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Fifth Circuit: civil RICO class action against Southwest Airlines and Boeing cannot stand for lack of Article III injury-in-fact

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Takeaway: Over two years ago, the Eastern District of Texas denied a motion to dismiss a putative civil RICO class action alleging an "overcharge-by-fraud" theory, where the class representatives appeared to have suffered no injury at all. *See Earl v. The Boeing Co.*, No. 4:19-cv-00507, 2020 WL 759385 (E.D. Tex. Feb. 14, 2020) ("*Earl I*"). We wrote an article criticizing that decision as inconsistent with the Fifth Circuit's "no injury" ruling in *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002), predicting that the Fifth Circuit would one day reverse it. *See E.D. Texas rules that fraudulent overcharge theory supplies standing for civil RICO class action* (Feb. 27, 2020). That day has come, as the Fifth Circuit last week concluded that the class plaintiffs did not allege a plausible Article III injury-in-fact. *See Earl v. Boeing Co.*, --- F.4th ---, No. 21-40720, 2022 WL 17088680 (5th Cir. Nov. 21, 2022) (*"Earl II"*). Although *Earl II* was an interlocutory appeal of the district court's class certification ruling, the appellate court's decision focused on the class plaintiffs' implausible allegations of economic harm.

Following two tragic crashes of Boeing's MAX 8 airplanes – Lion Air Flight 610 off the coast of Indonesia and Ethiopian Airlines Flight 302 in Ethiopia – eleven individuals who had taken Southwest Airlines flights on the MAX 8 filed a putative class action against Southwest and Boeing in the Eastern District of Texas. The class plaintiffs alleged fraud-based federal RICO claims based on the alleged concealment of defects in the MAX 8's computer-controlled aviation system (the "MCAS Defect"), as well as other related fraudulent conduct.

The class plaintiffs did not have a bad experience on their MAX 8 flights – they purchased their tickets from Southwest and were safely transported to the destinations of their choice. Moreover, they disclaimed any physical injury based on the MCAS 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. *See Earl I*, 2020 WL 759385, at *4-10

The district court rejected the first alleged harm – a full refund of the ticket purchases – as a "no injury" claim foreclosed by the Fifth Circuit's decision in *Rivera*. In that case, 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 – alleged 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 a defect when they took it. *Rivera*, 283 F.3d at 319-321. In other words, they got what they purchased.

According to the district court, plaintiffs' refund or "money back" theory presented the sort of "no injury" cause of action foreclosed by *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 Plaintiffs were killed by the MAX 8's defect; [and] Plaintiffs want their money back for their tickets." *Earl I*, 2020 WL 759385, at *6.

But the district court accepted the class plaintiffs' overcharge theory. As described by the Fifth Circuit, under the overcharge theory, absent the fraud, demand for tickets on routes flying the Max 8 would have gone down, depressing ticket prices: "So, the theory goes, plaintiffs paid a fraud-induced overcharge at the time they bought their tickets, and they have Article III standing to recover the amount of that overcharge." *Earl II*, 2022 WL 17088680, at *2. Accordingly, the district court denied the motion to dismiss and allowed the plaintiffs to proceed on their "overcharge-by-fraud" theory. *Earl I*, 2020 WL 759385, at *7-10.

The litigation proceeded through class discovery (including expert discovery) and briefing on plaintiffs' motion for class certification, with the district court ultimately certifying four different classes of ticket purchasers. Southwest and Boeing then sought an interlocutory appeal under Federal Rule 23(f), which the Fifth Circuit granted.

The panel focused its analysis on Article III standing, quoting *Rivera*: "Though Rule 23(f) allows a party to appeal only the issue of class certification, standing is an inherent prerequisite to the class certification inquiry. Accordingly, standing may – indeed must – be addressed even under the limits of a Rule 23(f) appeal." *Earl II*, 2022 WL 17088680, at *2 (quoting *Rivera*, 283 F.3d at 319).

According to the panel, the "overcharge-by-fraud" theory "rests on two unsupportable inferences." *Id*. at *4. The first inference was that, assuming the public knew about the MCAS Defect, the same MAX 8 routes would have been offered, "but with a price discount to compensate for the heightened risk that passengers would die." *Id*. According to the panel, that theory was not plausible. The more plausible theory was that no MAX 8 flights would have been offered, meaning "ticket fares would have likely gone up because the airlines' usable fleets would have been smaller in the meantime. (In other words, the airlines' supply of seats would have gone down, demand would have stayed the same, and prices would have risen as a result.)" *Id*.

The second inference – that the Federal Aviation Administration (FAA) would have permitted those flights – was even more implausible: "That's because in reality, after the public learned the full extent of the risk caused by the MCAS defect, regulators worldwide grounded the MAX 8. The FAA, for example, grounded the MAX 8 for 20 months." *Id*. Such a "but-for" scenario would have reduced the "seat supply," driving up ticket prices.

At oral argument, plaintiffs' counsel asserted that a rejection of their theory of standing would jeopardize all kinds of fraud-based cases, given that many consumer fraud cases rely on an "overcharge-by-fraud" theory. The panel dismissed that argument, stating: "In an ordinary fraud lawsuit – a pyramid scheme,

for example – there are identifiable victims who lost money that wouldn't have been lost in a counterfactual world without the fraudulent scheme." *Id*. Plaintiffs, on the other hand, potentially benefited from the scheme: "If the MCAS defect had been widely exposed earlier, the MAX 8 flights plaintiffs chose would have been unavailable and they'd have had to take different, more expensive (or otherwise less desirable) flights instead." *Id.*

Accordingly, the panel reversed the class certification ruling, remanding with instructions that the case be dismissed, holding: "[Plaintiffs] concededly have suffered no physical harm. They have offered no plausible theory of economic harm. At bottom, plaintiffs complain of a past risk of physical injury to which they were allegedly exposed because of defendants' fraud. But because that risk never materialized, plaintiffs have suffered no injury in fact and lack Article III standing." *Id*. at *5.