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E.D. Texas rules that fraudulent overcharge theory supplies standing for civil RICO class action

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Takeaway: To have standing to sue in federal court, Article III of the Constitution requires an injury in fact caused by the challenged conduct. Federal RICO standing requires a bit more: a RICO plaintiff must demonstrate an injury to "business or property" caused by the RICO violation. A recent district court decision in a putative class action against Boeing and Southwest Airlines found RICO standing in the consumer context, but the court's generous treatment of the plaintiffs' "overpayment" theory seems difficult to square with the Fifth Circuit's prior rejection of a similar "no injury" class action.

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 Boeing and Southwest in the Eastern District of Texas. *Earl v. The Boeing Co.*, Civil Action No. 4:19-cv-00507, 2020 WL 759385 (E.D. Tex. Feb. 14, 2020). The class plaintiffs alleged fraud-based claims based on (among other things) the alleged concealment of defects in the MAX 8's computer-controlled aviation system (the MCAS Defect) 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 from Southwest and were safely transported by Southwest 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. 2019 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 v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002). 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 – 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 any defect when they used it. 283 F.3d at 319-321.

According to the district court, the *Earl* plaintiffs' refund or "money back" 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 Plaintiffs were killed by the MAX 8's defect; [and] Plaintiffs want their money back for their tickets." *Earl*, 2019 WL 759385, at *6. 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. *Id*.

The district court, however, viewed the class plaintiffs' overcharge theory differently. To evaluate that theory, the district court considered *Cole v. Gen. Motors Corp*., 484 F.3d 717 (5th Cir. 2007), 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). *Cole*, 484 F.3d at 722-23.

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. § 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. § 1962(d) (RICO conspiracy). *Earl*, 2019 WL 759385, at *10. 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. *See id*. at *11-*13.

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

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. *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)). The only other RICO case cited by Earl similarly involved a racketeering scheme focused entirely on overcharging a county for office supplies. *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 *United States v. Cooper*, 135 F.3d 960 (5th Cir. 1998)).

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 "re-sold" 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. *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").

The *Earl* plaintiffs' "un-manifested 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 re-characterized as a "overpayment" injury, 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*.