

April 30, 2018

Ninth Circuit Decision Heightens Tender Offer Disclosure Risks

In a surprising decision issued last week, the U.S. Court of Appeals for the Ninth Circuit split from five other Circuits in determining that Section 14(e) of the Securities Exchange Act of 1934, traditionally understood as the “anti-fraud” rule applicable to tender offers, does not require fraud (scienter) at all, but only a lower standard of negligence.

In *Varjabedian v. Emulex*, involving a buyout of a public company by tender offer, a shareholder class action alleged that the failure to include a summary of the target investment bank’s comparable transaction premium analysis (which showed that the transaction premium was within the range but below the average) was a material omission that violated Section 14(e).

The District Court had rejected the claim on the basis that Section 14(e) requires a showing of scienter – an intent to defraud – following the holdings of the Second, Third, Fifth, Sixth and Eleventh Circuits. Based on a fine parsing of the words of Section 14(e) as distinguished from Rule 10b-5 – the general securities law antifraud provision – a panel of the Ninth Circuit held that only negligence is required for a 14(e) claim. At the same time, the panel cast doubt on whether the omission was material, and suggested that the level of culpability required to impose liability should be closer to gross negligence.

Until there is definitive clarification from the U.S. Supreme Court (or rehearing in the Ninth Circuit), acquirers of public companies should be aware that what they have thought of as “anti-fraud” rules applicable to tender offers may be governed by a much more plaintiff-friendly standard. This could make it more difficult to dispose of strike suits at a preliminary stage. It is regrettable that this uncertainty has been injected into the law of tender offers. Disclosure documents, including proxy statements and tender offer documents, often run into the hundreds of pages and overwhelm shareholders with minor details, in part because of the threat of strike suits. The Ninth Circuit’s ruling could exacerbate this trend at a time when federal courts are seeing a dramatic increase in deal-related disclosure claims after Delaware effectively shut down the disclosure-only settlement “racket” following its decision in *Trulia* (see our [memorandum](#)).

Paul Vizcarrondo
Theodore N. Mirvis
Trevor S. Norwitz

*If your address changes or if you do not wish to continue receiving these memos,
please send an e-mail to Publications@wlrk.com or call 212-403-1443.*