

Room for Optimism: The “Puffery” Defense under the Federal Securities Laws (Part 2 of 2)

By Robert N. Kravitz

Part 1 of this article surveyed the published appellate court opinions on the “puffery” defense in the First through Fifth Circuits. This second part discusses new cases in the Second and Fifth Circuits issued subsequent to the publication of Part 1, and surveys the cases in the Sixth through Eleventh Circuits.

Second Circuit

In *ECA & Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*,¹ the court ruled that a statement may be inactionable puffery even if the subject matter is material. The plaintiffs in *ECA* alleged that defendant JP Morgan Chase (JPMC) made misrepresentations regarding its “highly disciplined” risk management and its reputation for integrity, including statements that JPMC had “risk management processes [that] are highly disciplined and designed to preserve the integrity of the risk management process”; that it “set the standard for integrity”; and that it would “continue to reposition and strengthen [its] franchises with a focus on financial discipline.”² The plaintiffs argued that the statements were material because they related to the investment bank’s integrity and risk management practices.

The Second Circuit affirmed dismissal of the claims, ruling that such statements were “puffery.” The court said that the plaintiffs conflated the importance of the bank’s reputation for integrity with the materiality of the bank’s statements regarding its reputation. The court ruled that, “[w]hile a bank’s reputation is undeniably important, that does not render a particular statement by a bank regarding its integrity per se material.”³

Fifth Circuit

In *U.S. v. Skilling*,⁴ the Fifth Circuit affirmed the conviction of former Enron Corporation CEO Jeffrey Skilling on securities fraud charges, rejecting Skilling’s arguments that certain statements the jury was allowed to consider were inactionable “puffery” as a matter of law, and that the trial court should have given the jury a separate instruction on “puffery” in addition to its overall instruction on materiality. The statements at issue included Skilling’s statements that all of Enron’s businesses were “uniquely strong franchises with sustainable high earnings power”; that Enron’s Wholesale business was a “stable, high growth business” and “not a trading business”; that Enron Broadband Services (EBS) was having “a great quarter on the intermediation side of the bandwidth business” and was having “essentially strong growth on the intermediation side, strong growth on the content services side, in terms of people, budgets, the whole thing.”⁵ The Fifth Circuit said the statements were not immaterial as a matter of law in that a reasonable jury could find that the statements were strongly contrary to historical facts,

"Room for Optimism: The ‘Puffery’ Defense under the Federal Securities Laws (Part 2 of 2)," American Bar Association, Section of Litigation, *Securities Litigation Journal*, Volume 19, Number 3, Spring 2009. © 2009 American Bar Association. All rights reserved.

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that Skilling misstated his true opinion, and that the statements were misleading to a reasonable investor who would have considered them important.⁶

The trial court gave a general jury instruction on the definition of materiality, and also instructed that the securities fraud statute does “not cover minor, or meaningless, or unimportant misstatements or omissions,” but declined to give a more specific supplemental instruction regarding “puffery.” The Fifth Circuit ruled that the trial court’s instructions were adequate, and reiterated that the jury did not improperly consider statements that amounted to immaterial puffery as a matter of law.⁷

Sixth Circuit

The Sixth Circuit, sitting en banc, addressed the issue of whether certain optimistic projections were immaterial as a matter of law in *Helwig v. Vencor, Inc.*⁸ The court split 7–6 on the issue, with the majority concluding that the statements at issue were not immaterial as a matter of law.

Vencor, the defendant company in *Helwig*, was a provider of long-term health care. In February 1997, President Clinton proposed the Balanced Budget Act, which featured several Medicare provisions that would substantially affect the health care industry. The bill was signed into law on August 5, 1997. In its 1996 Form 10-K, filed on March 27, 1997, Vencor stated that it could not predict the content of potential legislation or whether it would be adopted and, accordingly, was unable to assess the effect of any such legislation on its business. At the same time, from February to October 1997, company officials stated that they were “comfortable” with projections of fourth-quarter earnings of \$0.59 to \$0.64 per share and yearly returns between \$2.10 to \$2.20 for 1997 and \$2.60 to \$2.65 for 1998. In October 1997, the company lowered its estimates of fourth-quarter earnings due to its “recently completed analysis” of the new federal legislation, and the stock price dropped. The plaintiffs alleged that the company knew about the likely adverse impact of the Budget Act earlier, but nonetheless made false and misleading earnings statements to boost its stock price.

The defendants argued that the company’s optimistic projections were “soft, puffing statements” that were immaterial as a matter of law. The court’s majority acknowledged that there was support for the proposition that “sales figures, forecasts, and the like only rise to the level of materiality when they can be calculated with substantial certainty.” But the majority did not agree that Vencor’s estimates of strong earnings “were so uncertain or casually disregarded by the marketplace.” In the context of the Budget Act—whose form and effect the company denied knowing until seven weeks after its passage—the projections were framed “as material reassurances of continued good fortune,” the court stated.⁹

The six dissenting judges sharply disagreed with this conclusion. Relying on the Second, Third, and Fourth Circuit cases discussed in Part 1, the dissent argued that a CEO’s expression of “comfort” with analysts’ projections was not capable of being proved false and that statements containing simple economic projections, expressions of optimism, and other puffery are insufficient to attach liability.¹⁰ The dissent also disagreed that the projections were capable of being “calculated with reasonable certainty.”¹¹

The Sixth Circuit then endorsed and applied the “puffery” doctrine in *In re Ford Motor Co. Securities Litigation*.¹² The plaintiffs in *Ford* alleged that Ford made a series of misrepresentations regarding the quality of its products that failed to disclose the dangerousness of its Explorer vehicles equipped with Bridgestone ATX tires. In setting forth the standards for determining whether the alleged misrepresentations were actionable, the court stated that “[s]tatements that are ‘mere puffing’ or ‘corporate optimism’ may be forward-looking or ‘generalized statements of optimism that are not capable of objective verification.’”¹³ The court then reviewed a series of statements that the plaintiffs alleged were misleading, including:

- “At Ford quality comes first.”
- “We aim to be the quality leader.”
- “Ford has its best quality ever.”
- “Ford is taking across-the-board actions to improve . . . [its] quality.”
- Ford has made “quality a top priority.”
- “Ford is a worldwide leader in automotive safety.”
- Ford is “designing safety into . . . [its] cars and trucks” because it wants its “customers to feel safe and secure in their vehicles at all times.”
- Ford “wants to make customers’ lives . . . safer.”
- Ford has “dedicated [itself] to finding even better ways of delivering . . . safer vehicles to [the] consumer.”
- Ford “wants to be clear leaders in corporate citizenship.”
- Ford’s “greatest asset is the trust and confidence . . . [it] has earned from . . . [its] customer.”
- Ford is “going to lead in corporate social responsibility.”

The court ruled that none of these statements was actionable. Noting that “[a]ll public companies praise their products and their objectives,” the court ruled that “[s]uch statements are either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they were misleading.”¹⁴

The court ruled that the same was true of two other statements: “We want to ensure that all our vehicles have world-class quality[,] . . . developing cars and trucks that are defect-free”; and “We’re also insisting our suppliers maintain Ford’s stringent quality standards.” The court

said: “What Ford ‘wants’ or is insisting its suppliers do would not be interpreted by an investor as a representation that its products achieve that objective or its suppliers maintain the quality standards it asks.”¹⁵

The Bridgestone tire problems were also at issue in *City of Monroe Employees Retirement System v. Bridgestone Corp.*,¹⁶ but this time, Bridgestone itself was the defendant. The plaintiffs alleged that the defendants were aware of the high rate of tire failure that was occurring, and that officials in other countries were investigating several tire blow-outs attributable to defects in manufacturing, but that defendants nonetheless published statements expressing confidence in their product.

The court ruled that a number of statements in Bridgestone’s annual reports regarding tire safety and product quality were immaterial “puffery,” but that one statement was not.

The statements that the court ruled were “puffery” were:

- Bridgestone’s statement that it sold “the best tires in the world”
- its statement in late 1996 that it had “no reason to believe there is anything wrong with [its ATX tires]”
- its statement that its products demonstrated “global consistent quality”
- its statement that “rigorous testing under diverse conditions at our proving grounds around the world helps ensure reliable quality for original equipment customers”
- its statement that sales success in North America was due to “high regard among automakers for our strengths in product quality”
- its statement that “we have built a premium-quality for . . . Firestone tires” and that “aggressive product development” had “re-established the Firestone name as a vigorous brand in premium-grade tires”
- Firestone’s statements in February 2000 that it had “full confidence” in the ATX tires and that “our experience with Radial ATX indicates high consumer satisfaction with the quality and reliability of these tires”
- Firestone’s statement in July 2000 that it had “full confidence” in its tires.

The court ruled that these statements “are best characterized as loosely optimistic statements insufficiently specific for a reasonable investor to ‘find them important to the total mix of information.’”¹⁷ The court added:

These statements, both on their own terms and in context, lacked a standard against which a reasonable investor could expect them to be pegged; such statements describing a product in terms of “quality” or “best” or benefiting

from “aggressive marketing” are too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision.¹⁸

The court concluded, however, that the following statement in a company press release was not mere “puffery,” and was actionable: “We continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires.”

The court said it was important to consider the context of the statement, which was made a few weeks after multiple lawsuits were filed challenging the safety of the ATX tires and after several safety groups called on Ford to recall its Explorer vehicles with the ATX tires on them. The court said that a reasonable juror could infer that the “objective data” representation was a direct response to the lawsuits or the recall campaign, or to both. The court said that a reasonable juror could also conclude that the statement, without some qualification or accompanying disclosure of the number of pieces of evidence that tended to cut the other way, was a misrepresentation.¹⁹

The court specifically rejected the defendants’ argument that the statement was a statement “of general optimism and in its defense of its products.” The court said it disagreed. Rather, the court said, the statement “was an assertion of a relationship between data and a conclusion, one that a finder of fact could test against record evidence.”²⁰

The Sixth Circuit affirmed dismissal of claims under the “puffery” doctrine in *Zaluski v. United American Healthcare Corp.*²¹ In *Zaluski*, the plaintiffs alleged that the defendants failed to disclose that United American Health Care Corporation was making illegal payments to a Tennessee state senator, which subjected the company to numerous criminal and civil investigations and put a major state contract in jeopardy. One of the statements that plaintiffs challenged as a misrepresentation was:

Fiscal 2002 was a year of significant changes for OmniCare-TN and the other [managed care organizations (MCOs)] having contracts with TennCare, a State of Tennessee program that provides medical benefits to Medicaid and working uninsured and uninsurable recipients. In a climate of continually rising medical costs, several of TennCare’s major MCOs ceased doing business in fiscal 2002. In contrast, TennCare expressly regarded OmniCare-TN as one of TennCare’s viable MCOs.

The Sixth Circuit ruled that this statement “is most properly described as immaterial puffery,” as described in *City of Monroe*.²²

The Sixth Circuit again dismissed a Rule 10b-5 claim under the “vague, optimistic statement” doctrine in *J&R Marketing, SEP v. General Motors Corp.*²³ In that case, the plaintiffs challenged a statement by General Motors Acceptance Corporation (GMAC) that it “has benefited from a significant reduction in unsecured borrowing spreads consistent with the overall improvement in the capital markets and [General Motors] as an issuer, in particular. The out-

look for GM improved partially due to the significant progress made in funding GM's pension and postretirement obligations."²⁴ The court acknowledged that the topic of the statement—GMAC's credit rating—was important. But the court ruled that the importance of the topic of a statement does not automatically make the statement material, and that, here, the statement at issue was "too vague and immeasurable" to be considered material. The court said:

It is impossible . . . to measure whether the progress was in fact "significant." In the end, any progress could be called significant given the large pension liability GM faced, and investors understand that management is generally optimistic. A representation that progress was "significant" is the same as a representation that a company's products are "the best," which is considered immaterial as a matter of law.²⁵

The Sixth Circuit relied upon the "puffery" doctrine in the context of scienter in *Ley v. Visteon Corp.*²⁶ The plaintiffs alleged that a defendant's statement in January 2003 that Visteon "had a solid year in 2002" while at the same time the company was internally saying it was "not doing well," "barely had enough money to pay its bills," and was "barely liquid," was evidence of scienter. The Sixth Circuit agreed with the district court that the "solid year" statement was merely "corporate optimism," and not probative of scienter.²⁷

Seventh Circuit

The Seventh Circuit affirmed dismissal of securities claims under the "puffery" doctrine—although without using that term—in *Searls v. Glasser*.²⁸ The plaintiffs in *Searls* alleged that the defendants misled investors by describing GATX Corporation as being "recession-resistant." The Seventh Circuit ruled that the phrase "recession-resistant" is "simply too vague to constitute a material statement of fact."²⁹ The court added:

Plaintiffs apparently interpret the phrase to mean "recessionproof." But it could be just as easily used to describe a company that although not impervious to the effects of a recession will nevertheless survive it better than others. It is a promotional phrase used to champion the company but is devoid of any substantive information. Just as indefinite predictions of "growth" are better described as puffery rather than as material statements of fact, describing a company as "recession-resistant" lacks the requisite specificity to be considered anything but optimistic rhetoric.³⁰

The plaintiffs in *Searls* also alleged that the defendants misled investors by assuring investors that GATX's disposition gains—that is, gains from the sale of equipment—would be "high," while the company's internal budget showed that it expected its disposition gains would decline substantially from earlier levels. The Seventh Circuit ruled that these assurances "are also best characterized as loose predictions and as such are not actionable." The court said that predictions of "high" disposition gains "cannot be held sufficiently definite so as to constitute material misstatements of fact." The court added:

Portraying disposition gains as "high" is of no help to an investor. Does it mean high relative to the previous year or the previous few years? Or does it

mean high relative to revenues as a whole? How far into the future does it extend? It is simply too vague a description to affect the mix of more detailed information upon which a reasonable investor typically relies.³¹

The Seventh Circuit again affirmed dismissal on summary judgment of securities claims under the “puffery” doctrine in *Eisenstadt v. Centel Corp.*³² In *Eisenstadt*, the plaintiffs complained that the defendants (Centel Corporation and two of its officers) exaggerated the prospects of a planned auction of Centel. It was alleged that, even as certain bidders for the company were dropping out of the auction, the defendants continued to maintain that the auction process was going well. The Seventh Circuit affirmed the district court’s conclusion that these statements were not actionable. The court ruled:

Everybody knows that someone trying to sell something is going to look and talk on the bright side. You don’t sell a product by bad-mouthing it. And everybody knows that auctions can be disappointing. It would be unreasonable for investors to attach significance to general expressions of satisfaction with the progress of the seller’s efforts to sell, just as it would be unreasonable for them to infer from a potential bidder’s apparent lack of enthusiasm that the bidder was uninterested rather than just was jockeying for a better price. The heart of a reasonable investor does not begin to flutter when a firm announces that some project or process is proceeding smoothly, and so the announcement will not drive up the price of the firm’s shares to an unsustainable level. . . .”³³

The court went on to qualify its statement by saying that such statements could be material if they were concealing “a disaster”—for example, if, for legal reasons, the auction process had, in fact, stopped, or was no longer feasible. But, since that was not the case, the court ruled that the defendants’ statements were not actionable. In further elaboration of its reasoning and of the “puffery” doctrine, the court stated:

An utterly candid statement of the company’s hopes and fears, with emphasis on the fears, might well have pushed the company’s stock below \$40, but perhaps only because, given the expectation of puffing, such a statement would be taken to indicate that the prospects for the auction were much grimmer than they were. Where puffing is the order of the day, literal truth can be profoundly misleading, as senders and recipients of letters of recommendation well know.³⁴

The Seventh Circuit dealt with the “puffery” doctrine again in *Makor Issues & Rights, Ltd. v. Tellabs Inc.*³⁵ The court ruled that certain statements challenged by the plaintiffs were “puffery” while others were not. The plaintiffs in *Tellabs* accused the company and its executives of failing to disclose flagging sales in two of its leading products.

The Seventh Circuit ruled that, even taking into account internal reports of declining demand for Tellabs’ best-selling product (the TITAN 5500), the following two statements were “no more than puffery”: “We feel very, very good about the robust growth we’re experiencing”; and “Demand for our core optical products . . . remains strong.” The court said that

“[t]hese vague comments did not identify the TITAN 5500 in particular and were unlikely to induce an investor to purchase Tellabs’ stock.”³⁶

The court ruled that the statement that demand for another Tellabs product was “exceeding our expectations” was also inactionable, stating: “As one court has put it, ‘it is hard to imagine a more subjective or vague statement than “exceeded our expectations.” This is precisely the type of statement that the marketplace views as pure hype, and accordingly discounts entirely.’”³⁷

The court ruled, however, that other challenged statements were not mere “puffery.” In particular, when a securities analyst asked whether Tellabs was experiencing any weakness in TITAN 5500 sales, the CEO responded: “We’re still seeing that product continue to maintain its growth rate; it’s still experiencing strong acceptance.” The court ruled: “In context, this went well beyond puffery: it was a direct response to an analyst’s inquiry about a possible decline in TITAN 5500 sales. It is reasonable that an analyst or investor would take [the CEO] at his word, and it is misleading to describe a decline as equivalent to a continued growth rate.”³⁸

Also, in the “frequently asked questions” section of an annual report, Tellabs answered the question of whether the TITAN 5500 had peaked, stating, “No. . . . although we introduced the product nearly 10 years ago, it’s still going strong.” The court ruled: “Perhaps in a different context this statement would amount to puffery, but its place in the ‘frequently asked questions’ section of the Annual Report suggests that the answer was particularly important to investors. It would be reasonable for an investor to rely on the statement, believing that sales for the TITAN were ‘still going strong.’”³⁹

- The court also found that a number of statements regarding the TITAN 6500 “crossed into the realm of material falsity” (assuming the truth of plaintiffs’ allegations), including statements that:
- “The TITAN 6500 system is available now.”
- “Interest in and demand for the 6500 continues to grow. . . . We continue to ship the . . . 6500 through the first quarter. We are satisfying very strong demand and growing customer demand.”
- “We should hit our full manufacturing capacity in May or June to accommodate the demand we are seeing. Everything we can build, we are building and shipping. The demand is very strong.”

The court ruled that these statements were “particular, specific, and, according to the complaint, completely false; accordingly, the court found that the plaintiffs had sufficiently alleged that they were material.”⁴⁰

Eighth Circuit

The Eighth Circuit endorsed and applied the “puffery” doctrine in *Parnes v. Gateway 2000, Inc.*⁴¹ The plaintiffs in *Parnes* alleged that a prospectus issued by Gateway included certain

misrepresentations, including the defendants' projection of "significant growth." Relying on *Raab* and other "puffery" cases discussed above, the Eighth Circuit held that this was a "puffing" statement that was immaterial as a matter of law.⁴²

The Eighth Circuit again applied the doctrine in *In re Hutchinson Technology, Inc. Securities Litigation*.⁴³ The plaintiffs alleged that defendants had issued a misleading statement that "[w]e believe we are well-positioned on a number of new disk drive programs that will be transitioning into volume production in the coming months," whereas, according to the plaintiffs' allegations, the company in fact could not keep up with demand and did not adequately account for product defects caused by operating at maximum capacity. The Eighth Circuit agreed with the district court that the statement was "too vague and too much like puffing to be material."⁴⁴

Ninth Circuit

In *Casella v. Webb*,⁴⁵ the Ninth Circuit reversed a district court's summary judgment ruling that an alleged misrepresentation was inactionable "puffery." The plaintiffs in *Casella* bought shares in a real estate limited partnership known as Hondo House, Ltd. They alleged that the defendants represented that the IRS had approved Hondo House as a tax shelter, that the plaintiffs could obtain a tax credit that exceeded their investment, and that "after a reasonable amount of time," the plaintiffs "would realize a return on their original investment plus a profit in that Hondo House was a secure investment, a sure thing."

The district court ruled that the statement that the investment in Hondo House was a "sure thing" was not a material misrepresentation of fact, but rather mere "puffery." The Ninth Circuit reversed. The court ruled:

Statements made in the course of an oral presentation "cannot be considered in isolation," but must be viewed "in the context of the total presentation." What might be innocuous "puffery" or mere statement of opinion standing alone may be actionable as an integral part of a representation of material fact when used to emphasize and induce reliance upon such a representation.⁴⁶

The Ninth Circuit then dismissed claims based on what it referred to as "inactionable forecasts" in *In re Syntex Corp. Securities Litigation*.⁴⁷ The series of statements at issue regarded the future success of new products that Syntex was developing. These statements included, among others:

- "We're doing well and I think we have a great future."
- "Business will be good this year. . . . We expect the second half of fiscal 1992 to be stronger than the first, and the latter part of the second half to be stronger than the first."
- "Everything is clicking. . . . New products are coming in a wave, not a trickle. . . . Old products are doing very well."
- "I am optimistic about [the company's] performance during this decade."

The Ninth Circuit ruled that the claims involving these statements failed to state a claim because the statements were “inactionable forecasts” and the plaintiffs had not pled facts showing that the statements were false when made. The court said it was important to understand that Syntex was in the drug manufacturing industry, which is an industry “laden with risk,” and that its optimistic statements were about new and innovative drugs. The court ruled: “Any statements related to future sales of new products were merely forecasts, optimistic speculations as to how the market would react to the new products. Defendants did not “[withhold] financial data or other existing facts from which forecasts are typically derived.”⁴⁸

In a later, unpublished opinion, the Ninth Circuit said that the statements at issue in *Syntex* were held to be “non-actionable puffery.”⁴⁹

Tenth Circuit

The Tenth Circuit endorsed and applied the “puffery” doctrine in *Grossman v. Novell, Inc.*⁵⁰ The court said that “vague statements of corporate optimism” were one of the categories of statements that are not considered materially misleading. The court said: “Statements classified as ‘corporate optimism’ or ‘mere puffing’ are typically forward-looking statements, or are generalized statements of optimism that are not capable of objective verification. Vague, optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions.”⁵¹

The court concluded that the following statements were correctly determined by the district court to be immaterial statements of corporate optimism as a matter of law:

- the statement by Novell’s CEO that Novell had experienced “substantial success” in integrating the sales forces of Novell and WordPerfect, a company it had recently acquired in a merger; that the merger was moving “faster than we thought,” and that the merger presented a “compelling set of opportunities” for the company
- Novell’s statements that “by moving rapidly to a fully integrated sales force, we are leveraging our combined knowledge of the expanding scope of network solutions,” and that it “expects that network applications will quickly reshape customer expectations.”

The Tenth Circuit concluded that their statements were “the sort of soft, puffing statements, incapable of objective verification, that courts routinely dismiss as vague statements of corporate optimism.”⁵²

The Tenth Circuit also relied on the “puffery” doctrine in another case involving Novell—*Pirraglia v. Novell, Inc.*⁵³ In *Pirraglia*, the plaintiffs challenged statements in a Novell press release reporting “broad market acceptance” of its products and claiming that its sales were “fueled by customer demand.” The Tenth Circuit ruled that plaintiffs had alleged no facts showing that these statements were false or misleading. Moreover, the court ruled, “even if these statements passed the Reform Act pleading test, they constitute ‘the sort of vague state-

ments of corporate optimism’ that ‘courts have found not to be actionable under the securities laws.’”⁵⁴

Eleventh Circuit

The Eleventh Circuit has not ruled on the “puffery” doctrine in a case involving federal securities claims. But it applied the doctrine in a fraud claim brought under Georgia state law in *Next Century Communications Corp. v. Ellis*,⁵⁵ and cited federal securities law cases from other circuits in support of its ruling.

The plaintiff in *Next Century* alleged fraud based on the defendant’s statement: “I think our share price will start to stabilize and then rise as our Company’s strong performance continues.” The Eleventh Circuit said that the first part of that statement was not actionable under a fraud theory under Georgia law, as it was “framed as a mere opinion as to future events.” As for the second part of the sentence—regarding the company’s “strong performance”—the court ruled that “the sounder interpretation of these words is that they constitute mere ‘puffing,’ and that as such [the plaintiff] cannot demonstrate the satisfaction of either the first or fourth element of fraud under Georgia law [i.e., a false representation by the defendant, and justifiable reliance by the plaintiff].”

The court said that the defendant’s characterization of the company’s performance as “strong” was “not the sort of empirically verifiable statement that can be affirmatively disproven.” In addition, the court ruled that the statement “cannot possibly have induced the reliance of a reasonable investor.”⁵⁶

Conclusion

As the cases surveyed in both parts of this article demonstrate, “puffery” and “corporate optimism” are now firmly entrenched as a defense to federal securities fraud claims in virtually every circuit.^Z

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Endnotes

1. 553 F.3d 187 (2d Cir. 2009).
2. *Id.* at 205.
3. *Id.* at 206.
4. 554 F.3d 529 (5th Cir. 2009).
5. *Id.* at 554.
6. *Id.*
7. *Id.* at 555.
8. 251 F.3d 540 (6th Cir. 2001) (en banc).
9. *Id.* at 555.
10. *Id.* at 567–68 (Kennedy, J., dissenting).
11. *Id.* at 568 (Kennedy, J., dissenting).
12. 381 F.3d 563 (6th Cir. 2004).
13. *Id.* at 570 (citation omitted).
14. *Id.* at 570–71 (citation omitted).

15. *Id.* at 571.
16. 399 F.3d 651 (6th Cir. 2005).
17. *Id.* at 671 (citation omitted).
18. *Id.*
19. *Id.* at 672.
20. *Id.* at 674.
21. 527 F.3d 564 (6th Cir. 2008).
22. *Id.* at 574.
23. No. 07-1411, 2008 U.S. App. LEXIS 13454 (6th Cir. June 26, 2008)
24. 2008 U.S. App. LEXIS 13454, at *2.
25. *Id.* at *5–6.
26. 543 F.3d 801 (6th Cir. 2008).
27. *Id.* at 811.
28. 64 F.3d 1061 (7th Cir. 1995).
29. *Id.* at 1066.
30. *Id.* (Citation omitted). In an earlier opinion, the Seventh Circuit affirmed dismissal of a wire and mail fraud claim based on the allegation that an insurance company had promised that its annuity product “offered rates of return equal to the highest in the market.” *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561 (7th Cir. 1991). The court ruled: “Statements that a certain investment will earn the ‘highest’ rate of return are puffery.” *Id.* at 570.
31. *Id.* at 1067.
32. 113 F.3d 738 (7th Cir. 1997).
33. *Id.* at 745 (emphasis in original).
34. *Id.* at 746 (citations omitted).
35. 437 F.3d 588 (7th Cir. 2006), *vacated on other grounds*, 551 U.S. 308 (2007).
36. *Id.* at 597.
37. *Id.* 597–98.
38. *Id.* at 597.
39. *Id.*
40. *Id.* at 598.
41. 122 F.3d 539 (8th Cir. 1997).
42. *Id.* at 547.
43. 536 F.3d 952 (8th Cir. 2008).
44. *Id.* at 960.
45. 883 F.2d 805 (9th Cir. 1989).
46. *Id.* at 808.
47. 95 F.3d 922 (9th Cir. 1996).
48. *Id.* at 932–33.
49. *In re Apple Computer, Inc.*, No. 03-16614, 2005 U.S. App. LEXIS 5511, at **19 (9th Cir. Apr. 4, 2005).
50. 120 F.3d 1112 (10th Cir. 1997).
51. *Id.* at 1119 (footnote omitted).
52. *Id.* at 1121–22.
53. 339 F.3d 1182 (10th Cir. 2003).
54. *Id.* at 1189.
55. 318 F.3d 1023 (2003).
56. *Id.* at 1027–29.