

Other Notable Circuit Court Decisions

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Ninth Circuit: Misstatement Claims Under Section 14(e) of the Exchange Act Require Only Proof of Negligence, Not Scienter

On April 20, 2018, the Ninth Circuit held that the first clause of Rule 14(e), which prohibits material misstatements in connection with tender offers, requires only proof of negligence, rather than scienter.^[1] [Varjabedian v. Emulex Corp.](#), 888 F.3d 399 (9th Cir. 2018) (Marguia, J.). Five other circuits to consider this question have relied on similarities between the first clause of Rule 14(e) and Rule 10b-5(b) to hold that a scienter requirement applies to Rule 14(e) claims.^[2] The Ninth Circuit departed from these decisions based on its determination that “important distinctions exist between Rule 10b-5 and Section 14(e)” that “strongly militate against importing the scienter requirement from the context of Rule 10b-5 to Section 14(e).”

The Ninth Circuit explained that Rule 10b-5(b)’s scienter requirement is based not on the text of the rule itself but on the language of Section 10(b), pursuant to which Rule 10b-5 was promulgated. The court found that “Section 14(e) differs fundamentally from Section 10(b)” because the SEC may regulate non-fraudulent conduct under Section 14(e). The Ninth Circuit observed that “[i]f the SEC can prohibit acts themselves not fraudulent under Section 14(e), then it would be somewhat inconsistent to conclude that Section 14(e) itself reaches only fraudulent conduct requiring scienter.” The court concluded that “because the text of the first clause of Section 14(e) is devoid of any suggestion that scienter is required, . . . the first clause of Section 14(e) requires a showing of only negligence, not scienter.”

Ninth Circuit: Limits the Extent to Which Courts Can Rely on Judicial Notice and the Incorporation-by-Reference Doctrine to Consider Extrinsic Documents at the Pleading Stage

On August 13, 2018, the Ninth Circuit addressed what it found to be “a concerning pattern in securities cases” in which defendants “improperly” utilize judicial notice and the incorporation-by-reference doctrine “to defeat what would otherwise constitute adequately stated claims at the pleading stage.” [Khoja v. Orexigen Therapeutics](#), 899 F.3d 988 (9th Cir. 2018) (Tashima, J.). The Ninth Circuit “clarif[ied] when and how the district court[s] should consider materials extraneous to the pleadings at the motion to dismiss stage.”

First, the Ninth Circuit stated that “a court cannot take judicial notice of disputed facts contained in . . . public records.” The Ninth Circuit reasoned that “[j]ust because [a] document itself is susceptible to judicial notice does not mean that every assertion of fact within that

document is judicially noticeable for its truth.”

Second, the Ninth Circuit reaffirmed that “a defendant may seek to incorporate a document into the complaint ‘if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim.’” *Id.* (quoting *United States v. Ritchie*, 342 F.3d 903 (9th Cir. 2003)). The court stated that there are “rare instances when assessing the sufficiency of a claim requires that [a] document [not mentioned in the complaint] be reviewed, even at the pleading stage.” But the Ninth Circuit instructed that “if the document merely creates a defense to the well-pled allegations in the complaint, then that document did not necessarily form the basis of the complaint.” The Ninth Circuit further stated that “it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint.”

[1] Rule 14(e), titled *Untrue statement of material fact or omission of fact with respect to tender offer*, provides in relevant part:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. §78n(e). Rule 14(e) was added as an amendment to the Securities Exchange Act of 1934 pursuant to the Williams Act.

[2] See *Chris-Craft Indus. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974); *In re Digital Island Sec. Litig.*, 357 F.3d 322 (3d Cir. 2004); *SEC v. Ginsburg*, 362 F.3d 1292 (11th Cir. 2004); *Adams v. Standard Knitting Mills*, 623 F.2d 422 (6th Cir. 1980).

Authors and Contacts

Paul Gluckow
Partner and General Counsel
pgluckow@stblaw.com
+1-212-455-2653

Jonathan Youngwood
Partner
jyoungwood@stblaw.com
1-212-455-3539

Peter Kazanoff
Partner
pkazanoff@stblaw.com
+1-212-455-3525



