

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 19 2020

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

RICHARD B. HOGUE,

No. 18-15204

Plaintiff-Appellant,

D.C. No.

v.

2:16-cv-01620-JCM-VCF

SILVER STATE SCHOOLS CREDIT
UNION,

MEMORANDUM*

Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted May 16, 2019
San Francisco, California

Before: McKEOWN and GOULD, Circuit Judges, and LASNIK,** District Judge.

Plaintiff-Appellant Richard B. Hogue appeals the district court’s dismissal of his claims brought under the Fair Credit Reporting Act (“FCRA”). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

Hogue filed a complaint against Defendant-Appellee Silver State Schools Credit Union (“Silver State”), alleging Silver State violated Section 1681s–2(b) of the FCRA: the duty to investigate the accuracy of reported information upon receiving notice of a dispute. Hogue alleges Silver State, first, erroneously reported an auto loan as “past due” to Defendant Experian Information Solutions, Inc. (“Experian”), a consumer reporting agency, after the loan had been discharged through bankruptcy, and, then, failed to adequately investigate the disputed credit information after Hogue reported it.

After discovery, the district court granted Silver State’s motion for summary judgment and dismissed Hogue’s claims. The district court determined Hogue did not state a claim for relief under the FCRA because Silver State had met its reporting and dispute investigation obligations.

A.

Although neither party addressed whether Hogue had Article III standing to bring this suit, we are required to consider standing in the first instance when it implicates our jurisdiction. *Laub v. U.S. Dep’t of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003). Standing is an “essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Standing requires a plaintiff to establish three elements: (1) “the plaintiff must have suffered an ‘injury in fact’” that is “concrete and

particularized” and “actual or imminent”; (2) “there must be a causal connection between the injury and the conduct complained of”; and (3) “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* at 560–61 (citations omitted).

At issue here is whether Hogue established that he had suffered an injury in fact. We have adopted a two-part inquiry to determine whether the violation of a statutory right constitutes a concrete injury. *Robins v. Spokeo, Inc.* [*Spokeo III*], 867 F.3d 1108, 1113 (9th Cir. 2017). We consider, “(1) whether the statutory provisions at issue were established to protect [the plaintiff’s] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged . . . actually harm, or present a material risk of harm to, such interests.” *Id.*

The first prong is satisfied because the FCRA was established to protect consumers’ concrete interests. *Id.* at 1113–14. The concrete-injury analysis in the FCRA context generally focuses on the second prong of the inquiry: whether the alleged procedural violations actually harmed, or presented a material risk of harm, to the consumer’s concrete interests. Hogue has not shown that the inclusion of the Silver State account on his consumer disclosure report actually harmed—or presented a material risk of harm to—his concrete interests.

First, Hogue has not shown actual harm to his concrete interests. The

district court found that “no third parties made an adverse credit decision as to [Hogue] based on this disputed information.” When DirecTV conducted a “soft inquiry” on Hogue’s credit report, there is no evidence the inquiry included the disputed Silver State account information, but even if it had, there was no harm: Hogue became a DirecTV customer. When the account came up in Hogue’s 2012 work background check, there was no harm: Hogue’s job was not affected. And although Hogue feared the account would be considered again in his 2017 work background check, it “fell off” his credit report one year before the background check. As for other damages, the district court discounted Hogue’s claims of out-of-pocket expenses and emotional distress because he did not provide supporting evidence of those damages and could not show that his expenses and distress were the result of an FCRA violation.

Second, Hogue has not shown a material risk of harm to his concrete interests. The district court found that Hogue “failed to show Experian disclosed the disputed credit information to a third party.” Although, as we held in *Ramirez v. TransUnion*, 951 F.3d 1008, 1027 (9th Cir. 2020), actual dissemination to a third party is not always required to establish standing under the FCRA, the plaintiff still must show a risk that the disputed information could be disseminated and that such dissemination would present a material risk of harm to his concrete interests. Here, there was no risk of dissemination to third parties. As the district court found, the

“disputed, negative information at issue here was not published in a consumer report, viewable b[y] third parties.” And even if there was a risk of dissemination, Hogue did not allege a material risk that such dissemination would harm him. Although Hogue’s consumer disclosure report listed the Silver State account as “past due,” it also described the account as having been discharged by Hogue’s bankruptcy. Thus, the district court found that the inclusion of the account was not “materially misleading.”

Hogue has not suffered a concrete injury-in-fact sufficient to confer Article III standing. We dismiss Hogue’s complaint for lack of subject matter jurisdiction.

B.

In supplemental appellate briefing, Hogue requests that, if we dismiss his complaint for lack of standing, we permit him leave to amend. This request has merit.

“In general, dismissal for lack of subject matter jurisdiction is without prejudice.” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017). And in theory, Hogue could allege facts that might supporting standing. *See id.* (“Plaintiffs have not satisfied the requirements [for] . . . standing. In theory, Plaintiffs could allege . . . facts that might support standing. As a result, the complaint should have been dismissed *without* prejudice.”). Thus, we affirm the district court’s dismissal of Hogue’s complaint, but on the basis that he lacks

Article III standing to bring his claims, and we instruct the district court to enter an order of dismissal without prejudice.

AFFIRMED with instructions to the district court to enter an order of dismissal without prejudice.

United States Court of Appeals for the Ninth Circuit

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95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

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