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U.S. COURT OF APPEALS

*Jaras v. Equifax, Inc.*, No. 17-15201+

BERZON, Circuit Judge, partially dissenting:

I respectfully dissent from the majority's holding that Plaintiffs have not alleged a concrete injury sufficient to establish standing. The majority requires Plaintiffs to allege that the inaccuracies in their credit reports affected a specific previous or imminent transaction. No such requirement exists in our case law, nor should it.

To plead a concrete injury in a FCRA action for correction of an inaccurate credit report, individuals must allege that a violation of FCRA "actually harm[s], or present[s] a material risk of harm" to their concrete interests. *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017). Nearly all Plaintiffs state that inaccuracies in the reporting of their confirmed bankruptcy lowered their credit score.[1] Those allegations satisfy the concrete harm requirement.

Unlike an erroneous zip code, *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016), the alleged inaccuracies in Plaintiffs' credit reports harm or present a material risk of harm to their concrete interests. Credit reports exist to convey information to third parties and are used in a wide variety of transactions, from

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[1] Because Plaintiff Jaras did not sufficiently allege that inaccuracies in his credit report adversely affected his creditworthiness, I concur with the majority that his complaint should be dismissed.

applying for a home loan to purchasing a cell phone.[2] In most instances, third parties need not give notice before accessing an individual's credit report, 15 U.S.C. § 1681b(2)(A) (requiring notice only when requesting credit reports for employment purposes); and in some instances, third parties can access credit reports without the consumer taking any action to instigate a transaction—pre-screening individuals for offers of credit or insurance, for example. *See* 15 U.S.C. § 1681b(c)(1)(B). It is thus often difficult to predict when a credit report may be accessed or to know when it has been accessed, and inaccuracies that are discovered may take up to 30 days to investigate and correct. *See* 15 U.S.C. § 1681i(a)(1)(A).

Given their "ubiquity and importance . . . in modern life—in employment decisions, in loan applications, in home purchases, and much more—the real–world implications of material inaccuracies in [credit] reports seem patent on their face." *Robins*, 867 F.3d at 1114. That is because "[t]he 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." *Id*.

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[2] *See* Beth Braverman, *Getting a new cellphone? Expect a credit check*, Creditcards.com (Feb. 2, 2016), https://www.creditcards.com/credit-card-news/cellphone-credit-check-1270.php.

As a result, adverse information on a credit report, often resulting in a lower credit rating, constitutes a reputational injury creating a material risk of harm, whether or not an individual contemplates a specific, imminent transaction. Our decision on remand from the Supreme Court in *Robins v. Spokeo, Inc*. so recognizes, and does *not* demand an allegation of known access by a third party or of a past, or imminent, specific transaction. The plaintiff in *Robins* alleged only that a website's posting of inaccurate information about his personal life "caused actual harm to [his] employment prospects" because he was "actively seeking employment." First Amended Complaint at ¶¶ 34-35, *Robins*, 867 F.3d 1108. He did not state what specific transactions he was undertaking to look for employment, or whether any prospective employer had looked at the allegedly inaccurate reports.

Nonetheless, we held that he had alleged a sufficiently concrete injury to establish standing. *Id*. at 1118. We did not require the plaintiff to be more specific because we recognized that "determining whether any given inaccuracy in a credit report would help or harm an individual (or perhaps both) is not always easily done." *Id* at 1117. Moreover, we rejected the argument that Robins lacked standing because he had only "asserted that such inaccuracies *might* hurt his employment prospects, but not that they present a material or impending risk of doing so." *Id*. at

1118. We held that making available "a materially inaccurate consumer report" was injury enough. *Id*.

Plaintiffs' allegations in this case are just as specific and just as concrete as the ones we accepted in *Robins*. For that reason, I would hold that Plaintiffs have standing.

I note that establishing constitutional standing is separate from answering the substantive question, as required by FCRA, of whether Plaintiffs' credit reports are "patently incorrect, or . . . misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009). The original dispute in this case—before the panel asked for supplemental briefing on the standing issue—was whether any error in those credit reports meets this standard, given that the Plaintiffs' pre-petition bankruptcy debts were not yet discharged and the Chapter 13 plans, even if accurately reported, might have the same consequences for future transactions as the current reporting method. In my view, that bankruptcy-focused issue is the one we should be addressing, as the plaintiffs do have standing. But as the majority does not address this substantive question, I do not either.

I respectfully dissent.