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9th Circ. Splits From Similar Rulings On Tender Offer Suits

By **Dunstan Prial**

Law360 (April 20, 2018, 8:17 PM EDT) -- Departing from circuit court rulings in five similar cases, the Ninth Circuit on Friday reversed a lower court's dismissal of a putative securities class action alleging Emulex Corp. concealed that Avago Technologies Ltd.'s $606 million acquisition offer was too low, holding that the investors' claims require a showing of negligence rather than intentional wrongdoing.

A three-judge panel of the appeals court overturned a California federal judge's 2016 finding that dismissed the suit on the grounds that Emulex shareholders needed to show scienter, or that the telecommunications company had intentionally deceived investors. The panel, citing two past U.S. Supreme Court rulings, remanded the case back to the district court to reconsider its finding under the negligence standard.

"We are aware that our holding today parts ways from our colleagues in five other circuits," the ruling states. "However ... we are persuaded that intervening guidance from the Supreme Court compels the conclusion that Section 14(e) of the Exchange Act imposes a negligence standard."

In January 2016, U.S. District Judge Cormac J. Carney **granted** Emulex's motion to dismiss the suit, saying shareholders couldn't show that Emulex and its directors had intentionally misled investors when they issued a summary of a Goldman Sachs financial analysis that omitted a chart showing that while Avago's offer was within industry norms, the 26.4 percent premium to investors was below average.

Judge Carney considered in his ruling whether the shareholders had to prove that Emulex and its directors had acted with scienter and intentionally omitted the chart in an effort to deceive investors. The judge rejected the investors' argument that they only needed to show negligence for claims under Section 14(e) of the Exchange Act related to tender offers, finding all federal courts to consider the issue have required proving scienter.

The judge's opinion then found that the shareholders couldn't prove Emulex and its executives had intentionally omitted the information to deceive investors about the value of the deal.

The Ninth Circuit panel found, however, that Judge Carney wrongly concluded that Section 14(e) requires that claims brought under it must allege intent.

"The district court relied on decisions from five other circuits holding that Section 14(e) claims require alleging scienter," the ruling states. "However, we are persuaded that the rationale underpinning those decisions does not apply to Section 14(e) of the Exchange Act."

According to the ruling, the Ninth Circuit judges departed from findings by the Fifth Circuit in a 2009 decision, the Third Circuit in a 2004 decision, the Eleventh Circuit also in a 2004 decision, the Second Circuit in a 1987 decision and the Sixth Circuit in a 1980 decision.

According to Friday's ruling, the district court's finding, based on the earlier decisions by the five circuit courts, was based on similarities in the texts between Rule 10b-5 of the Securities Exchange Act and Section 14(e). The ruling states "important distinctions" exist between the two "that strongly militate against importing the scienter requirement from the context of Rule 10b-5 to Section 14(e)." For instance, Section 14(e) "differs fundamentally" from Section 10(b) because under the former the U.S. Securities and Exchange Commission is authorized to regulate a "broader array of conduct" than under the latter, the court said.

The ruling explained that separate Supreme Court decisions in Ernst & Ersnt v. Hochfelder in 1976 and Aaron v. SEC in 1980 persuaded the judges to depart from the other circuit court rulings which held that class action suits filed under Section 14(e) required scienter. According to the Ninth Circuit ruling, those courts apparently did not address "the ramifications of the Supreme Court's holdings" in the two past rulings, which differentiated between Section 14(e) and Rule 10b-5, despite their similar wordings.

"I conclude that the decision we reach today is a faithful application of these Supreme Court cases," U.S. Circuit Judge Morgan Christen wrote in a concurring opinion.

Emulex shareholder Gary Varjabedian first **filed the suit** against Emulex, its board of directors and Avago in April 2015, just over a month after Emulex announced the deal. Varjabedian claimed that the $8 per share offer failed to account for Emulex's recent performance and potential for future growth.

Counsel for the shareholders did not respond to a request for comment. Counsel and representatives for Emulex and Avago also did not respond to requests for comment.

The shareholders are represented by David E. Bower, Miles D. Schreiner and Juan E. Monteverde of Monteverde & Associates PC, and Barbara A. Rohr of Faruqi & Faruqi LLP.

Emulex and the directors are represented by Eric Landau, Travis Biffar and Kevin H. Logan of Jones Day.

Avago is represented by Patrick E. Gibbs of Cooley LLP, and Hilary H. Mattis and Matthew Rawlinson of Latham & Watkins LLP.

U.S. Circuit Judges Susan P. Graber, Mary H. Murguia, and Morgan Christen sat on the panel. Circuit Judge Murguia wrote the opinion, and Judge Christen wrote a concurring opinion.

The case is Gary Varjabedian v. Emulex Corp. et al., case number 16-55088 in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Carmen Germaine. Editing by Alanna Weissman.

Correction: An earlier version of this story contained incorrect counsel information. The error has been corrected.