Information Privacy Act); *Orpilla*, 2020 WL 239-5002 (Fair Credit Reporting Act); *Siglin*, 2020 WL 3468220 (Fair and Accurate Credit Transactions Act); *Hustedt*, 2022 WL 214483 (Fair Credit Reporting Act and Fair Debt Collections Practices Act); *Ferriol*, 2022 WL 4376007 (Fair Debt Collections Practices Act).) And in some of these cases, plaintiffs could plead standing if they wanted to, given that privacy-injuries, like having one's information used and commoditized without one's consent, are "often economic harms [that] surmount Article III standing's hurdle relatively easily," *Enforcing Digital Privacy*, 33 Harv. J.L. & Tech. 311, 314 (2019), or are intangible harms similar to those traditionally recognized under common law privacy torts. "It is no secret to anyone that [these plaintiffs] took care in their allegations… to steer clear of federal court. But in general, plaintiffs may do this." *Thornley*, 984 F.3d at 1248. In other words, these plaintiffs drafted poison-pilled complaints so that, if their cases are removed to federal court, they could easily move to remand.

And such self-sabotage is not necessarily harmful to a plaintiff's case once it returns to state court. After all, as *Spokeo* notes,"[s]tanding to sue is a doctrine… developed in our case law to ensure that *federal courts* do not exceed their authority." (578 U.S. at 338

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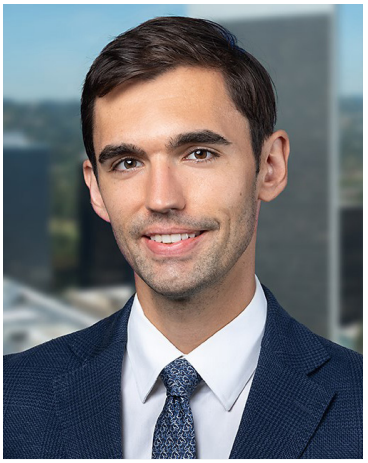

(emphasis added).) Thus, establishing a plaintiff lacks standing proves "only that the *federal courts* have no power to adjudicate the matter. State courts are not bound by the constraints of Article III." (*Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016) (emphasis in original).) And once a federal court determines it lacks the constitutional power to hear a case, it also "lacks the power to adjudicate the merits of the case. Accordingly, where there is a lack of Article III standing, 'Article III deprives federal courts of the power to dismiss a case with prejudice.'" (*Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 54-55 (2d Cir. 2016).) So in *Thornley*, the federal court was careful to "express no opinion on the adequacy of Thornley's complaint as a matter of Illinois law. That will be for the state court to address." (984 F.3d at 1249.)

Indeed, these plaintiffs have realized that "they may take advantage of the fact that Illinois [and many other state courts] permit[] cases that allege bare statutory violations, without any further need to allege or show injury." (*Id.* at 1248-49.) In doing so, plaintiffs can successfully bypass the Class Action Fairness Act (CAFA), which allows defendants to remove certain class actions to federal court. (*Polo*, 833 F.3d at 1197.) Congress passed CAFA in 2005 at the urging of tort reform lobbyists, based on a perception that state courts were more likely to enter large monetary verdicts in class action cases. This set off a "jurisdictional ping-pong game" where plaintiffs often sought to have the case heard in state court, and defendants sought to have the case heard in federal court. (*Id.*) But once a federal court determines that a plaintiff lacks standing, "this rally has concluded," and the case must go to state court. (*Id.*)

These cases illustrate that modern-day standing doctrine, often viewed as another arrow in the defense's quiver, is more like a double-edged sword.