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The Statutory Safe Harbor for Forward-Looking Statements: A Scorecard in the Courts From November 2004 Through November 2006

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The Private Securities Litigation Reform Act (PSLRA) provides a safe harbor from liability for forward-looking statements, which immunizes an issuer's forward-looking statements from securities law liability if: (1) the statement is identified as forward-looking and is accompanied by meaningful cautionary language; or (2) the statement is immaterial; or (3) plaintiffs fail to establish that defendants had actual knowledge of the falsity of the statement.[1]

Since the enactment of the PSLRA, there have been 21 court of appeals and nearly 230 district court decisions interpreting the safe harbor provision. Over the past two years, there have been five court of appeals and 70 district court decisions applying the safe harbor rule.[2] The district courts continue to construe the reach of safe harbor provision almost exclusively at the motion to dismiss stage.[3]

This article focuses on developments in the safe harbor case law that have occurred over the last two years. Although some areas of the law appear to be settled, there remains a surprising amount of divergence on critical issues, including whether safe harbor protection applies to an issuer who makes a knowingly false statement, but accompanies the statement with adequate cautionary language; whether and to what extent a

[1] For a comprehensive discussion of the statutory structure and pre-2004 case law, refer to my prior articles. *See* Richard A. Rosen "The Safe Harbor for Forward-Looking Statements in the Courts, May 2003 Through October 2004: Does Asher Change the Rules?" 36 Sec. Reg. & L. Rep. (BNA) 2135 (Dec. 6, 2004); Richard A. Rosen, "Safe Harbor for Forward-Looking Statements in the Courts: A Scorecard in the Courts from January 2002 Through April 2003," 34 Sec. Reg. & L. Rep. (BNA) 24 (June 16, 2003); Richard A. Rosen, "The Statutory Safe Harbor for Forward-Looking Statements in the Courts: A Year 2001 Scorecard," 34 Sec. Reg. & L. Rep. (BNA) 91 (Jan. 21, 2002), 70 U.S.L.W. 2443 (Jan. 29, 2002); Richard A. Rosen, "The Statutory Safe Harbor for Forward-Looking Statements in the Courts: A Scorecard," 27 Sec. Reg. L. J. 400 (2000); Richard A. Rosen, "The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has it Changed the Law? Has it Achieved What Congress Intended?" 76 Wash. U.L.Q. 645 (1998).

[2] The court of appeals and district court opinions are listed in Appendix A to this article. The earlier cases are cited in my previous articles referenced above.

[3] The two exceptions over the last two years are *In re Bristol-Myers Squibb Sec. Litig.*, 2005 WL 2007004 (D.N.J. 2005) and *In re Broadcom Corp. Sec. Litig.*, 2004 WL 3390052 (C.D. Cal. 2004) where the courts assessed the safe harbor provision at the summary judgment stage.

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statement with both factual and forward-looking aspects can acquire protection under the safe harbor; and whether a court may determine the adequacy of cautionary language at the pleading stage without discovery.

I. Meaningful Cautionary Language. The safe harbor was designed, in part, to facilitate dismissal of meritless securities claims at the pleading stage and thereby avoid protracted and expensive discovery. In the last two years, many courts have dismissed complaints at the pleading stage based on a showing that the issuer accompanied any potentially misleading forward-looking statement with ''meaningful cautionary language.''

A. Did Asher Change the Rules?

A decision in 2004 from the U.S. Court of Appeals for the Seventh Circuit, *Asher v. Baxter International*, called into question whether courts could continue to determine the adequacy of cautionary language at the pleading stage.[4]

In *Asher*, the plaintiff alleged that the defendant, a medical manufacturer, had made positive projections about revenue growth without disclosing various internal and external risk factors.[5] The district court found defendant's long and relatively company-specific list of warnings meaningful.[6] On appeal, the Seventh Circuit reversed and rejected defendant's safe harbor defense. The court held that dismissal was inappropriate—*without discovery*—to determine if defendant's cautionary language was ''meaningful.''[7] As Judge Easterbrook wrote, ''the problem is that there is no reason (on this record) to conclude that Baxter mentioned those sources of variance that (at the time of the projection) were the principal or important risks . . . This raises the possibility—no greater confidence is possible before discovery—that Baxter omitted important variables from the cautionary language.''[8] Accordingly, the Seventh Circuit remanded the case so that discovery could begin.[9]

The *Asher* decision reflected a significant departure from prior case law on the scope of the safe harbor's protection. Prior to *Asher*, the prevailing rule had been that the adequacy of defendant's cautionary language could be determined at the pleading stage provided the cautionary language warned investors of important risks that could cause results to differ.[10] In contrast, *Asher* held that discovery was required to determine the adequacy of defendant's cautionary language unless the cautionary language identified the risk that actually materialized.[11]

Over the last two years, the *Asher* decision has sparked a wave of commentary about the continued utility of the safe harbor.[12] Some commentators expressed concern that public companies, fearing potential protracted and expensive discovery disputes, would be less likely to issue forward-looking statements.[13] Others, myself included, were more sanguine that it would be recognized that *Asher* arose in a narrow context and that it would not be interpreted expansively to cripple the utility of the safe harbor.

Fears of the safe harbor's demise have not been realized. A review of the case law over the last two years reveals that while *Asher* remains controlling law in the Seventh Circuit, it has not altered the scope of safe harbor protection outside that Circuit. Even in the Seventh Circuit, *Asher's* applicability is relatively limited.

1. Impact of Asher: Narrower Safe Harbor in the Seventh Circuit.

Asher has clearly raised the bar for defendants seeking dismissal in the Seventh Circuit. All of the recent decisions in the circuit have held that if the defendant's cautionary language does not identify the negative events that ultimately occurred, discovery is required to determine if defendant's cautionary language was sufficiently meaningful.[14]

For example, in *Selbst v. McDonald's Corp.*, the district court for the Northern District of Illinois found defendant McDonald's list of cautionary factors inadequate to warrant safe harbor protection at the pleading stage.[15] The court focused on the fact that the cautionary factors did not specifically warn about losses that could occur if defendant's worldwide sales declined.[16] Accordingly, the court held that it could not establish that the defendant's cautionary language reflected the ''objective risks'' facing McDonald's when made.[17]

The *Asher* decision and its progeny in the circuit represent a divergence from prior jurisprudence and weaken the utility of the safe harbor. Fortunately, the impact of *Asher* has been confined to the Seventh Circuit. In any event, *Asher* does not stand for the proposition that discovery invariably will be required; rather, even in the Seventh Circuit that should only be necessary if an unidentified risk is the one that materializes and causes the loss.

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[4] For a more complete analysis of the *Asher* decision, *see* Richard A. Rosen ''The Safe Harbor for Forward-Looking Statements in the Courts, May 2003 Through October 2004: Does Asher Change the Rules?'' 36 Sec. Reg. & L. Rep. (BNA) 2135 (Dec. 6, 2004).

[5] 377 F.3d 727 (7th Cir. 2004).

[6] *See Asher v. Baxter Int'l Inc.*, 2003 WL 21825498 (N.D. Ill. July 17, 2003) *rev'd by* 377 F.3d 727 (7th Cir. 2004).

[7] *Asher*, 377 F.3d at 734.

[8] *Id.*

[9] *Id.*

[10] *See, e.g., Harris v. Ivax Corp.*, 182 F.3d 799 (11th Cir. 1999); *Rombach v. Chang*, 355 F.3d 164 (2d Cir. 2004); *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125 (9th Cir. 2004); *Baron v. Smith*, 380 F.3d 49 (1st Cir. 2004).

[11] *Asher*, 377 F.3d at 734.

[12] *See* Joseph De Simone, *et al.*, ''Asher to Asher and Dust to Dust: The Demise of the PSLRA Safe Harbor,'' 1 N.Y.U. J. L. & Bus. 799 (2005); Sarah S. Gold, *et al.*, ''The Not-So Safe Harbor,'' N.Y.L.J., Oct. 13, 2004; Alfred Wang, ''The Problem of Meaningful Language: Safe Harbor Protection in Securities Class Action Suits After *Asher v. Baxter*,'' 100 Northwestern L. Rev. 4, (2006); Veronica Montagna, ''The First Prong of the Safe Harbor Provision of the Private Securities Litigation Reform Act: Can It Still Provide Shelter from the Storm in the Wake of *Asher v. Baxter*,'' 58 Rutgers L. Rev. 511 (2006).

[13] *Id.*

[14] *See, e.g., Ong v. Sears, Roebuck & Co.*, 2004 WL 2534615 (N.D. Ill. Sept. 27, 2004); *Selbst v. McDonald's Corp.*, 2005 WL 2319936 (N.D. Ill. Sept. 21, 2005); *Blatt v. Corn Products*, 2006 WL 1697013 (N.D. Ill. June 14, 2006); *Central Laborers' Pension Fund v. Sirva, Inc.*, 2006 WL 2787520 (N.D. Ill. Sept. 22, 2006).

[15] 2005 WL 2319936, at *18 (N.D. Ill. Sept. 21, 2005)

[16] *Id.*

[17] *Id.*

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2. Impact of Asher: Status Quo Outside the Seventh Circuit.

Outside the Seventh Circuit, courts have not followed *Asher*.[18] Instead, courts continue to follow the prevailing rule that the adequacy of defendant's ''cautionary language'' can be resolved at the pleading stage, *without discovery*, so long as the language identifies important factors that could cause results to differ materially from those in the forward-looking statement.[19]

This approach is more consistent with the safe harbor's express language and legislative history than the Seventh Circuit's approach. After all, the statute directs a court on a motion to dismiss to ''consider any statement cited in the complaint and any cautionary statement accompanying the forward-looking statement.''[20] Moreover, the legislative history states that the ''Conference Committee specifi[ed] that the cautionary statement identify 'important' factors to provide guidance to investors and not to provide an opportunity for plaintiff counsel to conduct discovery on what factors were known to the issuer at the time the forward-looking statement was made.''[21]

B. Specificity of Cautionary Language.

While courts generally agree that cautionary language is sufficient provided it warns investors of risks similar in scope to that actually realized so that the investor is on notice of the danger of the investment; courts struggle with the issue of specificity. The issue, invariably, is how specific an issuer's risk disclosure must be to avoid the fatal charge that its cautionary language is mere boilerplate.

In *In re Gilat Satellite Securities Litigation*, for example, the district court for the Eastern District of New York found that cautionary language that broadly covered the nature of the issuer's business would suffice.[22] In *Gilat*, technological difficulties postponed defendant's scheduled launch of high speed Internet access. The court found that defendant's general warning that it may be unable ''to timely develop and introduce new technologies'' constituted sufficient cautionary language.[23] The court found that defendants ''could have been more helpful had they identified specific technological difficulties.''[24] Nonetheless, the court accorded safe harbor protection because defendant did not have to ''reveal in detail what could go wrong.''[25]

Of course, it remains a cliché—but an accurate one for all that—that the more specific and concrete the cautionary language, the more likely a court will find the language to be ''meaningful.'' In *In re Ibis Technology Securities Litigation*, plaintiffs alleged that defendant, a semiconductor manufacturer, had made excessively optimistic statements about the prospects for sales of a certain machine.[26] The court rejected the plaintiff's claim. It found defendant's cautionary language relating to ''product demand,'' ''market acceptance risks,'' and the defendant's ''limited history with regard to sales of [the type of machine]'' sufficiently meaningful to warrant safe harbor protection.[27]

Generic warnings remain unlikely to receive safe harbor protection.[28] Courts are especially unlikely to find the safe harbor applicable where the language is so broad that it could be applied to any business.[29] For example, in *Makor v. Tellabs*, the court analyzed a telecommunications company warning that stated: ''Actual results may differ from the results discussed in the forward-looking statements. Factors that might cause such a difference include . . . risks associated with introducing new products, entering new markets, availability of resources, competitive response, and a downturn in the telecommunications industry.''[30] The court rejected this warning as ''useless caveat emptor boilerplate.''[31] The court held that the ''breadth of these warnings makes it impossible to determine if it meaningfully described the principal or important risks facing [the defendant].' ''[32]

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[18] *See, e.g., Yanek v. Staar Surgical Company*, 388 F. Supp. 1110 (C.D. Cal. 2005) (''*Asher* suggests only that the statutory safe harbor cannot always be determined on the pleadings . . . *Asher* does not require the safe harbor determination be subject to discovery in all Seventh Circuit cases, much less in all Ninth Circuit cases.'')

[19] 15 U.S.C. § 78u-5(c)(1)(A)(i). For some of the most recent examples of cautionary factors that qualified for safe harbor protection post-*Asher*, *see In re Ligand Pharmaceuticals, Inc. Sec. Litig.*, 2005 WL 2461151 (S.D. Cal. Sept. 27, 2005); *In re Portal Software, Inc. Sec. Litig.*, 2005 WL 1910923 (N.D. Cal. Aug. 10, 2005); *Hess v. Am. Physicians Capital Inc.*, 2005 WL 456398 (W.D. Mich. Jan. 11, 2005); *In re Airgate PCS, Inc. Sec. Litig.*, 389 F. Supp. 1360 (N.D. Ga. Sept. 29, 2005); *Yellen v. Hake*, 437 F. Supp. 2d 941 (S.D. Iowa July 7, 2006); *In re Network Commerce Inc. Sec. Litig.*, 2006 WL 1375048 (W.D. Wash. May 16, 2006); *In re Nokia OYJ Sec. Litig.*, 423 F. Supp. 2d 364, 401-402 (S.D.N.Y. Mar. 31, 2006); *In re Thoratec Corp. Sec. Litig.*, 2006 WL 1305226 at *6 (N.D. Cal. May 11, 2006); *In re Tibco Software, Inc. Sec. Litig.*, 2006 WL 1469654 at *26 (N.D. Cal. May 25, 2006); *Romero v. US Unwired*, 2006 WL 2366342, at *6-7 (E.D. La. Aug. 11, 2006); *Key Equity Investors, Inc. v. Sel-Leb Marketing Inc.*, 2005 WL 3263865 (D.N.J. Nov. 30, 2005); *In re Alamosa Holdings Sec. Litig.*, 382 F. Supp. 2d 832, 844 (N.D. Tex. Mar. 28, 2005); *In re Applied Signal Tech. Inc. Sec. Litig.*, 2006 WL 1050174 (N.D. Cal. Feb. 8, 2006); *In re Broadcom Corp. Sec. Litig.*, 2004 WL 339052, at *4 (C.D. Cal. Nov. 23, 2004); *In re Gilat Satellite Networks, Ltd. Sec. Litig.*, 2005 WL 2277476 (E.D.N.Y. Sept. 19, 2005); *In re Ibis Tech. Sec. Litig.*, 422 F. Supp. 2d 294, 311 (D. Mass. Apr. 12, 2006); *In re Laboratory Corp. Sec. Litig.*, 2006 WL 1367428, at *6 (M.D.N.C. May 18, 2006); *In re Michaels Stores, Inc. Sec. Litig.*, 2004 WL 2851782, at *5-*6 (N.D. Tex. Dec. 10, 2004).

[20] 15 U.S.C. § 77z-2(e).

[21] H.R. Conf. Rep. 104-369, at 43-44 (1995) (emphasis added).

[22] 2005 WL 2277476 (E.D.N.Y. Sept. 19, 2005).

[23] *Id.* at *13.

[24] *Id.*

[25] *Id.*

[26] 422 F. Supp. 2d 294, 311 (D. Mass. Apr. 12, 2006).

[27] *Id.*

[28] *See, e.g., In re NTL Sec. Litig.*, 347 F. Supp. 2d 15 (S.D.N.Y. 2004) (holding that cautionary language was too generic where it simply warned that actual results may be ''materially different than projections''); *In re Cambrex Corp. Sec. Litig.*, 2005 WL 2840336 (D.N.J. Oct. 27, 2005) (holding that forward-looking statements were not protected because the cautionary statements were too general); *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983 (S.D. Cal. June 7, 2005) (holding that cautionary statements did not address the risks involved and therefore did not qualify as a meaningful cautionary statement); *Dutton v. D&K Healthcare Resources*, 2006 WL 1778884 (E.D. Mo. June 23, 2006) (cautionary language was ''too generalized and boilerplate to make such language meaningful to the ordinary investor and thus, the subject statements are not protected by the safe harbor provision of the PSLRA'').

[29] *Yanek v. Staar Surgical Company*, 388 F. Supp. 1110, 1134 (C.D. Cal. 2005).

[30] 437 F.3d 588, 599 (7th Cir., Jan. 25, 2006).

[31] *Id.*

[32] *Id.*

Although there is an inevitable element of subjectivity that goes into a court's analysis of the specificity of cautionary language, there are steps an issuer can take to protect itself against a charge that its cautionary language is mere boilerplate. First, and most important, every issuer should reconsider, on a quarterly basis, whether new developments in its business or in the markets in which it operates warrant an update of the cautionary language to reflect any changes to the description of the nature of the risks facing the company. Second, in crafting risk disclosures it will often be helpful for the issuer's counsel to review the risk disclosures of competitors, suppliers and customers. Third, reviewing recent analyst reports on the company and the industry will often help identify appropriate risk factors to highlight.

Plaintiffs often argue that a defendant's cautionary language is ''boilerplate'' based on the fact that defendants have used identical cautionary language for a number of quarters. The decision in *Asher* relied heavily on the fact that the issuer failed to update its cautionary language even though the risks facing the company continued to change. When an issuer has updated its cautionary language, courts are much more likely to find the language is ''substantive and tailored'' and therefore meaningful.[33]

II. Knowledge: Does Knowledge of Falsity Bar Application of the PSLRA? Under a plain reading of the PSLRA, the safe harbor can apply to forward-looking statements even if the defendant knew the forward-looking statements were false.[34] The ''safe harbor'' provision is written in the disjunctive. It has two distinct and separate prongs of protection. Specifically, safe harbor protection applies (1) if the statements are identified as forward-looking statement and accompanied by appropriate cautionary language or are immaterial *or* (2) if the plaintiff fails to prove that the forward-looking statements were made with actual knowledge of their falsity.

Despite the statute's plain language, there is a rather surprising ongoing circuit split over whether a defendant who is alleged to have had actual knowledge that a statement was false when made may still obtain safe harbor protection.

A majority of courts continue to hold, correctly, that knowledge of falsity does *not* preclude safe harbor protection.[35] *In re Gilat Satellite Networks Ltd. Securities Litigation*, a decision from the Eastern District of New York, offers a well-reasoned analysis of the issue.[36] The *Gilat* court found that the statute's plain language, its legislative history and policy considerations all supported the view that a defendant wins so long as there is adequate cautionary language, irrespective of what can be pleaded or proven about its state of knowledge. First, the court found that the disjunctive wording of the statute indicated that knowledge is a separate prong.[37] Second, the court noted that the legislative history accords with this view because it instructs courts not to ''examine the state of mind of the person making the statement'' when determining whether cautionary language is material.[38] Finally, the court found as a matter of policy that knowledge of falsity is irrelevant because once an issuer provides meaningful cautionary language no investor would have reasonably relied on a misstatement as a matter of law.[39] District courts from the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, have reached the same conclusion, usually without a detailed analysis, that where a forward-looking statement is accompanied by meaningful cautionary language, defendants' state of mind is irrelevant.[40]

Some courts, however, have ignored the plain language of the statute and caricatured the statutory provision by contending that applying the disjunctive standard would mean that an issuer has a ''license to lie.'' Those courts fail to recognize that allegations of fraud are often proved false. The disjunctive test of the safe harbor is designed to encourage forward-looking disclosure by insulating issuers from allegations (often ill-founded) that their projections were phony, so long as risk factors are disclosed. The safe harbor would be illusory if issuers, notwithstanding scrupulous and detailed risk disclosures, still had to worry that any material divergence from projected results could nevertheless draw a fraud lawsuit, since even a patently meritless case can be expensive to defend.

Nevertheless, courts in the Third Circuit have consistently held that the safe harbor does not apply to statements made with actual knowledge of falsity.[41] Courts in the First, Ninth and Eleventh Circuits have reached internally conflicting interpretations.

The First Circuit saw two conflicting appeals court decisions within one year on the issue. In *Baron v. Smith*, the appeals court held that proof of actual knowledge of falsity precludes safe harbor protection.[42] However, just a year after this decision, the appeals court came to the opposite conclusion in *In re Stone & Webster Securities Litigation*, albeit in dicta.[43] Specifically, the *Stone & Webster* court stated: ''[t]he statute

[33] *See, e.g., In re Discovery Laboratories Sec. Litig.*, 2006 WL 3227767 (E.D. Pa. Nov. 1, 2006)

[34] This interpretation is in accord with the legislative history of the PSLRA. The House Conference Report instructs that in applying the safe harbor, ''[c]ourts should not examine the state of mind of the person making the statement.'' H.R. Conf. Rep. No. 369, at 44.

[35] *See, e.g., Ryan v. Flowserve*, 2006 WL 2079333 (N.D. Tex. June 9, 2006) (noting that the statutory language interpretation represents ''the weight of authority on the safe harbor provision'').

[36] 2005 WL 2277476 (E.D.N.Y. Sept. 19, 2005).

[37] *Id.* at *12.

[38] *Id.*

[39] *Id.*

[40] *See, e.g., Romero v. US Unwired*, 2006 WL 2366342, at *6-7 (E.D. La. Aug. 11, 2006); *In re Cardinal Health Inc. Sec. Litig.*, 426 F. Supp. 2d 688, 756-57 (S.D. Ohio Apr. 12, 2006); *Central Laborers Pension v. Sirva*, 2006 WL 2787520, at *23 (N.D. Ill. Sept. 22, 2006); *Yellen v. Hake*, 437 F. Supp. 2d 941, 961 (S.D. Iowa July 7, 2006); *In re Broadcom Sec. Litig.*, 2004 WL 3390052, at *3 (C.D. Cal. Nov. 23, 2004); *Amalgamated Bank v. Coca-Cola Co.*, 2006 WL 2818973, at *4 (N.D. Ga. Sept. 29, 2006).

[41] *See In re Bristol–Myers Squibb Sec. Litig.*, 2005 WL 2007004 (D.N.J. Aug. 17, 2005) (citing *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 535-36 (3d Cir. 1999); *see also In re PDI Sec. Litig.*, 2005 WL 2009892 (D.N.J. Aug. 17, 2005) (same); *In re Veritas Software Corp. Sec. Litig.*, 2006 WL 1431209 (D. Del. May 23, 2006) (same); *Palladin Partners v. Gaon*, 2006 WL 2460650 (D.N.J. Aug. 22, 2006) (''[f]orward-looking statements made with actual knowledge are not protected'').

[42] 380 F.3d 49, 55 (1st Cir. 2004).

[43] 414 F.3d 187 (1st Cir. 2005); *see also In re Ibis Tech. Sec. Litig.*, 422 F. Supp. 2d 294 (D. Mass. Apr. 12, 2006) (citing

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seems to provide a surprising rule that the maker of knowingly false and willfully fraudulent forward-looking statements, designed to deceive investors, escapes liability for the fraud if the statement is 'identified as a forward-looking statement' that is accompanied by meaningful cautionary language.''[44]

District courts in the Ninth and Eleventh Circuit have also reached inconsistent decisions. The court in *In re Broadcom Corporation Securities Litigation* noted the existence of conflicting precedents in the Ninth Circuit.[45] Analyzing the conflicting case law, the court held that based on the ''statute, legislative history and courts interpreting the statute,'' the safe harbor should apply to protect statements known to be false when made.[46] However, during the same period, another district court reached the opposite result after interpreting the relevant Ninth Circuit case law.[47] A similar split of district court decisions has also emerged in the Eleventh Circuit.[48]

III. Present v. Past Tense: Is the Statement Forward-Looking? Plaintiffs often seek to avoid application of the safe harbor by arguing that the challenged statements are not forward-looking, but are statements of historical or present fact. It is settled law that the safe harbor does not protect a defendant from liability for statements that misrepresent historical or present facts.[49]

The Fifth Circuit decision in *Plotkin v. IP Axess Inc.* illustrates some of the difficulties in applying this superficially obvious distinction.[50] In *Plotkin*, defendants sought safe harbor protection for statements made in a press release about certain contracts. The Fifth Circuit noted that ''the announcement of signed, allegedly lucrative contracts is a statement of fact, not a generalized positive statement.''[51] Moreover, ''the touting [of the contracts] was designed to create an impression that a substantial payoff would soon flow from the contracts.''[52] The court stated that ''these impressions were not dispelled by the press releases' standard warnings about the risks and uncertainties facing IP Axess as it started selling new products.''[53] Accordingly, the Fifth Circuit reversed the district court's ruling on the issue and held that the statements in the press release concerning the contracts were not forward-looking.[54]

Courts find that present tense statements may still be forward-looking ''if the truth or falsity of the statement cannot be discerned until some point in time after the statement is made.''[55] For example, a company's statement about reserves (which estimate anticipated revenues or losses) should receive protection under the safe harbor.[56]

Although it has been held that statements about reserves will not receive protection if the issuer describes the reserves ''as adequate or solid when it knows that the reserves are inadequate or unstable,''[57] this ruling seems incorrect. At most an issuer can make a prediction about whether its reserves will prove adequate. The statement is plainly forward-looking in its essence. The most a plaintiff could say is that there was no good faith basis for the projection at issue, but that does not convert a forward-looking statement into a statement about the present.

A recent district court decision, *In re Majesco Securities Litigation*, addressed the novel question whether a claim that the issuer omitted to disclose an existing fact from a forward-looking statement strips the forward-looking statement of protection under the safe harbor.[58] The *Majesco* case involved a video game developer that had issued statements regarding the expected release of certain new games in 2005.[59] The plaintiffs alleged that the statement, although forward-looking in form, was actually an untrue statement about ''existing facts'' because it allegedly *omitted* to disclose that the company was having technical problems producing the games.[60] The court denied safe harbor protection. The court held that omissions of existing facts, by their very nature, are

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Stone & Webster for principle that knowledge is independent prong).

[44] *Id.* at 212.

[45] 2004 WL 3390052, at *3 (C.D. Cal. Nov. 23, 2004) *comparing No 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 936-37 (9th Cir. 2003) (stating a person may be liable if the forward-looking statement is made with actual knowledge of its falsity) *with Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1130 (9th Cir. 2004) (affirming summary judgment based on the safe harbor without considering whether the alleged forward-looking statement was made with knowledge of its falsity).

[46] *Id.* at *3; *see also Zack v. Allied Waste Industries, Inc.*, 2005 WL 3501414 (D. Ariz. Dec. 15, 2005).

[47] *In re Siebel Sys. inc. Sec. Litig.*, 2005 WL 3555718 at *10 (N.D. Cal. Dec. 28, 2005) (''the second statement, that licensing revenue for the new quarter would be flat, is a projection protected by safe harbor provisions; thus, it is actionably only if plaintiffs allege specific facts that give rise to a strong inference that defendants knew the statement was false when made'').

[48] *Cf. Primavera v. Liquidmetal Techs.*, 2005 WL 3276291 (M.D. Fla. 2005); *Reina v. Tropical Sportswear Int'l*, 2005 WL 846170 (M.D. Fla. 2005); *In re Catalina Marketing Corp.*, 390 F. Supp. 2d 1110 (M.D. Fla. 2005); *Marrari v. Medical Staffing Network Holdings, Inc.*, 2005 WL 2642047 (S.D. Fla. 2005) with *In re Sawtek*, 2005 WL 2465041 (M.D. Fla. Oct. 6, 2005); *Amalgamated Bank v. Coca-Cola Co.*, 2006 WL 2818973 (N.D. Ga. Sept. 29, 2006).

[49] *See, e.g., South Ferry LP #2 v. Killinger*, 399 F. Supp. 2d 1121, 1133 (W.D. Wash. Nov. 17, 2005) (statement that defendant had ''identified the issues that led to [net losses] and have implemented measures to address them'' was a present tense statement not protected by the safe harbor); *In re Veeco Instruments, Inc. Sec. Litig.*, 2006 WL 759751, at *15 (S.D.N.Y. Mar. 21, 2006) (''challenged statements are not forward-looking; rather they are either affirmative representations about the current or historical performance of Veeco and TurboDisc, or statements that omit to disclose material information regarding Veeco's alleged accounting improprieties'').

[50] 407 F.3d 690 (5th Cir. 2005).

[51] *Id.*

[52] *Id.* at 697.

[53] *Id.* at 699.

[54] *Id.*

[55] *In re Tibco Software, Inc. Sec. Litig.*, 2006 WL 1469654, at *26 (N.D. Cal. May 25, 2006); *In re Applied Signal Tech., Inc. Sec. Litig.*, 2006 WL 1050174, at *16 (N.D. Cal. Feb. 8, 2006).

[56] *In re Applied Signal Sec. Litig.*, 2006 WL 1050174, at *12 (N.D. Cal. Feb. 8, 2006); *but See Dynex Capital*, 2006 WL 314524 (S.D.N.Y. Feb. 10, 2006) (holding that reserve established to measure future losses ''encompassed a representation of present fact'').

[57] *In re PMA Capital Corporation Sec. Litig.*, 2005 WL 1806503 (E.D. Pa. July 27, 2005).

[58] 2006 WL 2846281, at *4 (D.N.J. Sept. 29, 2006).

[59] *Id.* at *1.

[60] *Id.* at *3.

not forward-looking statements and are therefore not protected by the safe harbor.[61] The court went on to say that it was not addressing the related question whether plaintiffs had adequately alleged that the issuer had made the forecast with actual knowledge of its falsity.

The ruling contains virtually no analysis and no citation of pertinent authority. The court's reasoning and conclusion are seriously flawed. Virtually every forward-looking statement by every issuer that comes under attack in a securities fraud case can be recharacterized as misleading by virtue of an omission of some other alleged fact. But this is mere slight of hand, literal acceptance of which would nullify the safe harbor. If indeed the plaintiffs adequately allege that the issuer's projection was made in bad faith and/or was unreasonable because of some fact that was not disclosed, the correct analytical approach would be to determine whether plaintiff has adequately alleged ''actual knowledge'' of falsity, *not* to convert the prediction into a statement of present fact.

IV. Mixed Statements with Present Tense and Forward-Looking Aspects Where a statement contains both present tense and forward-looking elements, courts have followed two different approaches to determine whether the statement qualifies as forward-looking. Under the ''parsing'' approach, a court examines individual clauses in a mixed statement and makes discrete determinations about which are present tense and which are forward-looking.[62] Conversely, under the ''holistic'' approach, a court analyzes a mixed statement as a whole and makes an assessment whether the entire mixed statement is present tense or forward-looking.[63] The two approaches can lead to different results under similar facts.

A recent First Circuit decision adopted the ''parsing'' approach. In *Stone & Webster*, the First Circuit reversed a decision of the District Court of Massachusetts that found a particular statement forward-looking in nature.[64] The First Circuit evaluated the statement that the company ''has on hand and has access to sufficient sources of funds to meet its anticipated operating, dividend and capital operating expenditure needs.''[65] The First Circuit parsed the language and found that the statement contained both present tense (i.e., access to funds) and forward-looking (i.e., anticipated expenditure needs) aspects.[66] The court found that the company had knowingly misrepresented the present fact about its access to funds because the company was then suffering from ''a dire cash shortage.''[67] Thus, the court held the statement was not protected by the safe harbor.

By contrast, in *In re Airgate*, the district court for the Northern District of Georgia found safe harbor protection for statements factually similar to *Stone & Webster*.[68] The *Airgate* court analyzed two separate statements: (1) ''[w]e believe our current business plan is fully funded''; and (2) ''based on our current plan, we expect to generate positive [EBITDA].''[69] Plaintiffs had alleged that the ''fully funded'' statement was misleading because there were various undisclosed factors affecting the company's funds.[70] The court followed the ''holistic'' approach and analyzed the two clauses as one statement. It found the statement forward-looking because it reflected a ''belief'' that the plan was fully funded for the future and an ''expect[ation]'' that positive earnings would be generated as a result and thus ''clearly implicated events in the future.''[71]

V. The "'Accompaniment' Requirement. One issue that often arises is whether cautionary language must literally accompany forward-looking statements or whether a defendant may simply ''reference'' cautionary language from a public document, such as an SEC filing. The safe harbor does not explicitly state whether cautionary language may be incorporated by reference in a written statement (as opposed to an oral statement, in which the statute is clear that it may be incorporated).

Plaintiffs often argue that the statute's silence on incorporation by reference means that written statements may not reference cautionary language from public documents, but must actually include the cautionary language.[72] Recent decisions have squarely rejected this argument.[73] For example, one district court noted that although ''the safe harbor provision does not explicitly provide for incorporation by reference for written statements,'' the safe harbor protection for written statements was implicit in the statute.[74] Similarly, the Third Circuit noted in a recent case that ''cautionary language was sufficient because the press release incorporated by reference the cautionary statements in [defendant's] 2000 Form 10-K.''[75] The court held generally that ''cautionary statements do not have to be in the same document as the forward-looking statements.''[76]

It is now settled law that safe harbor protection may apply to a statement in a written document that references cautionary language from an SEC filing. Indeed, none of the recent decisions have found that an issuer lost its safe harbor protection by simply cross-referencing, in one written statement, to cautionary language in one of its SEC filings. Such a rule is entirely consistent with the proposition that securities markets are efficient and that all relevant information is promptly reflected in securities prices—a staple assertion in plaintiffs' arsenal of arguments.

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[61] *Id.* at **4; see also Takara Trust v. Molex Inc.*, 429 F. Supp. 2d 960, 974 (N.D. Ill. Apr. 28, 2006) (noting that it is ''axiomatic that the failure to make a statement cannot be forward-looking'').

[62] *In re Stone & Webster Sec. Litig.*, 414 F.3d 187, 211 (1st Cir. 2005).

[63] *See, e.g., Harris v. Ivax*, 182 F.3d 799 (11th Cir. 1999).

[64] 414 F.3d at 211.

[65] *Id.*

[66] *Id.* at 213. The court held that it would ''determine which aspects of the statement are alleged to be false'' and apply the safe harbor only to ''the forward-looking aspects of the statement.''

[67] *Id.*

[68] 389 F. Supp. 2d 1360, 1371 (N.D. Ga. Sept. 29, 2005).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See, e.g., Yellen v. Hake*, 437 F. Supp. 2d. 941, 963 (S.D. Iowa July 7, 2006).

[73] *Id.*; *see also In re Laboratory Corp. of Am. Holdings Sec. Litig.*, 2006 WL 1367428, at *6 (M.D.N.C. May 18, 2006); *In re Merck & Co.*, 432 F.3d 261, 273 (3d Cir. 2005).

[74] *Yellen*, 437 F. Supp. 2d at 963.

[75] *Merck*, 432 F.3d at 273.

[76] *Id.*

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VI. The 'Accompaniment' Requirement and Oral Forward-Looking Statements. The PSLRA statute specifically provides that cautionary language from a public document may be incorporated by reference into an oral forward-looking statement.[77] The safe harbor simply requires that the referenced cautionary language statement must be ''contained in a *readily available* written document.''[78]

A recent decision addressed the issue of when a document is ''readily available.'' In *In re Laboratory Corporation of America Securities Litigation*, plaintiffs argued that defendants' statements on a conference call were not protected by meaningful cautionary language through a ''readily available'' written document because the specific 10-K to which defendants referred had not yet been filed.[79] The defendants countered that they referenced other documents, including the company's 8-K and the previous year's 10-K that had already been filed.[80] The court agreed with the defendants that while the specific 10-K may not have been ''readily available,'' the older documents cited by defendants contained similar language and therefore the safe harbor applied.[81]

Here again, the courts are adopting an appropriately practical approach to these issues, rather than an excessively formalistic analysis. Such pragmatism is especially sensible given that it is the plaintiffs who invariably insist that the security at issue trades in an efficient market.

VII. Puffery or Immaterial Forward-Looking Statements. Statements that are considered immaterial, or mere ''puffery,'' are protected under the safe harbor. Although determinations of materiality are often made by a trier of fact, complaints alleging securities fraud will frequently contain claims that are so obviously unimportant that courts can rule them immaterial as a matter of law at the pleading stage.[82]

Consistent with prior jurisprudence under the safe harbor, in the last two years courts found that such vague or subjective statements of optimism are not actionable because reasonable investors would not rely on this information in making decisions.[83] For example, in *In re iPass Securities Litigation*, the district court for the Northern District of California held that a statement that defendant's business had ''momentum'' was mere puffery ''in light of the vague sense in which 'momentum' is used . . . an investor could not reasonably rely on the representations . . . in drawing specific conclusions about iPass's financial health.''[84] Similarly, in *Limantour v. Cray*, the district court for the Western District of Washington found that statements such as we ''expect continued strong growth'' or we are ''very optimistic and expect[] 2004 to be good'' constituted vague and opinion-oriented statements that ''clearly fall in the category of puffery.''[85]

General statements of optimism, however, are not always protected. Courts look to the context in which a statement appears to determine whether it is material.[86] If a generalized statement appears in a particularized context in which investors would likely rely on the statement, a court is more likely to find the statement actionable. For example, in *Makor v. Tellabs*, defendants responded to a frequently asked question in an annual report about whether sales had peaked on a particular product.[87] The defendants stated that ''we're still seeing that product continue to maintain its growth rate.''[88] The court held that this statement might amount to mere puffery in other contexts, but ''its place in the 'frequently asked questions' . . . suggests that the answer was particularly important to investors.''[89] The court therefore held that the statement was not mere puffery.[90]

Optimistic statements about a company's prospects in litigation should normally be protected as mere puffery. In *In re Glaxo Smithkline PLC Securities Litigation*, plaintiffs alleged that defendant's statements expressing confidence in the outcome of certain patent litigation constituted actionable misstatements.[91] The court found that an issuer's statements of confidence about ongoing litigation is a ''classic example of a forward-looking statement and is clearly protected as such.''[92] The court found that ''to hold that a legal position taken by a publicly traded company . . . may be converted by hindsight into an actionable misrepresentation if the company later loses the lawsuit would have a chilling effect on publicly traded companies seeking to defend their interests in litigation.''[93]

However, in *Rosenbaum Capital v. Boston Communications Group, Inc.*, the district court for the District of Massachusetts found defendant's optimistic statement about ongoing litigation actionable.[94] Plaintiffs had alleged that defendants' statement that ''it did not believe it infringe[d certain] patents'' constituted an actionable misstatement because defendant was subsequently found liable for patent infringement.[95] The court agreed. It ruled that the company's ''own assessment regarding the outcome of litigation'' altered ''the total mix of information'' available and is therefore not merely a ''rosy affirmation.''[96]

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[77] 15 U.S.C. § 78u-5(c)(2).
[78] 15 U.S.C. 77z-2(c)(2)(B)(i).
[79] 2006 WL 1367428 (M.D.N.C. May 18, 2006).
[80] *Id.* at *6.
[81] *Id.* at *7.
[82] *Payne v. DeLuca*, 433 F. Supp. 2d 547, 561 (W.D. Pa. May 2, 2006).
[83] *Id.* at 561-62.
[84] 2006 WL 496046 (N.D. Cal. Feb. 28, 2006).
[85] 2006 WL 1169791 (W.D. Wash. Apr. 28, 2006).
[86] *See Makor v. Tellabs*, 437 F.3d 588, 597 (7th Cir. Jan. 25, 2006); s*ee also In re Ligand Pharmaceuticals Sec. Litig.*, 2005 WL 2461151 (S.D. Cal. Sept. 27, 2005) (holding that generalized statements constituted puffery where they were in ''response[] to specific questions posed during the conference call''); *Blatt v. Corn Products*, 2006 WL 1697013 (N.D. Ill. June 14, 2006) (holding that general statements of optimism when placed among specific list of factors ''tend[ed] to show that Defendants' statements were not simple expressions of optimism but reasoned predictions of the future'').
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] 2006 WL 2871968, at *1 (S.D.N.Y. Oct. 6, 2006)
[92] *Id.*
[93] *Id.*
[94] 2006 WL 2423360, at *5 (D. Mass. Aug. 20, 2006)
[95] *Id.*
[96] *Id.*

VIII. Merck: Protection for Statements About a Planned IPO. The safe harbor is designed to shield an *existing* company's statements about revenue projections and business plans from liability.[97] The safe harbor does not apply to statements made ''in connection with an initial public offering'' of a company.[98]

A recent Third Circuit decision, *In re Merck & Co. Inc. Securities Litigation*, addressed the novel question whether a press release about a planned IPO that ultimately never happened was ''in connection with'' an IPO and therefore ineligible for safe harbor protection.[99] Merck planned an IPO of its wholly owned subsidiary Medco Health Solutions, Inc. Prior to the IPO, Merck's CEO released the following statement: ''We believe the best way to enhance the success of both businesses going forward is to enable each one to pursue independently its unique and focused strategy.''[100] Shortly thereafter, information about improper revenue recognition at Medco came to light and Merck cancelled the Medco IPO. Plaintiffs brought suit asserting that the press release statement violated securities laws. Merck sought and the court granted safe harbor protection, holding that a statement made ''before a planned IPO that never happened is not 'in connection with' an IPO.''[101]

IX. Conclusion. Although there remain a number of issues on fundamental aspects of the safe harbor that will ultimately have to be resolved by the Supreme Court, in most respects courts have interpreted and applied the safe harbor in a manner consistent with the original congressional goal of encouraging forward-looking disclosure. Despite assiduous efforts by the plaintiffs' bar to chip away at its effectiveness, the safe harbor continues to furnish defense counsel with significant arguments for the dismissal of suits predicated on faulty projections.

APPENDIX A

Cases Construing and Applying the Statutory Safe Harbor from November 2004 to November 2006.

In re Apple Computer, Inc., 127 Fed. Appx. 296 (9th Cir. Feb. 17, 2005); *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261 (3d Cir. Sept. 29, 2005); *In re Stone & Webster, Inc. Sec. Litig.*, 414 F.3d 187 (1st Cir. July 14, 2005); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588 (7th Cir. Jan. 25, 2006); *Plotkin v. IP Axess Inc.*, 407 F.3d 690 (5th Cir. Apr. 21, 2005); *Asher v. Baxter, Int'l*, 2005 WL 331572 (N.D. Ill. Feb. 3, 2005); *Blatt v. Corn Products Int'l, Inc.*, 2006 WL 1697013 (N.D. Ill. June 14, 2006); *Brumbaugh v. Wave Systems Corp.*, 2006 WL 52751 (D. Mass. Jan. 11, 2006); *Burman v. Phoenix Worldwide Industries, Inc.*, 384 F. Supp. 2d 316 (D.D.C. Aug. 30, 2005); *Central Laborers' Pension Fund v. Sirva, Inc.*, 2006 WL 2787520 (N.D. Ill. Sept. 22, 2006); *Davis v. SPSS, Inc.*, 385 F. Supp. 2d 694 (N.D. Ill. May 10, 2005); *Dutton v. D & K Healthcare Resources*, 2006 WL 1778884 (E.D. Mo. June 23, 2006); *Hess v. American Physicians Capital, Inc.*, 2005 WL 456938 (W.D. Mich. Jan. 11, 2005); *In re Airgate PCS, Inc. Sec. Litig.*, 389 F. Supp. 1340 (N.D. Ga. Sept. 29, 2005); *In re Alamosa Holdings, Inc.*, 382 F. Supp. 2d 832 (N.D. Tex. Mar. 28, 2005); *In re Administaff, Inc. Sec. Litig.*, 2006 WL 846378 (S.D. Tex. Mar. 30, 2006); *In re Applied Signal Tech, Inc. Sec. Litig.*, 2006 WL 1050174 (N.D. Cal. Feb. 8, 2006); *In re Bristol-Myers Squibb Sec. Litig.*, 2005 WL 2007004 (D.N.J. Aug. 17, 2005); *In re Broadcom Sec. Litig.*, 2004 WL 3390052 (C.D. Cal. Nov. 23, 2004); *In re Cambrex Corp. Sec. Litig.*, 2005 WL 2840336 (D.N.J. Oct. 27, 2005); *In re Cardinal Health Inc. Sec. Litig.*, 2006 WL 932017 (S.D. Ohio Apr. 12, 2006); *In re Catalina Marketing Corp. Sec. Litig.*, 390 F. Supp. 2d 1110 (M.D. Fla. Mar. 31, 2005); *In re Cigna Corp. Sec. Litig.*, 2005 WL 3536212 (E.D. Pa. Dec. 23, 2005); *In re Cigna Corp. Sec. Litig.*, 2006 WL 782431 (E.D. Pa. Mar. 24, 2006); *In re DDI Corp. Sec. Litig.*, 2005 WL 3090822 (C.D. Cal. July 21, 2005); *In re Discovery Laboratories Sec. Litig.*, 2006 WL 3227767 (E.D. Pa. Nov. 1, 2006); *In re Dynex Sec. Litig.*, 2006 WL 314524 (S.D.N.Y. Feb. 10, 2006); *In re Eastman Kodak*, 2006 U.S. Dist. Ct. WL 79879 (W.D. N.Y. Nov. 1, 2006); *In re Ess Tech., Inc. Sec. Litig.*, 2004 WL 418548 (N.D. Cal. Dec. 1, 2004); *In re Gander Mountain Co. Sec. Litig.*, 2006 WL 140670 (D. Minn. Jan. 17, 2006); *In re Geopharma Inc. Sec. Litig.*, 2005 WL 2341518 (S.D.N.Y. Jan. 27, 2004); *In re Gilat Satellite Networks, Ltd. Sec. Litig.*, 2005 WL 2277476 (E.D.N.Y. Sept. 19, 2005); *In re Glaxo Smithkline PLC Sec. Litig.*, 2006 WL 2871968 (S.D.N.Y. Oct. 6, 2006); *In re Ibis Tech. Sec. Litig.*, 2006 WL 936709 (D. Mass. Apr. 12, 2006); *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983 (S.D. Cal. June 7, 2005); *In re iPass, Inc. Sec. Litig.*, 2006 WL 496046 (N.D. Cal. Feb. 28, 2006); *In re Laboratory Corp. of America Holdings Sec. Litig.*, 2006 WL 1367428 (M.D.N.C. May 18, 2006); *In re Ligand Pharmaceuticals, Inc. Sec. Litig.*, 2005 WL 2461151 (S.D. Cal. Sept. 27, 2005); *In re Majesco Sec. Litig.*, 2006 WL 2846281 (D.N.J. Sept. 29, 2006); *In re Michaels Stores, Inc. Sec. Litig.*, 2004 WL 2851782 (N.D. Tex. Dec. 10, 2004); *In re Mikohn Gaming Corp. Sec. Litig.*, 2006 WL 2547095 (D. Nev. Sept. 1, 2006); *In re Network Commerce Inc. Sec. Litig.*, 2006 WL 1375048 (W.D. Wash. May 16, 2006); *In re NTL Sec. Litig.*, 347 F. Supp. 2d 15 (S.D.N.Y. Dec. 6, 2004); *In re Nokia OYJ Sec. Litig.*, 2006 WL 851155 (S.D.N.Y. Mar. 31, 2006); *In re PDI Sec. Litig.*, 2005 WL 2009892 (D.N.J. Aug. 17, 2005); *In re PDI Sec. Litig.*, 2006 U.S. Dist. Ct. WL 20080142 (D.N.J. Nov. 2, 2006); *In re PMA Capital Corp. Sec. Litig.*, 2005 WL 1806503 (E.D. Pa. 2005); *In re Portal Software, Inc. Sec. Litig.*, 2005 WL 1910923 (N.D. Cal. Aug. 10, 2005); *In re Regneron Pharmaceuticals, Inc. Sec. Litig.*, 2005 WL 225288 (S.D.N.Y. Feb. 1, 2005);; *In re Sawtek Inc. Sec. Litig.*, 2005 WL 2465041 (M.D. Fla. Oct. 6, 2005); *In re Siebel Sys. Inc. Sec. Litig.*, 2005 WL 3555718 (N.D. Cal. Dec. 28, 2005); *In re Thoratec Corp. Sec. Litig.*, 2006 WL 1305226 (N.D. Cal. May 11, 2006); *In re Tibco Software, Inc. Sec. Litig.*, 2006 WL 1469654 (N.D. Cal. May 25, 2006); *In re Veeco Instruments, Inc. Sec. Litig.*, 2006

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[97] S. Rep. No. 104-98 at 17, *reprinted* at 1995 U.S.C.C.A.N. 679, 696.

[98] 15 U.S.C. § 78u-5(b)(2)(D).

[99] 432 F.3d 261, 272 (3d Cir. 2005).

[100] *Id.*

[101] *Id.* at 273. The court left open the question whether statements in a registration statement or prospectus filed for an IPO are ''in connection with'' an IPO. However, the two courts that have addressed the issue found that statements made in a registration statement and prospectus filed for an IPO are made ''in connection with'' an IPO and therefore ineligible for safe harbor protection. *See, e.g., In re Ravisent Techs., Inc., Sec. Litig.*, 2004 WL 1563024, at *11 (E.D. Pa. 2004) (registration statement); *In re Musicmaker.com Sec. Litig.*, 2001 WL 34062431, at *13 (C.D. Cal. 2001) (registration statement and prospectus).

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WL 759751 (S.D.N.Y. Mar. 21, 2006); *In re Veritas Software Corp. Sec. Litig.*, 2006 WL 1431209 (D. Del. May 23, 2006); *In re Vicuron Pharmaceuticals, Inc. Sec. Litig.*, 2005 WL 2989674 (E.D. Pa. July 1, 2005); *Kaltman v. Key Energy Services, Inc.*, 2006 WL 2346423 (W.D. Tex. Aug. 11, 2006); *Key Equity Investors v. SelLeb Marketing Inc.*, 2005 WL 3263865 (D.N.J. Nov. 30, 2005); *Limantour v. Cray, Inc.*, 2006 WL 1169791 (W.D. Wash. Apr. 28, 2006); *Marrari v. Medical Staffing Network Holdings, Inc.*, 2005 WL 2462047 (S.D. Fla. Sept. 27, 2005); *Marsden v. Select Medical Corp.*, 2006 WL 891445 (E.D. Pa. Apr. 6, 2006); *Montalvo v. Tripos*, 2005 WL 2453964 (E.D. Mo. Sept. 30, 2005); *Orton v. Parametric Tech. Corp.*, 344 F. Supp. 2d 290 (D. Mass. Nov. 3, 2004); *Palladin Partners v. Gaon*, 2006 WL 2460650 (D.N.J. Aug. 22, 2006); *Payne v. DeLuca*, 2006 WL 1157861 (W.D. Pa. May 2, 2006); *Primavera v. Liquidmetal Tech.*, 403 F. Supp. 2d 1151 (M.D. Fla. Dec. 2, 2005); *Reina v. Tropical Sportswear Int'l*, 2005 WL 846170 (M.D. Fla. Apr. 4, 2005); *Romero v. US Unwired, Inc.*, 2006 WL 2366342 (E.D. La. Aug. 11, 2006); *Rosenbaum Capital v. Boston Communications Group, Inc.*, 2006 WL 2423360 (D. Mass. Aug. 20, 2006); *Ryan v. Flowserve Corp.*, 2006 WL 2079333 (N.D. Tex. June 9, 2006); *Sekuk Global Enterprises v. KVH Industries*, 2005 WL 1924202 (D.R.I. Aug. 11, 2005); *Selbst v. McDonald's Corp.*, 2005 WL 2319936 (N.D. Ill. Sept. 21, 2005); *South Ferry LP #2 v. Killinger*, 399 F. Supp. 2d 1121 (W.D. Wash. Nov. 17, 2005); *Sterling Heights v. Abbey National*, 2006 WL 846261 (S.D.N.Y. Mar. 31, 2006); *Takara Trust v. Molex*, 2006 WL 1134613 (N.D. Ill. Apr. 28, 2006); *Yanek v. Staar Surgical Co.*, 388 F. Supp. 2d 1110 (C.D. Cal. Sept. 19, 2005); *Yellen v. Hake*, 437 F. Supp. 2d 941 (S.D. Iowa July 7, 2006); *Zack v. Allied Waste Industries*, 2005 WL 3501414 (D. Ariz. Dec. 15, 2005).