CASE TO WATCH: *FIRST SOLAR INC. V. MINEWORKS PENSION SCHEME*

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A basic premise of the federal securities laws is that investors are entitled to recover for harms caused by the revelation of a company's false statements. But in *First Solar Inc. v. Mineworks Pension Scheme*, defendants argue that they cannot be held liable for losses caused by the revelation of the effects of their fraudulently concealed conduct until the fact of the fraud itself is also disclosed. After their arguments fell short at the trial and appeals court levels, they have petitioned the Supreme Court of the United States to consider their position. *First Solar Inc.*, No. 18-164 (U.S.) (cert. petition pending).

During the class period alleged in the case, First Solar's stock fell from nearly $300 per share to around $50. Plaintiffs allege that, during that period, defendants intentionally concealed the existence of serious defects in two of their products, and that, even after one of the defects was revealed, defendants continued to hide its full costs and impact. The market did not learn about the existence of the second defect during the class period. But defendants did incorporate the costs of the concealed defects into their earnings statements—albeit without explaining all the reasons for their poor performance to the public. Plaintiffs argue that their loss was caused, in part, by the market reaction to those statements. A trial court agreed that plaintiffs' argument was sufficient to go to trial but permitted defendants to appeal that determination to the Ninth U.S. Circuit Court of Appeals.

On appeal, defendants did not meaningfully contest that plaintiffs put forward evidence that the earnings statements, rather than other intervening causes, reflected defendants' fraudulently concealed conduct and caused the decline in stock price that harmed them. Nevertheless, defendants contended that their fraudulent concealment of the defects could not have caused plaintiffs' losses because the market was only reacting to the economic *effects* of the undisclosed defects, without knowing that any conduct had been fraudulently concealed. The Ninth Circuit, applying a standard "proximate cause" analysis, agreed with the trial court that plaintiffs had adequately shown that their losses were caused by defendants' fraudulent conduct because those losses could be traced back to "the very facts about which the defendant lied."

Defendants now seek to argue their case before the Supreme Court. Again, they claim that the market must specifically learn about the fraudulent *nature* of their conduct in order for plaintiffs to

DEFENDANTS' POSITION WOULD GIVE POTENTIAL DEFENDANTS A ROADMAP FOR DRASTICALLY NARROWING THE POTENTIAL DAMAGES RESULTING FROM SECURITIES FRAUD; AS DEFENDANTS DID HERE, CORPORATIONS WOULD BE INCENTIVIZED TO REVEAL THE ECONOMIC IMPACT OF THEIR FRAUD, ALLOW THE MARKET TO REACT, AND THEN FACE LIABILITY ONLY FOR THE LOSSES INCURRED AFTER THE CONCEALED CONDUCT ITSELF WAS ADMITTED, WHICH MIGHT AMOUNT TO A MERE FRACTION OF THE OVERALL LOSS.

demonstrate loss causation—that is, defendants argue that investors are not harmed by their fraudulent misstatements unless the investors know that their injury is being caused by a fraud. That position would give potential defendants a roadmap for drastically narrowing the potential damages resulting from securities fraud; as defendants did here, corporations would be incentivized to reveal the economic impact of their fraud, allow the market to react, and then face liability only for the losses incurred after the concealed conduct itself was admitted, which might amount to a mere fraction of the overall loss.

Although defendants' argument is contrary to established Supreme Court precedent, corporation-friendly organizations, including the Securities Industry and Financial Markets Association, the U.S. Chamber of Commerce, and the Business Roundtable, have already filed an amicus brief supporting their position. In October 2018, the Supreme Court asked the Office of the Solicitor General to provide its views, which may take months. We will be watching this petition closely and will keep our clients apprised if the Supreme Court grants the petition and decides to hear the case. ■

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EMULEX UPDATE: SUPREME COURT TO HEAR CASE WITH BIG IMPLICATIONS FOR MERGER SUITS

As the *Shareholder Advocate* predicted last summer, a plaintiff-friendly appeals court ruling in California has led the Supreme Court to consider an issue that, if decided in defendants' favor, would limit investors' ability to successfully bring federal merger-objection lawsuits.

In *Varjabedian v. Emulex Corp.* (*Emulex*), the Ninth U.S. Circuit Court of Appeals said plaintiffs needed only show that defendants were negligent to survive a motion to dismiss, rather than show defendants acted with *scienter* (knowledge of wrongdoing). In doing so, the Ninth Circuit adopted a more relaxed standard than five of its sister circuits for cases brought under Section 14(e) of the Securities Exchange Act of 1934.

In accepting the case on January 4, the Supreme Court waded into the debate over the increasing number of federal merger-objection lawsuits, which accounted for nearly half the securities class actions filed last year and have propelled annual filings to higher-than-average levels. Alleging breaches of fiduciary duty during the merger process that reduce deal prices at the expense of the acquired companies' shareholders, these cases have migrated to federal court following adverse state court rulings in Delaware, where most had been brought.

While most deal cases are brought under a different subsection of the Exchange Act, Section 14(a), there is concern that the Supreme Court could use the question presented in *Emulex* to impose the higher *scienter* standard on plaintiffs for all parts of Section 14.

Some anti-investor forces would like to see the Supreme Court go even further. In a friend-of-the-court brief filed in support of defendants' petition for consideration, the U.S. Chamber of Commerce urged the high court to eliminate the right to bring private lawsuits under Section 14 altogether.

The Supreme Court is expected to decide the case this year. ■