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9th Circ. Stays Mum On Private Plaintiff Issue In Emulex Row

By **Craig Clough**

Law360 (April 15, 2021, 10:25 PM EDT) -- The Ninth Circuit refused Thursday to revive a shareholder suit claiming Emulex Corp. negligently omitted unsavory information about a $606 million acquisition offer, but punted on the larger issue of whether private plaintiffs can bring such lawsuits at all.

The panel's unanimous, unpublished decision said that a one-page "premium analysis" prepared by Goldman Sachs that was left out of a larger report over Avago Technologies Ltd.'s $606 million acquisition offer was not significant enough for Emulex's leadership to have violated Section 14(e) of the Securities and Exchange Act.

"Thus, no statements in the recommendation were rendered misleading by the omission of the chart," the panel said. "Although perhaps an interested shareholder would find the chart of interest, its omission from the recommendation in this case does not violate14(e)."

During oral arguments earlier this month, a good deal of the parties' discussion with the panel focused on if Section 14(e) even allows private plaintiffs to bring negligence claims. But the panel did not explicitly address that larger issue, appearing to agree as the U.S. Supreme Court did that the case is not the best vehicle to decide the issue on.

Instead, the panel stuck to a narrower ruling that the omission of the analysis did not violate Section 14(e) and affirmed the lower court's dismissal of the suit with prejudice.

Section 14(e) "prohibit[s] only misleading and untrue statements, not statements that are incomplete," the panel said while citing the Ninth Circuit's 2002 ruling in Brody v. Transitional Hospitals.

The shareholders' suit hinged on a "premium analysis" presented by Emulex leadership and prepared by Goldman Sachs that they said was omitted in a presentation to them because it showed that although Avago's offer was within industry norms, the 26.4% premium to investors was below average.

U.S. District Judge Cormac J. Carney first dismissed the complaint in 2016 on the grounds that Emulex shareholders needed to show scienter, or that the telecommunications company had intentionally deceived them. The Ninth Circuit remanded the case to the district court to assess whether the shareholders had shown negligence rather than scienter.

The ruling departed from circuit court decisions in five similar cases, and the defendants appealed. The

U.S. Supreme Court granted their petition for writ of certiorari, but then dismissed the writ as improvidently granted in April 2019 after hearing oral arguments. Some of justices seemed unconvinced that the case was the best vehicle for the claims, given that Emulex didn't raise the question of a private right of action before any of the lower courts.

The case returned to Judge Carney's court, and he again dismissed it in February 2020, ruling that the omission of the premium analysis was not significant, among other things. The chart was about semiconductor companies, a related but "ultimately distinct sector of the industry," and included mergers that occurred four years before Avago's tender offer, he said.

Judge Carney declined to rule on the larger issue of the existence of a private right of action under the negligence standard, saying he believed that the Ninth Circuit's earlier ruling "seems to foreclose the issue" but that he was leaving it "for another court and another day."

During oral arguments last week, the shareholders urged the panel to not reconsider if Section 14(e), which seeks to prevent fraudulent, deceptive or manipulative acts in tender offers, can be enforced in court by private plaintiffs and not just the U.S. Securities and Exchange Commission.

By remanding the case back to the district court previously, the shareholders argued that the circuit court had already decided on a private right of action. Emulex told the panel the remand order was not that specific, in that the circuit court told the district court to review under a negligence standard but had not specifically ruled that a private right of action exists.

At least one member of the Ninth Circuit panel, U.S. Circuit Judge Andrew D. Hurwitz, appeared to believe the question was still open last week when he interrupted Juan E. Monteverde of Monteverde & Associates PC, who represents the investors, as he was telling the panel that "the court obviously recognized" a private right "implicitly" in its previous ruling.

"You're implying it," Judge Hurwitz said. "You're saying we must have recognized it there."

Monteverde told the panel that in its previous ruling, the court "did not create a new cause of action, it just clarified a standard of liability."

Emulex told the Ninth Circuit that it can decide there is no private right, and that it should do so.

But the panel also asked questions that some members of the Supreme Court also asked over Emulex not previously raising the question of a private right of action.

The panels' four-page unpublished opinion did not appear to take the bigger issue head on, perhaps leaving the questions for another court or another day, as Judge Carney did.

"We're thrilled with the court's decision, which is a complete win for Emulex and establishes an important benchmark for the Ninth Circuit's new negligence standard under Section 14(e)," Gregory G. Garre of Latham & Watkins LLP, who represents Emulex, said in an email to Law360.

Counsel for the other parties did not immediately respond to requests for comment.

Judges William A. Fletcher, Paul J. Watfor and Andrew D. Hurwitz sat on the panel for the Ninth Circuit.

The shareholders are represented by Juan E. Monteverde of Monteverde & Associates PC.

The Emulex directors are represented by Eric Landau of Thomas Whitelaw & Kolegraff LLP.

Emulex is represented by Gregory G. Garre of Latham & Watkins LLP.

The case is Mutza v. Emulex Corp. et al., case number 20-55339, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Rachel Graf. Editing by Adam LoBelia.