Blogs
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Section 14(e) of the Securities Exchange Act prohibits deceptive conduct when making a tender offer to shareholders.

Recently, in *Emulex Corp. v. Varjabedian*, the United States Supreme Court declined to resolve a split among the circuit courts about what a plaintiff alleging a violation of Section 14(e) must prove. As a result, the Ninth Circuit is currently the only circuit allowing Section 14(e) claims based on *negligent* (as opposed to *intentional*) misrepresentations or omissions of material facts. This development may result in an uptick in tender offer lawsuits in that jurisdiction.

The *Emulex* case stemmed from the company's merger with Avago. As part of that merger, Avago initiated a tender offer for Emulex's outstanding shares. In accordance with SEC rules, Emulex filed a public statement with the SEC in which it supported Avago's tender offer and recommended that Emulex shareholders tender their shares. Among other things, the statement observed that Emulex shareholders would receive a premium on their stock and described financial analyses that had been undertaken to reach this conclusion. However, Emulex's statement omitted reference to a portion of its financial analysis that concluded the takeover premium offered for Emulex's outstanding shares was below average for mergers involving similar companies. A putative class of shareholders brought suit, alleging that Emulex's statement file with the SEC violated Section 14(e) of the Securities Exchange Act by failing to include the more lackluster price analysis. The district court dismissed the putative class action. It held that to allege a violation of Section 14(e), the plaintiff must show that the allegedly-misleading statements or omissions were intentional. The district court relied on cases from other circuits comparing SEC Rule 10b-5 (which prohibits deception in connection with the sale or purchase of securities) with Section 14(e). Those cases hold that there is no reason to treat deception in connection with tender offers (under Section 14(e)) any differently than deception on the market more generally (under Rule 10b-5), and therefore both require that a false statement be *intentionally* made to be actionable. On appeal, the Ninth Circuit disagreed, returning to a plain reading of the text of Section 14(e): It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, **or** to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. 15 U.S.C. § 78n(e) (emphasis added). The Ninth Circuit held that Section 14(e)'s use of the term "or" creates "two different offenses." It then concluded that "because the text of the first clause of Section 14(e) is devoid of any suggestion that scienter is required, we conclude that the first clause of Section 14(e) requires a showing of only negligence, not scienter." *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 408 (9th Cir. 2018). The Ninth Circuit's decision created a split between it and the Second, Third, Fifth, Sixth, and Eleventh Circuits, all of which have previously held that Section 14(e) liability must be based upon intentional misstatements or omissions. Emulex appealed to the Supreme Court to resolve this split, hoping to have the Supreme Court rule in favor of the intent requirement imposed by other circuits. But in its written submissions to the Court, Emulex went further, asking a more fundamental question—whether Section 14(e) even provides a private cause of action for plaintiffs. In so arguing, Emulex pointed to a long line of Supreme Court cases holding that inferring a private right of action in disfavored. Specifically, as the Court made clear in *Alexander v. Sandoval*, it does not read private rights of action into statutes absent congressional intent to do so, "no matter how desirable that might be as a policy matter, or how compatible with the statute." By asking the Court to address this threshold issue, however, Emulex called the entire appeal into question. At oral argument, Justices asked numerous questions about whether the question of a private right of action had been raised in the lower courts, appearing troubled by the fact that no party has raised the question below. Justice Alito asked counsel if they thought "that that claim was properly before us." Justice Ginsburg echoed that "[t]his is a court of review, not of first view." Ultimately, the Court dismissed the writ as improvidently granted in a one-line order, leaving two critical questions unanswered. First, the split created by the Ninth Circuit as to whether Section 14(e) extends to *negligent* misstatements and omissions remains an open issue. In the meantime, additional Section 14(e) suits are likely to be aimed at district courts in the Ninth Circuit, which will be viewed as a pro-plaintiff forum for tender offer lawsuits. Second, the threshold issue as to whether Section 14(e) even provides for a private right of action remains in flux, meaning this will be a hotly contested issue in future tender offer lawsuits.

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