Emulex Highlights Greater Scrutiny Of Issues At High Court

By **Serena Hallowell, Corban Rhodes and Anna Menkova**

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On Tuesday, the U.S. Supreme Court surprised many observers by dismissing an appeal in the Emulex Corp. v. Varjabedian matter as improvidently granted. While the court's order did not elaborate on the reasons for its dismissal, questioning from several justices during oral argument, as well as a recent dissent by Justice Samuel Alito under similar circumstances, imply that the court may have been irked by a dramatic shift in focus between the petition for writ of certiorari and the issue ultimately presented to the court.[1]

A brief review of the procedural history of the case, and the circumstances giving rise to the court's abrupt dismissal, may provide useful insights for future petitioners seeking the court's review.

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In Emulex, the U.S. District Court for the Central District of California dismissed the shareholders' complaint for lack of scienter, rejecting the plaintiffs' argument that negligence is sufficient to plead an adequate claim under Section 14(e).[2] Although Section 14(e) does not expressly provide a private right of action, courts throughout the country for decades have recognized an implied private right of action for the benefit of shareholders, and not surprisingly, neither the defendants nor the district court addressed the issue.

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The U.S. Court of Appeals for the Ninth Circuit reversed, expressly parting ways with five other circuits on the mens rea standard, and holding that Section 14(e) does not require scienter and can be established through negligence.[3] The petitioners conceded the existence of the implied private right of action, and in fact, the panel specifically noted that the issue was "undisputed."[4] The first passing mention of the implied private right came in Emulex's petition for rehearing en banc, where Emulex argued that if "Section 14(e)'s implied right of action had to sweep in negligence, that would be grounds for eliminating it, not expanding it."[5]

Unsurprisingly, given the clear circuit split that was created by the Ninth Circuit's decision concerning the appropriate mens rea standard, Emulex's petition to the Supreme Court for writ of certiorari focused almost exclusively on that question, except for a brief argument that to embrace an implied private right of action under Section 14(e) would "disrupt" the balance Congress tried to strike "between protecting investors against fraud, on the one hand, and overly encumbering the markets with judicial second-guessing, on the other."[6] Moreover, the question presented was ambiguously worded, leaving open to interpretation whether a distinct issue concerning the existence of the implied private right was embedded within its scope.

Specifically, the question presented read:

> Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an

> inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.

Interestingly, while the question may be read to incorporate the antecedent matter of the private right's existence, the reference to "express disagreement with five other courts of appeals" solely relates to the negligence question. With respect to the implied private right, there was no circuit split created by the Ninth Circuit's decision, because no circuit had ever doubted the existence of the private right of action. Undoubtedly, the focus of the petition, and the discussion the court agreed to hear, was the mens rea standard.

After the Supreme Court granted certiorari, however, the petitioners' focus shifted dramatically toward the implied private right of action. The issue dominated much of the petitioners' brief, was addressed in seven separate amicus curiae briefs, and was virtually the only topic of discussion during oral argument.

Yet, the issue had barely been mentioned throughout the litigation or appeal, and indeed, the first and only time respondents had an opportunity to brief the merits of the issue was less than a month before the Supreme Court held argument.

At the argument, several of the justices openly questioned whether the implied private right issue was properly before the court. In fact, the very first question from Justice Ruth Bader Ginsburg squarely asked:

> why should we consider that when it wasn't raised in this case until, what was it, the motion for rehearing in the court of appeals? It went through the trial court, court of appeals, not a word —everybody accepted there was a private right of action. And you are now making the non-existence of a private right your principal argument.[7]

Justice Ginsburg reminded the petitioners that the Supreme Court "is a court of review, not of first view."[8] Even some of the more conservative-leaning justices probed the ripeness of intervening in a settled issue. Justice Alito asked the petitioners' counsel to "explain why [he] think[s] it's appropriate for [the Supreme Court] to reach the question whether there's a private right of action[.]"[9] He continued, "If you were the Respondent here, would you think that that claim was properly before us? Is that the precedent you want us to set?"[10]

Another clue to the rationale behind the court's dismissal comes from a recent dissent from earlier this term, penned by Justice Alito and joined by Justices Neil Gorsuch and Clarence Thomas. Using language that could easily be analogized to the situation in Emulex, Justice Alito stated in dissent in Madison v. Alabama:

> Petitioner's counsel convinced the Court … to grant his petition for a writ of certiorari for the purpose of deciding a clear-cut constitutional question … After persuading the Court to grant review of this question, counsel abruptly changed course … and he switched to an entirely different argument.[11]

Justice Alito admonished the petitioners' counsel for "mak[ing] a mockery" of the court's rules, specifically Rule 14.1(a),[12] and observed that the newly raised issue could not have "fairly" been included within the question the court had accepted on review.[13] Justice Alito noted that the "whole certiorari system would be thrown into turmoil if we allowed counsel to obtain review of one question and then switch to an entirely different question after review is granted," and provided two examples from 2015 and 2016 where the court dismissed the writ as improvidently granted on that basis (the same grounds cited in the court's terse order in Emulex).[14] Justice Alito concluded that it was "highly improper" for

the court to take up the new issue on a "cold record," foreshadowing his questioning in Emulex.[15]

Ultimately, the court does not provide or owe an explanation for exactly why it decided to dismiss the appeal. But it certainly seems likely here that the justices were uncomfortable with the implied private right issue being inserted as a kind of Trojan horse into the certiorari petition. Future petitioners would be well-served to be as transparent and direct as possible when their appeal has the potential to raise multiple issues, particularly ones of such sweeping scope, to afford the court maximum visibility and control over the issues presented before it, and to avoid situations like Emulex.

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[1] Petition for Writ of Certiorari at 8, Emulex Corp. v. Varjabedian, 587 U. S. ____ (2019) (No. 18-459), 2018 WL 4942046 ("Petition").

[2] Varjabedian v. Emulex Corp., 152 F. Supp. 3d 1226 (C.D. Cal. 2016).

[3] Varjabedian v. Emulex Corp., 888 F.3d 399, 410 (9th Cir. 2018), cert. granted, No. 18-459, 2019 WL 98542 (U.S. Jan. 4, 2019).

[4] Id. at 409.

[5] Petition for Rehearing En Banc of Defendants-Appellees, Varjabedian v. Emulex, No. 16-55088 (9th Cir. May 4, 2018), ECF No. 63-1.

[6] Petition at 3.

[7] Oral Argument Tr. at 3:22-4:5

[8] Id. at 4:7.

[9] Id. at 35:13-16.

[10] Id. at 35:17-19.

[11] 139 S. Ct. 718, 731 (2019)

[12] Id. at 731-32.

[13] Id. at 732.

[14] Id.

[15] Id. at 738.