CARLTON FIELDS

Emulex Cert Dismissed: Supreme Court Passes on Opportunity to Curtail Federal Court Merger Litigation

April 23, 2019

Emulex Corp. v. Varjabedian, No. 18-459 (U.S. Apr. 23, 2019)

On April 23, 2019, the U.S. Supreme Court dismissed a writ of certiorari that could have decided whether investors may sue public companies alleged to have negligently (rather than intentionally) misstated or omitted information related to tender offers. The matter — *Emulex Corp. v. Varjabedian*, No. 18-459 (U.S.) — could further have resolved whether such a cause of action, under any state-of-mind standard, existed at all.

Public companies and the securities bar have followed the *Emulex* matter closely because it was thought to present an opportunity for the Court to reduce the flood of federal-court premerger litigation. The last few years have seen a jump in deal-related litigation in federal courts after the Delaware Chancery tightened its review of "disclosure based" settlements in *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

The dispute in this case arose out of Avago Technologies' $606 million merger offer for Emulex Corp., a network connectivity company. The investor plaintiffs alleged that Emulex concealed that the offer was too low. In deciding a motion to dismiss, the district court held that the shareholders had to plead the defendants' scienter (that is, their intent to deceive, manipulate, or defraud) to state a claim under Section 14(e) of the Exchange Act and dismissed the complaint for a failure to do so.

The plaintiffs appealed, and the U.S. Court of Appeals for the Ninth Circuit in April 2018 held that Section 14(e) supports an inferred private right of action based on a mere *negligent* misstatement or omission made in connection with a tender offer, and that a plaintiff therefore need not allege intent.

That is, investors need show only that the company was being negligent rather than intentionally engaging in wrongdoing when it allegedly misled shareholders about the merger offer.

Five other circuits — the Second, Third, Fifth, Sixth, and Eleventh — have held that claims under Section 14(e) of the Exchange Act related to tender offers must allege intent. The district judge in the *Emulex* matter had held the same, a holding that the Ninth Circuit reversed on the plaintiffs' appeal.

Although it presented only one stated question, Emulex's petition for certiorari could be fairly read to present both a challenge to the *negligence* standard applied by the appellate court and the further issue of whether Section 14(e) of the Exchange Act supports a private right of action at all. On January 4, 2019, the Supreme Court granted cert of the complete question.

The Court heard oral arguments on April 15, 2019, with several justices questioning whether it was appropriate for the Court to decide the second, "private right of action" question when the issue had not been presented first to the lower courts. The Court dismissed the case a week later in a one-line order dated April 23, noting only that, "The writ of certiorari is dismissed as improvidently granted." Note that the Court did not dismiss the writ with directions to consider the "private right of action" question, but simply dismissed the writ.

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