Ninth Circuit Rejects Decisions of Five Other Circuits: Exchange Act Section 14(e) Does Not Require Scienter

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Scienter has been a critical element of a claim based on Exchange Act Section 10(b) in an SEC enforcement action since the Supreme Court's decision in *Aaron v. SEC*, 446 U.S. 680 (1980). It has also been a key element in private damage actions based on the cause of action implied under Section 10(b) and Rule 10b-5 since *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Both decisions were based largely on the text and language of Section 10(b).

Section 14(e), added to the Exchange Act by the Williams Act in 1968, has also been held to require proof of scienter by the Circuit Courts – the Supreme Court has not considered the questions.

Now, however, the decisions by the five Circuit Courts regarding Section 14(e) are being called into question by the Ninth Circuit. That Circuit recently examined the statutory language of Section 14(e), as well as its purpose and history, all of which lead the Court to conclude that the clause prohibiting a misrepresentation/omission only requires proof of negligence.

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