Boeing Case Overcharge Ruling May Not Survive If Appealed

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For a plaintiff to have standing to sue in federal court, Article III of the U.S. Constitution requires an injury in fact caused by the challenged conduct. Federal standing under the Racketeer Influenced and Corrupt Organizations Act requires a bit more: A RICO plaintiff must demonstrate an injury to business or property caused by the RICO violation.

A recent federal district court decision in a putative class action against Boeing Co. and Southwest Airlines Co. found RICO standing in the consumer context. But the court's generous treatment of the plaintiffs' overpayment theory seems difficult to square with the U.S. Court of Appeals for the Fifth Circuit's prior rejection of a similar no-injury class action.

Following two tragic crashes of Boeing's 737 Max 8 airplanes — Lion Air Flight 610 off the coast of Indonesia, and Ethiopian Airlines Flight 302 in Ethiopia — 11 individuals who had taken Southwest Airlines flights on the Max 8 filed a putative class action against Boeing and Southwest in the U.S. District Court for the Eastern District of Texas.[1] The class plaintiffs alleged fraud claims based on (among other things) the alleged concealment of defects in the Max 8's computer-controlled aviation system, and alleged misrepresentations to the Federal Aviation Administration.

The class plaintiffs did not have a bad experience on their Max 8 flights: They purchased their tickets and were safely transported by Southwest to the destinations of their choice. Moreover, they disclaimed any physical injury based on the aviation system defect. But they asserted two forms of injury.

First, they alleged that, had they known the Max 8 was "fatally defective," they never would have purchased their plane tickets in the first place, and thus they were entitled to full refunds on their ticket purchases from Southwest. Second, they argued that defendants' allegedly fraudulent omissions and misrepresentations enabled Southwest to overcharge them for their plane tickets.

Boeing and Southwest moved to dismiss the complaint, arguing (among other things) that plaintiffs did not suffer an injury in fact, and therefore did not have standing to sue. To resolve the standing inquiry, the district court analyzed the two forms of injury alleged by the class plaintiffs.[2]

The district court rejected the first claim — for a full refund of the ticket purchases — as a no-injury claim foreclosed by the Fifth Circuit's decision in Rivera v. Wyeth-Ayerst Labs.[3] In Rivera, plaintiffs who had purchased pain medication that caused certain users to

experience liver failure — but who did not themselves suffer liver failure or allege any physical or emotional injuries — claimed that they had been induced to purchase a defective drug and demanded refunds for their purchases. The Fifth Circuit rejected this no-injury theory on standing grounds, because plaintiffs purchased and received effective pain medication that did not manifest any defect when they used it.[4]

According to the district court, the Earl plaintiffs' refund theory presented the sort of no-injury cause of action foreclosed by the Fifth Circuit's decision in Rivera:

> Like the Rivera plaintiffs' no-injury products liability claim, Plaintiffs' first theory of injury is: Defendants manufactured and operated the MAX 8; Plaintiffs purchased a ticket for a flight, potentially on a MAX 8; Defendants did not warn Plaintiffs of the MAX 8's dangers and/or the MAX 8 was defective; people other than Plaintiff's were killed by the MAX 8's defect; [and] Plaintiffs want their money back for their tickets.[5]

Because this theory of damages was "nearly identical to the one rejected by the Fifth Circuit in Rivera," the Earl court found the class plaintiffs' first theory of harm did not constitute "cognizable injury-in-fact" under Article III.

The district court, however, viewed the class plaintiffs' overcharge theory differently. To evaluate that theory, the district court considered Cole v. General Motors Corp.,[6] where a class of Cadillac DeVille purchasers claimed the DeVilles they purchased contained defective air bag systems that could deploy without warning and without a crash, posing a risk of physical injury.

As with Rivera, the Cole class excluded anyone who suffered any type physical injury from the air bag systems. But the Fifth Circuit distinguished Rivera, ruling the plaintiffs had standing to sue because they alleged a defect in their Cadillacs at the time of purchase that caused them actionable economic harm (overpayment or loss in value).[7]

Accepting the plaintiffs' allegations as true, the district court ruled that the Earl plaintiffs' overcharge theory constituted an economic injury satisfying Article III's injury-in-fact requirement. Accordingly, the district court ruled that the Earl plaintiffs could proceed on their federal RICO claims under 18 U.S.C. Section 1962(c) (conducting or participating in the conduct of a RICO enterprise's affairs through a pattern of racketeering activity) and 18 U.S.C. Section 1962(d) (RICO conspiracy).[8]

But the district court dismissed the rest of the Earl plaintiffs' claims, alleged under state common law and consumer protection statutes, primarily on the ground that the state law claims were preempted under the federal Airline Deregulation Act.[9]

Does the district court's distinction between an improper no-injury claim and a cognizable overcharge theory, based on the same facts, hold water? A comparison of the facts of the authorities on which the Earl court relied with the facts of the case before it calls into question the district court's differentiation between the two theories, and suggests it may have created an unworkable exception to Rivera's holding.

In the classic consumer concealed-defect case (such as Cole), the claimed economic injury makes sense, because the consumer either still owns a good worth less after the disclosure of the defect, or has sold the good at a discount after disclosure of the defect. A consumer owning a used Cadillac that would have been worth $20,000 if it had not been defective should be able to recover $10,000 in damages if the defective Cadillac actually owned by

the consumer can only be re-sold for $10,000. Similarly, in the securities fraud context, a stockholder's loss of value upon disclosure of an improperly concealed material fact should be readily quantifiable and compensable.[10]

The other cases cited by the Earl court similarly involve classic inflated price contexts. Some involve antitrust claims, where the entire point of the challenged price-fixing conspiracies was to artificially inflate prices.[11] The only other RICO case cited by Earl similarly involved a racketeering scheme focused entirely on overcharging a county for office supplies.[12]

The facts of the Earl plaintiffs' claims do not fit into any of these boxes. In Earl, the class plaintiffs' flights had been completed, without incident. There was no remaining good to be resold at an allegedly diminished price.

Nor can Boeing's and Southwest's alleged concealment of the purported defects in the Max 8 plausibly be characterized as intended entirely to drive up the price of tickets for flights on the Max 8. Had the potentially fatal defects been disclosed, the Earl plaintiffs presumably would not have bought the tickets at all, just as they expressly alleged.[13]

The Earl plaintiffs' "unmanifested but potentially fatal defect" claim does not seem reasonably distinguishable from the injury theory in Rivera. By allowing the class plaintiffs to circumvent Rivera through an overpayment theory, the Earl court created an exception that potentially swallows the no-injury rule. Virtually any no-injury claim could be recharacterized as a overpayment claim, under the theory that while no consumers actually would have bought the potentially fatally defective product, if they had, they certainly would have paid much less.

It will be interesting to see how the RICO claims in Earl progress as the case moves beyond the Rule 12 pleadings stage. RICO claims typically face formidable summary judgment challenges, which Boeing and Southwest may seek to present together with or even in advance of the class plaintiffs' motion for class certification. Assuming the Fifth Circuit has the opportunity to review the district court's overpayment theory, it may well conclude the Earl court's reasoning cannot be reconciled with Rivera.

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[1] Earl v. Boeing Co., Civil Action No. 4:19-cv-00507, 2020 WL 759385 (E.D. Tex. Feb. 14, 2020).

[2] 2019 WL 759385, at *4-*10.

[3] Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315 (5th Cir. 2002).

[4] 283 F.3d at 319-321.

[5] Earl, 2019 WL 759385, at *6.

[6] Cole v. Gen. Motors Corp., 484 F.3d 717 (5th Cir. 2007).

[7] Cole, 484 F.3d at 722-23.

[8] Earl, 2019 WL 759385, at *10.

[9] See id. at *11-*13.

[10] See Earl, 2019 WL 759385, at *8 (citing Martone v. Robb, 902 F.3d 519, 524 (5th Cir. 2018)).

[11] See Earl, 2019 WL 759385, at *8 (citing Finkleman v. Nat'l Football League, 810 F.3d 1897, 201 (3d Cir. 2016), and In re Domestic Airline Travel Antitrust Litig., 221 F. Supp. 3d 46, 56 (D.D.C. 2016)).

[12] Id. at *8 n.7 (citing Alcorn Cty. v. U.S. Interstate Supplies Inc., 731 F.2d 1160, 1169 (5th Cir. 1984), abrogated on other grounds by U.S. v. Cooper, 135 F.3d 960 (5th Cir. 1998)).

[13] See 2019 WL 759385, at *5 (discussing class plaintiffs' allegation that, "if they had known the MAX 8 was fatally defective, Plaintiffs would never have purchased a ticket").