April 25, 2019

Supreme Court Passes–For Now–on Rejecting an Implied Private Right of Action for Tender Offer Claims

On April 23, 2019, the Supreme Court issued a one-line *per curiam* order in *Emulex* v. *Varjabedian*: "The writ of *certiorari* is dismissed as improvidently granted."[1] The dismissal comes just one week after contentious oral arguments that focused on the fundamental question of whether shareholders can bring private suits under Section 14(e) of the Securities Exchange Act for misstatements or omissions made in connection with tender offers. The Supreme Court's dismissal of the appeal leaves two fundamental questions unresolved: First, does a private right of action exist under Section 14(e)? And, second, does a claim based on false statements or omissions under Section 14(e)—whether by private plaintiffs if the private right of action exists or by the SEC if it does not—require proof only of negligence, as the Ninth Circuit has held, or of scienter, as other circuits have held?

Relevant Background and Procedural History

Section 14(e) prohibits untrue statements of material facts, omissions of material facts, and fraudulent, deceptive, or manipulative acts in connection with a tender offer.[2] Until recently, every federal court of appeals to have considered this provision—including the Second, Third, Fifth, Sixth, and Eleventh Circuits—had held that plaintiffs must show that a defendant acted with scienter to make out a claim. In its *Emulex* decision, the Ninth Circuit disagreed; it reasoned that negligence was sufficient for a claim alleging false statements or omissions. Although the Supreme Court had previously held that similar language in Rule 10b-5 imposed a scienter requirement,[3] the Ninth Circuit distinguished that decision as being rooted in the relationship between Rule 10b-5 and its authorizing legislation, Section 10(b), rather than the text of Rule 10b-5 itself.[4]

Emulex sought rehearing *en banc* before the Ninth Circuit, arguing that the Ninth Circuit erred by applying a negligence standard, and also arguing—for the first time, and only in passing—that a private right of action cannot be implied at all under Section 14(e).[5] Although the Supreme Court had expressly left the question

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1 *Emulex Corp.* v. *Varjabedian*, No. 18-459 (U.S. Apr. 23, 2019) (order dismissing writ of c*ertiorari*).

2 15 U.S.C. § 78n(e).

3 *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

4 *See Varjabedian* v. *Emulex Corp.*, 888 F.3d 399, 404–08 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 782 (2019), and *cert. dismissed as improvidently granted*, No. 18-459, 2019 WL 1768137 (Apr. 23, 2019).

5 Petition for Writ of *Certiorari* at 11, *Emulex Corp.* v. *Varjabedian*, No. 18-459 (Oct. 11, 2018).

open, lower courts had routinely permitted private litigants to pursue claims under Section 14(e), and Emulex had not challenged the existence of a private right of action before the Ninth Circuit panel. The Ninth Circuit denied the petition for rehearing *en banc*.[6]

Emulex's petition for *certiorari* to the Supreme Court followed, and it advanced *both* the arguments that no private cause of action exists, and that any such claim is governed by a scienter standard. Both issues were fully briefed at the *certiorari* stage, and were encompassed in the question presented. In fact, when the Supreme Court granted the petition, the Court did not re-write the question presented by Emulex to limit briefing to the question whether negligence was the correct standard.[7] This procedural history led many practitioners to believe the Supreme Court had determined that there would be no barrier to reaching the question during the appeal.

Oral Argument Before the Supreme Court

At argument on April 15, 2019, a majority of the Court seemed poised to rule that there was no implied private right of action under Section 14(e). Several Justices asked counsel for the plaintiffs skeptical questions about the absence of textual indications that Congress intended to authorize private suits in Section 14(e). Moreover, referring to the Supreme Court's 1964 decision in *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), which had upheld a private right of action under Section 14(a), Chief Justice Roberts said "we now know that that [the approach in *Borak*] was not the right approach."[8] He further said, "*Borak* would not be decided the same way today," and "from today's perspective, what we did back then was a mistake."[9] These Justices suggested that recognizing a private right of action under Section 14(e) would require the Court to re-endorse its prior regime, under which it freely recognized private rights of action regardless of statutory text.[10] The Court had rejected that regime in *Alexander* v. *Sandoval*,[11] which clarified that traditional statutory analysis must govern the inquiry.

Several Justices also questioned whether it would be appropriate to rule on the proper standard under Section 14(e) without resolving the existence of an implied right of action, since both petitioners and the United States, as amicus, had argued that the questions are logically related.[12]

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6 Order, *Varjabedian* v. *Emulex Corp*, No. 16-55088 (9th Cir. 2018), ECF No. 75.

7 *See Emulex Corp.* v. *Varjabedian*, 139 S. Ct. 782 (2019) (granting *certiorari* without mentioning the question presented).

8 Hr. Tr. at 40:5–7.

9 Hr. Tr. at 40:9–10, 41:1–4.

10 Hr. Tr. 40:5–41:14, 43:1–9.

11 532 U.S. 275 (2001).

12 Hr. Tr. 46:18–47:9, 61:17–62:3, 62:14–63:13.

But several Justices pressed the preservation issue. Justice Ginsburg asked, as the very first question, why Emulex had not raised the issue of whether a private right of action existed prior to its petition for rehearing before the Ninth Circuit.[13] In response, Emulex relied on a prior case in the securities context—*Central Bank of Denver N.A.* v. *First Interstate Bank of Denver, N.A.*[14]—to argue that the Court can consider issues that are fully briefed at the Supreme Court even if not raised below.[15] Several Justices pushed back on Emulex's counsel, questioning whether addressing the issue was appropriate given the record below.

Implications

While the Court's *per curiam* opinion shed no light on its reasons for dismissing the case as having been "improvidently granted," it seems likely that the majority of Justices decided to wait for a case where the question was fully preserved in order to avoid confounding issues and needing to address a strong argument by the dissent that the question should not have been resolved at all.

The Supreme Court's dismissal of *Emulex* means that, at least for now, the Ninth Circuit's opinion stands. The private right of action may not be around for much longer, however. Based on the tenor of oral argument in *Emulex*, a majority of the Justices seem prepared to close the door on any implied private right of action under Section 14(e).[16] Notably, Section 14(e) applies only to "tender offers," not to mergers or other transactions where no tender is made. It remains to be seen whether the Supreme Court has any interest in reconsidering the private right of action under Section 14(a), the provision governing proxies, which was at issue in the *Borak* decision repeatedly invoked at argument.

For now, it is important for all defendants being sued under Section 14(e) to make, and preserve, all arguments that no implied private right of action exists under Section 14(e), both to present a desirable vehicle for the Supreme Court to reconsider the question, and to make it easier for these defendants to benefit from a favorable decision on this question if the Supreme Court rejects a private right of action in the future.

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13 Hr. Tr. 3:22–4:9.

14 511 U.S. 164 (1994).

15 Hr. Tr. 4:10–5:13.

16 Further increasing the chances of that ultimate outcome, the United States took the position that there is no private right of action under Section 14(e) in its amicus brief, which was signed by the Securities and Exchange Commission as well as the Department of Justice. Brief for the United States as *Amicus Curiae* in Support of Neither Party at 26–32, *Emulex Corp.* v. *Varjabedian*, No. 18-459 (Feb. 26, 2019).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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