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## FEDERAL COURT REMINDS DEFENDANTS THAT DISMISSAL FOR LACK OF STANDING CAN BE A PYRRHIC VICTORY

by Glenn G. Lammi

A plaintiff's lack of standing to sue is about as close to a silver-bullet defense as civil-litigation defendants have at their disposal in federal court. The doctrine is based in Article III of the U.S. Constitution, which limits federal courts to hearing only "cases and controversies." The doctrine puts the onus on a plaintiff to prove, among other factors, that she suffered an actual harm, and if she can't, the court has no jurisdiction over the case. Because standing is a jurisdictional question, defendants can raise it at any point in the litigation. And as the Petitioner in the Supreme Court case [Frank v Gaos](#) learned in October Term 2018, courts can raise it *sua sponte* as well.

There are also times, however, when a business defendant would prefer to be in federal court. When facing claims in a plaintiff-friendly state court, for instance, business defendants often seek the lawsuit's removal to federal court. But what happens when a defendant in a successfully removed case successfully argues that the plaintiff lacks standing to sue? The result, as an October 18 district court ruling in [Pitre v. Wal-Mart Stores, Inc.](#) illustrates, will almost certainly be a Pyrrhic victory.

### Yet Another FCRA Class Action

Claiming to represent over 6.5 million similarly harmed individuals, three named plaintiffs applied for and obtained jobs at Wal-Mart. In a suit filed in Orange County Superior Court, they allege that when Wal-Mart violated the Fair Credit Reporting Act (FCRA) when it procured consumer reports on employment applicants. Wal-Mart successfully sought to remove the case to the U.S. District Court for the Central District of California. The federal court subsequently granted the plaintiffs' motion to certify their class. Wal-Mart moved for summary judgment.

### A Win on Standing

The court first examined Wal-Mart's argument that the plaintiffs lacked standing to sue because they lacked a real-world injury. It quickly dispensed with the plaintiffs' claim that Wal-Mart, before procuring their consumer report, failed to give the plaintiffs a written summary of their rights. But the FCRA requires a written summary for only an *investigative* consumer report. Because the FCRA doesn't require a prospective employer to give a written summary to an applicant when obtaining a generic consumer report, the plaintiffs could not establish standing.

The court then assessed the plaintiffs' standing to allege that extraneous information contained in Wal-Mart's disclosure notices rendered them not "clear and conspicuous" as the FCRA requires. The court explained that even if Wal-Mart didn't provide perfectly compliant disclosures, a mere procedural defect doesn't constitute a harm under Article III. The U.S. Supreme Court established this principle in [Spokeo, Inc. v. Robins](#), a case in which the plaintiff alleged FCRA violations. The plaintiffs in [Pitre](#) thus had to prove they suffered a concrete injury or faced an imminent risk of harm.

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Depositions of the *Pitre* plaintiffs revealed that each plaintiff was aware that Wal-Mart “might conduct a background check . . . and did not object thereto.” Each plaintiff understood background checks were a necessary part of the application process, and each testified that they wanted to work for Wal-Mart. Because none of the plaintiffs were unaware of the background checks and each of them got what they wanted—a job offer—the court concluded that Pitre and his fellow plaintiffs suffered no actual or imminent harm.

### **A Loss on Remand**

The court then had to decide the fate of the plaintiffs’ suit. Wal-Mart asked the court to enter judgment in the company’s favor. Pitre argued that the court must remand the case to Orange County Superior Court. The court concluded *Pitre* must be remanded back to state court.

Under federal [statutory](#) and [case law](#), when a federal court ultimately concludes that it lacks jurisdiction over claims remanded from state to federal court, that court must send the claims back to state court. The *Pitre* court also noted that it could not grant Wal-Mart’s request because the plaintiffs’ lack of standing deprived the court of its authority to enter judgment.

State courts can exercise concurrent jurisdiction over federal statutory claims, and because state courts are not bound by Article III doctrine, the court explained, remand in this case would not be “futile” as Wal-Mart had argued. “The nature of our federalist system,” the court reasoned, dictates that a California court, applying state jurisdictional principles, should have the opportunity to determine the plaintiffs’ standing to sue.

### **What’s a Defendant to Do?**

For most defendants, dismissal of a class action for lack of standing would be a resounding victory. But for Wal-Mart in *Pitre*, that outcome thrust them back into Orange County. The California constitution doesn’t feature a “case or controversy” requirement for court jurisdiction, so the Superior Court will likely find that the plaintiffs have standing to sue Wal-Mart.

Decisions like *Pitre* leave defendants in quite a bind. The U.S. Supreme Court [held](#) in 1981 that “absent provision by Congress to the contrary” states have concurrent jurisdiction to enforce federal statutes. That principle sets an extremely high bar for defendants trying to stop a lawsuit to enforce a federal statute from returning to state court. Some federal laws, like the FCRA, even explicitly authorize state-court jurisdiction.

Rather than risk a ruling on jurisdiction, perhaps defendants in a *Pitre*-like bind could simply ignore standing and ask the court to dismiss on other grounds, such as a plaintiff’s failure to prove their case. But as we explain above, judges at any point in civil litigation can question whether a plaintiff has standing to sue. Federal district court judges, especially those in class-action-heavy jurisdictions, actively look for ways to thin their dockets, and asking a plaintiff to demonstrate standing is certainly one of the most effective methods.

State-court defendants should also analyze that particular state’s standing doctrine before seeking removal to federal court. As noted in a recent Washington Legal Foundation [paper](#), Wal-Mart [successfully challenged](#) a plaintiff’s standing to bring claims under the FCRA in Missouri state court because Missouri’s constitution has an analogue to Article III. On the other hand, an Illinois state court [rejected](#) FedEx’s motion to dismiss a suit under the federal Fair and Accurate Credit Transactions Act for lack of standing. The court reasoned that “Illinois courts are not required to follow federal law on issues of justiciability and standing.”

If a defendant concludes that it has as much of a chance to win on standing grounds in state court as it has in federal court, the economical choice could be to remain in state court. That choice, ironically, may also be the most financially prudent one when, upon removal to federal court, a standing challenge represents the defendant’s best chance of dismissal. If your path to victory is a Pyrrhic circle, perhaps the best strategy is to stand still.