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REPORT

Private Securities Litigation Reform Act

The Safe Harbor for Forward-Looking Statements in the Courts, May 2003 Through October 2004: Does Asher Change the Rules?

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Under the Private Securities Litigation Reform Act (''PSLRA'' or ''Reform Act''), an issuer's forward-looking statement or projection does not give rise to securities law liability if: (1) the statement is identified as forward-looking and 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]

There have been sixteen court of appeals decisions about the safe harbor since the enactment of the PSLRA, the majority of which were issued over the past year and a half. Since the safe harbor's passage, there have also been well over 150 district court opinions, over thirty of which have come down since April 2003.[2] Of all the district court and court of appeals decisions in the last nineteen months, only one decision was not in the context of a motion to dismiss.[3]

The PSLRA was designed in part to facilitate dismissal at the pleading stage, and thereby to avoid the necessity of burdensome and lengthy inquiry into a defendant's state of mind, if the issuer could show that any potentially misleading forward-looking statements had been accompanied by meaningful cautionary lan-

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[1] For a comprehensive discussion of the statutory structure and the pre-2003 case law, refer to my prior articles: Richard A. Rosen ''Safe Harbor for Forward-Looking Statements in the Courts: A Scorecard in the Courts From January 2002 Through April 2003,'' 35 Sec. Reg. & L. Rep. (BNA) 1000 (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. (BNA) 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 court cases are all cited in my ''Safe Harbor for Forward-Looking Statements in the Courts: A Scorecard in the Courts From January 2002 Through April 2003'' and ''Safe Harbor for Forward-Looking Statements in the Courts: A Year 2001 Scorecard'' articles.

[3] *See In re AT&T Corp. Sec. Litig.*, Civ. No. 00-5364 (GEB) (D.N.J. 2004) (unpublished opinion) (summary judgment).

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guage.[4] This goal, however, is under threat by two emerging lines of cases. Of most recent concern to issuers is *Asher* v. *Baxter International, Inc.*,[5] a Seventh Circuit decision which, if read too broadly, raises the question whether a court may *ever* determine the adequacy of cautionary language at the pleading stage. There is also an emerging circuit split on whether the safe harbor protects an issuer that made predictions accompanied by adequate cautionary language, even if the defendant made the predictions knowing they were false or had no reasonable basis.

A review of the cases decided in the last year and a half reveals, in addition, that case law remains inconsistent on whether statements that contain both factual and forward-looking elements can be afforded protection under the safe harbor, on whether cautionary language must literally ''accompany'' the predictions or may be incorporated by reference to another document, and on what constitutes immaterial ''puffery'' and when it is appropriate to decide that question.

I. Meaningful Cautionary Language

A. Does Asher Close the Safe Harbor? A recent decision from the U.S. Court of Appeals for the Seventh Circuit has caused many to fear that public companies will no longer be able to seek refuge in the safe harbor.[6] Since the enactment of the statute, issuers have been willing to make more forward-looking disclosures with some confidence that, should they be sued, they have a reasonable likelihood of obtaining a dismissal at the pleading stage so long as the predictions were accompanied by meaningful cautionary language identifying ''important factors that could cause actual results to differ materially from those in the forward-looking statement.''[7] Indeed, although plaintiff buyers continue to assert claims for such statements, they are generally regarded by practitioners on the plaintiffs' side as relatively weak.

This may be about to change. In *Asher*,[8] the Seventh Circuit raises the question whether a court may *ever* determine the adequacy of cautionary language at the pleading stage.[9] The plaintiff in *Asher* alleged that Baxter International, a medical manufacturer, made positive projections about revenue growth without disclosing various internal and external risk factors. Although the lower court found Baxter's long and relatively company-specific list of warnings to be adequate,[10] the Seventh Circuit reversed and remanded, writing, ''[t]here is no reason to think—at least, no reason that a court can accept at the pleading stage, before plaintiffs have access to discovery—that the items mentioned in Baxter's cautionary language were those thought at the time to be the (or any of the) 'important' sources of variance.''[11]

The court appears to be shifting the safe harbor inquiry from whether the cautionary language identified ''some important risks'' to whether the language fully reflected what the issuers actually knew when they made the predictions. This interpretation is in acute tension with the language of the statute, which requires issuers only to identify ''important factors that could cause actual results to differ materially from those in the forward-looking statement.''[12] Shifting the focus from whether the identified factors provided adequate notice of risk—an objective inquiry that can often be determined at the pleading stage—to an inquiry into what

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[4] The House Conference Report explains:

The use of the words 'meaningful' and 'important factors' are intended to provide a standard for the types of cautionary statements upon which a court may, where appropriate, decide a motion to dismiss, without examining the state of mind of the defendant. The first prong of the safe harbor requires courts to examine only the cautionary statement accompanying the forward-looking statement. Courts should not examine the state of mind of the person making the statement.

Conf. Rpt., H. Rpt. No. 104-369 at 43-44 (1995).

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

[6] *See* Sarah S. Gold and Richard L. Spinogatti, ''Corporate and Securities Litigation,'' N.Y.L.J., Oct. 13, 2004, at 3; Sandra Rubin, ''No safe harbor? A U.S. federal appeals court decision makes it harder to shut down shareholder lawsuits, leaving corporations vulnerable if their guidance turns out to have been overly optimistic,'' Nat'l Post's Fin. Post & FP Investing, Sept. 22, 2004, at 7.

[7] 15 U.S.C. § 78u-5(c)(1)(A)(i). For the most recent examples of cautionary statements that satisfied the safe harbor requirements, see *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund* v. *Clorox Co.*, 353 F.3d 1125 (9th Cir. 2004); *GSC Partners CDO Fund* v. *Washington*, 368 F.3d 228, 242-43 (3d Cir. 2004); *In re Adams Family Golf Sec. Litig.*, 381 F.3d 267 (3d Cir. 2004); *In re Duane Reade Sec. Litig.*, 02 Civ. 6478 (NRB), 2003 U.S. Dist. LEXIS 21319 (S.D.N.Y. Nov. 25, 2003), *aff'd by Nadoff* v. *Duane Reade, Inc.*, No. 03-9352, 2004 WL 1842801 (2d Cir. Aug. 17, 2004); *Rombach* v. *Chang*, 355 F.3d 164 (2d Cir. 2004); *Barr* v. *Matria Healthcare, Inc.*, 324 F. Supp. 2d 1369 (N.D. Ga. 2004); *Gavish* v. *Revlon, Inc.*, No. 00 Civ. 7291(SHS), 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004); *In re Aegon N.V. Sec. Litig.*, No. 03 Civ. 0603 (RWS), 2004 U.S. Dist. LEXIS 11466, at *34-35 (S.D.N.Y. June 28, 2004); *In re American Express Co. Sec. Litig.*, No. 02 Civ. 5533 (WHP), 2004 WL 632750 (S.D.N.Y. Mar. 31, 2004); *In re Blockbuster Inc. Sec. Litig.*, 3:03-CV-0398-M (LEAD), 2004 U.S. Dist. LEXIS 7173 (N.D. Tex. Apr. 26, 2004); *In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 883 (N.D. Cal. 2004); *In re Kindred Healthcare, Inc. Sec. Litig.*, 299 F. Supp. 2d 724 (W.D. Ky. 2004); *In re Midway Games, Inc. Sec. Litig.*, 332 F. Supp. 2d 1152 (N.D. Ill. 2004); *In re NUI Sec. Litig.*, 314 F. Supp. 2d 388, 417 n.21 (D.N.J. 2004); *Johnson* v. *Tellabs, Inc.*, 303 F. Supp. 2d 941 (N.D. Ill. 2004); *Taubenfeld* v. *Hotels.com*, No. 3:03-CV-0069 (N.D. Tex. Sept. 27, 2004) (unpublished opinion); *Stavros* v. *Exelon Corp.*, 266 F. Supp.2d 833 (N.D. Ill. 2003).

[8] 377 F.3d 727 (7th Cir. 2004).

[9] *See id. See also Ong* v. *Sears, Roebuck & Co.*, No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425, at *105-06 (N.D. Ill. Sept. 24, 2004) (applying *Asher* v. *Baxter, Int'l, Inc.*); *In re Intermune, Inc. Sec. Litig.*, No. C 03-2954 SI, 2004 U.S. Dist. LEXIS 15382, at *15 (N.D. Cal. July 30, 2004) (''To the extent that a statement is forward-looking and is not based on the most accurate information available to defendants, it would not be protected by the general safe harbor provision. The Court cannot conclude at this early stage whether defendants relied on the most accurate information or whether they failed to discuss negative information, as alleged by plaintiffs.''). In *New Jersey* v. *Sprint Corp.*, No. 03-20710JWL, 2004 U.S. Dist. LEXIS 17765 (N.D. Kan. Sept. 3, 2004), the Northern District of Kansas applied *Asher* to find that plaintiffs adequately pled actual knowledge, the second prong of the safe harbor. *Id.* at *36-37. This application of *Asher* (though a more sensible application of the law) is not relevant to the current inquiry, which concerns the first prong of the safe harbor, adequate cautionary language.

[10] *See Asher* v. *Baxter Int'l Inc.*, No. 02 C5608, 2003 U.S. Dist. LEXIS 12905 (N.D. Ill. July 17, 2003), *rev'd by* 377 F.3d 727.

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

[12] 15 U.S.C. § 78u-5(c)(1)(A)(i).

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issuers knew when they made predictions seems to preclude pre-discovery dismissal. Taken to its logical extreme, the *Asher* court's formulation would require an inquiry into exactly what the issuers knew or should have known at the time of the forward-looking statements.

Asher need not be the end of the world, however, for four reasons. First, the analysis should only come into play when the issuer failed to identify the risk that actually materialized. Second, the issuer in *Asher* failed to update its cautionary language in the face of changing risks—a circumstance that weighed heavily with the court. Third, much of the balance of the *Asher* decision is not consistent with the conclusion that the safe harbor is never available at the pleading stage, even in the Seventh Circuit. Finally, *Asher* is not the law in all the circuits; this is a critical issue of great practical importance that seems ripe for Supreme Court review.

First, Baxter failed to identify the risks that actually materialized. Though the court emphasizes that it is not *necessary* to do so,[13] warning buyers of the very circumstance that eventually causes a negative outcome certainly should be *sufficient* to place forward-looking statements within the safe harbor.[14] After all, it would be irrelevant to the outcome of the case if it turned out that management subjectively knew of material undisclosed risks that never in fact came to pass. Thus, where issuers have identified the risk that materialized, *Asher*, properly read, should not adversely affect the viability of a motion to dismiss.

Second, whereas the district court found that Baxter's failure to include certain known risks was mitigated by the ''substantive and sufficiently tailored'' cautionary disclosures,[15] the appellate outcome seems to have been heavily influenced by the fact that Baxter's cautionary language ''remained fixed even as the risks changed.''[16] For example, the complaint alleged that there was a ''sterility failure'' in the spring of 2002, but ''Baxter left both its forecasts and cautions as is.'' Also, Baxter allegedly ''closed plants that were its least-cost sources of production,'' yet ''the forecasts and cautions continued without amendment.''[17] For the court, the unchanging cautionary language was a red flag, raising ''the possibility—no greater confidence is possible before discovery—that Baxter omitted important variables from the cautionary language and so made projections as more certain than internal estimates at the time warranted.''[18] Of course, even before *Asher* it was crucial for issuers to adapt their cautionary language to reflect any major changes in the risks their company faces.

The language of *Ong* v. *Sears, Roebuck & Co.*,[19] the only district court case to apply *Asher*,[20] similarly indicates that the defendant may have fared better had it been more current in its description of risk factors.[21] Sears had made rosy predictions about the quality of its credit-card portfolio, cautioning that the accuracy of the predictions was subject to ''changes in . . . delinquency and charge-off trends in the credit card receivables portfolio.''[22] The court found this language to be insufficient, writing, ''[a] warning that trends could change . . . is not the same as a warning that the current portfolio is experiencing rising delinquencies and charge-offs due to its high-risk customers.''[23]

Third, the court's discussion in *Asher* includes several good points on the safe harbor that are wholly inconsistent with the notion that it is never appropriate to apply the safe harbor at the pleading stage. For example, the court notes that, ''[u]nless it is possible to give a concrete and reliable answer [to the question of what constitutes meaningful cautionary language], the safe harbor is not 'safe.' ''[24] The opinion goes on, ''[a] safe harbor matters only when the firm's disclosures (including the accompanying cautionary statements) are false or misleadingly incomplete; yet whenever that condition is satisfied, one can complain that the cautionary statement must have been inadequate. The safe harbor loses its function.''[25]

Given these inherent difficulties, the court tries to discern a standard for applying the safe harbor. Clearly, ''issuers need not anticipate all sources of deviations from expectations,'' as that would render the safe harbor meaningless.[26] Also, public companies need not reveal the calculations underlying predictions, as revealing this kind of confidential information might undermine the company's competitiveness, ultimately hurting shareholders.[27]

Finally, other circuit courts have recently affirmed dismissals based on the safe harbor, applying a far more lenient standard than the *Asher* court.[28] For example, in the same month as *Asher*, the Third Circuit affirmed a district court's dismissal based, in part, on the safe harbor. In *In re Adams Family Golf Securities Litigation*,[29] the defendant, a manufacturer of custom-fit golf clubs, made forward-looking statements concerning ''sanguine prospects for the golf industry and the rising popularity of the sport more generally.''[30] Plaintiffs alleged that these statements were materially misleading given that there was an oversupply of clubs in

[13] *See Asher*, 377 F.3d at 734 (''The problem is not that what actually happened went unmentioned; issuers need not anticipate all sources of deviations from expectations.'').

[14] *See*, *e.g.*, *Miller* v. *Champion Enters., Inc.*, 364 F.3d 660, 678 (6th Cir. 2003) (finding adequate cautionary language and noting that ''[defendant] disclosed the exact risk that occurred in this situation . . . [and] is not required to detail every facet or extent of that risk to have adequately disclosed the nature of the risk''). *But see Ong*, No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425, at *102-03 (rejecting defendant's argument that its warnings must have been adequate because they were ''not only realistic; they actually came true'').

[15] No. 02 C5608, 2003 U.S. Dist. LEXIS 12905, at *13 (N.D. Ill. July 17, 2003), *rev'd by* 377 F.3d 727.

[16] 377 F.3d at 734.

[17] *Id.*

[18] *Id.* at 734-35.

[19] No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425 (N.D. Ill. Sept. 24, 2004).

[20] As noted above, *New Jersey* v. *Sprint Corp.*, No. 03-20710JWL, 2004 U.S. Dist. LEXIS 17765, at *36-37 (N.D. Kan. Sept. 3, 2004), cites *Asher*, but not in the context of determining whether cautionary language was adequate.

[21] *Ong*, No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425, at *102-03.

[22] *Id.* at *102.

[23] *Id.*

[24] *Asher*, 377 F.3d at 729.

[25] *Id.*

[26] *Id.* at 734.

[27] *Id.* at 733.

[28] *See*, *e.g.*, *In re Adams Family Golf Sec. Litig.*, 381 F.3d 267 (3d Cir. 2004); *Rombach* v. *Chang*, 355 F.3d 164 (2d Cir. 2004).

[29] 381 F.3d at 279.

[30] *Id.*

the retail market.[31] The court found that defendant's registration statement contained adequate cautionary language that warned of ''prospects of lagging demand for the Company's products, competitive products from rivals, unseasonable weather patterns that could diminish the amount of golf played, and an overall decline in discretionary consumer spending.''[32]

It did not concern the court that there was no warning about the oversupply specifically. Rather, the court focused on the fact that the risks identified ''relate directly to the claim on which plaintiffs allegedly relied; the general representations of better business ahead were mitigated by the discussion of the several factors that could have caused poor financial results.''[33] Thus, as the statute directs, the Third Circuit focused on whether the cautionary language appropriately modified the forward-looking statement, not whether the language matched exactly with what the defendant knew at the time it made the statement.[34] While it remains to be seen how courts in other circuits will react to the *Asher* decision, as of today, it stands virtually alone.[35]

B. Specificity. Decisions are unfortunately far from uniform as to the specificity required of cautionary language.[36] In *In re Midway Games, Inc. Securities Litigation*,[37] granting a motion to dismiss under the safe harbor provision, the court emphasized that cautionary language must be ''sufficiently related in subject matter and strong in tone to counter the statement made.''[38] In this case, defendant Midway had made predictions about product release dates and growth in sales and revenue. The court found language such as ''[w]e do not know when or whether we will become profitable again'' to be ''highly specific.''[39] The court emphasized that Midway's warnings ''continue[d] for pages'' and identified ''numerous factors'' that might lead to adverse outcomes, including, ''variations in the level of market acceptance of our products,'' ''delays and timing of product introductions,'' and ''development and promotional expenses relating to the introduction of our products.''[40]

In *Rombach* v. *Chang*,[41] the Second Circuit upheld a lower court's determination that the defendant's cautionary statements, though ''formulaic,'' were sufficiently meaningful.[42] The language included warnings ''that the company's past performance was not necessarily indicative of future results''[43] and ''that no assurance could be given that additional facilities would be readily integrated into the Company's operating structure.''[44] The Second Circuit ruled that the language offered ''a sobering picture of a company's financial condition and future plans,'' and therefore was protected by the safe harbor.[45] On the other hand, in *In re American Express Securities Litigation*,[46] the Southern District of New York found language that ''potential deterioration in the high-yield sector . . . could result in further losses,'' accompanying the prediction that losses on high-yield investments would go down, was inadequate because ''it was not based on specific facts, and therefore was insufficiently precise.''[47]

In light of *Asher* and other recent cases careful issuers would be wise to update their cautionary language every quarter to reflect all changes—both within the company and in the outside markets. The language must be as specific as possible. Issuers should also write cautionary language with an eye to the risk disclosures of competitors, suppliers and customers. Similarly, it is always helpful to review research reports of the analysts who follow the company. Their insights into industry-wide phenomena, and their nonpartisan view of the company and its prospects, will help to identify potential risk factors.

II. Is Actual Knowledge of Falsity a Barrier to Safe Harbor Protection?

Though the statute is clear and unambiguous on the issue, there is an emerging circuit split over the ''actual knowledge'' provision of the safe harbor. A literal reading of the statute provides three separate grounds for dismissing a count—the first, if its statements are forward-looking and accompanied by adequate cautionary language, the second, if the plaintiff has failed to allege that the defendant actually knew its statements were false, and the third, if the alleged misrepresentations were immaterial. Therefore, a defendant that loses on the cautionary language issue may nevertheless argue that plaintiff failed adequately to plead scienter.[48]

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[31] *See id.*

[32] *Id.*

[33] *Id.*

[34] It should be noted that the court placed this language within the safe harbor on two bases: because it was accompanied by adequate cautionary language and because it was too vague to be material. *See id.*

[35] *But see Ong* v. *Sears, Roebuck & Co.*, No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425 (N.D. Ill., Sept. 24, 2004) (applying *Asher*); *In re Intermune, Inc. Sec. Litig.*, No. C 03-2954 SI, 2004 U.S. Dist. LEXIS 15382, at *15 (N.D. Cal. July 30, 2004) (denying motion to dismiss because it is inappropriate at the pleadings stage). As noted above, *New Jersey* v. *Sprint Corp.*, No. 03-20710JWL, 2004 U.S. Dist. LEXIS 17765, at *36-37 (N.D. Kan. Sept. 3, 2004), cites *Asher*, but not in the context of determining whether cautionary language was adequate.

[36] *See Rombach* v. *Chang*, 355 F. 3d 164, 175-77 (2d Cir. 2004); *In re Midway Games, Inc. Sec. Litig.*, 332 F. Supp. 2d 1152, 1166 (N.D. Ill. 2004); *In re American Express Co. Sec. Litig.*, No. 02 Civ. 5533(WHP), 2004 WL 632750, at *12 (S.D.N.Y. Mar. 31, 2004); *In re Vivendi Universal, S.A. Sec. Litig.*, 02 Civ. 5571 (HB), 2003 U.S. Dist. LEXIS 19431, at *66-67 (S.D.N.Y. Nov. 3, 2003) (''The generic warning that actual results may differ . . . does not come close to the cautionary language needed to render reliance on the misrepresentation unreasonable.'') (internal citations omitted).

[37] 332 F. Supp. 2d 1152. The court does not cite the *Asher* decision in its analysis. *Id.*

[38] *Id.* at 1166 (internal quotations omitted).

[39] *Id.*

[40] *Id.* at 1166-67.

[41] 355 F.3d 164.

[42] *Id.* at 175-77.

[43] *Id.* at 176.

[44] *Id.* at 175.

[45] *Id.* (internal citations omitted).

[46] No. 02 Civ. 5533(WHP), 2004 WL 632750 (S.D.N.Y. Mar. 31, 2004).

[47] *Id.* at *12 (citing *Credit Suisse First Boston* v. *ARM Fin. Group, Inc.*, No. 99 Civ. 12046, 2001 WL 300733, at *8 (S.D.N.Y. Mar. 28, 1991) (''Warnings of specific risks . . . do not shelter defendants from liability if they fail to disclose hard facts critical to appreciating the magnitude of the risks described.'')).

[48] *See GSC Partners CDO Fund* v. *Washington*, 368 F.3d 228 (3d Cir. 2004); *In re Duane Reade Sec. Litig.*, 2003 U.S. Dist. LEXIS 21319 (S.D.N.Y. Nov. 25, 2003) *aff'd by Nadoff* v. *Duane Reade, Inc.*, No. 03-9352, 2004 WL 1842801 (2d Cir.

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But the converse is not necessarily true. Circuits are split over whether a defendant that actually knew its statements were false or misleading at the time they were made may still avail itself of the safe harbor so long as the statements were forward-looking and accompanied by meaningful cautionary language. This split has a profound impact on how motions to dismiss get decided.

Over the past year and a half the Fifth, Sixth and Ninth Circuits have all found that the two prongs of the safe harbor provision operate totally independently of one another. For example, in *Miller* v. *Champion Enterprises, Inc.*,[49] the Sixth Circuit ruled that if a statement qualifies as forward-looking and is accompanied by cautionary language, it is ''protected regardless of the actual state of mind.''[50] In *Southland Securities Corp.* v. *Inspire Insurance Solutions Inc.*,[51] the Fifth Circuit wrote, ''[t]he safe harbor has two independent prongs: one focusing on the defendant's cautionary statements and the other on the defendant's state of mind.''[52] Similarly, in *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund* v. *The Clorox Co.*,[53] the Ninth Circuit affirmed the district court's application of the safe harbor to allegedly ''knowingly false statements'' because it found that the statements were accompanied by ''sufficient warnings.''[54]

Some district courts in other circuits agree, most recently in the Northern District of Illinois, where the court noted that, ''[f]or purposes of § 78u-5(c)(1)(A), proof of knowledge of the falsity of a forward-looking statement is 'irrelevant' when the statement is accompanied by meaningful cautionary language.''[55]

The First and Third Circuits, however, have rejected this reading, finding that forward-looking statements with adequate cautionary language fall within the safe harbor ''*unless* the person making the forward-looking statements . . . had actual knowledge that they were false or misleading.''[56] In these circuits, then, there is no possibility for dismissal at the pleading stage where plaintiff has adequately pled scienter. Moreover, if plaintiff is able to prove scienter, the safe harbor will not apply at all, even if defendant's predictions were couched in adequate cautionary language.

III. Is the Statement Forward-Looking?

Courts seem to have relatively little trouble determining whether a simple statement is forward-looking. Of late, this question has received less detailed attention than in the past. Courts are still sharply divided, however, on how to analyze statements with both factual and forward-looking elements.

Most courts determine whether an issuer's statement is forward-looking simply by asking if the ''the truth or falsity of the statement cannot be discerned until some point in time after the statement is made.''[57] At times, however, courts will not apply even this level of analysis.[58] Some statements are classically forward-looking and require little analysis because they relate to management's expectations for the company's future operations. For example, statements that speak of a ''strategic operating plan'' or indicate that management is ''expecting a very good year'' address future events and are prototypical forward-looking statements.[59]

Complications arise when the court must review a statement that contains both forward-looking and his-

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Aug. 17, 2004); *Southland Secs. Corp.* v. *Inspire Ins. Solutions Inc.*, 365 F.3d 353, 372 (5th Cir. 2004); *Miller* v. *Champion Enters., Inc.*, 364 F.3d 660, 676-80 (6th Cir. 2003); *In re American Express Co. Sec. Litig.*, 2004 WL 632750 (S.D.N.Y. Mar. 31, 2004); *In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F. Supp. 2d 256 (S.D.N.Y. 2004); *In re Kindred Healthcare, Inc. Sec. Litig.*, 299 F. Supp. 2d 724 (W.D. Ky. 2004); *In re Midway Games, Inc. Sec. Litig.*, 332 F. Supp. 2d 1152, 1167-68 (N.D. Ill. 2004); *In re QLT, Inc. Sec. Litig.*, 312 F. Supp. 2d 526 (S.D.N.Y. 2004); *Johnson* v. *Tellabs, Inc.*, 303 F. Supp. 2d 941 (N.D. Ill. 2004); *Ong* v. *Sears, Roebuck & Co.*, No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425, at *99 (N.D. Ill. Sept. 24, 2004); *Taubenfeld* v. *Hotels.com*, No. 3:03-CV-0069, at *6 (N.D. Tex. Sept. 27, 2004) (unpublished opinion); *Stavros* v. *Exelon Corp.*, 266 F. Supp.2d 833 (N.D. Ill. 2003).

[49] 364 F.3d 660 (6th Cir. 2003).

[50] *Id.* at 672.

[51] 365 F.3d 353 (5th Cir. 2004).

[52] *Id.* at 371; *see also Taubenfeld* v. *Hotels.com*, No. 3:03-CV-0069, at *6 (N.D. Tex. Sept. 27, 2004) (unpublished opinion) (''The Court finds these cautionary statements meaningful and that the press release is not an actionable misrepresentation, regardless of Defendants' intent.'').

[53] 353 F.3d 1125 (9th Cir. 2004).

[54] *Id.* at 1131-33.

[55] *In re Midway Games, Inc. Sec. Litig.*, 332 F. Supp. 2d 1152, 1167-68 (N.D. Ill. 2004); *see also New Jersey* v. *Sprint Corp.*, No. 03-20710JWL, 2004 U.S. Dist. LEXIS 17765, at *32-33 (N.D. Kan. Sept. 3, 2004).

[56] *Baron* v. *Smith*, 380 F.3d 49, 55 n.3 (1st Cir. 2004) (emphasis added); *see also In re AT&T Corp. Sec. Litig.*, (D.N.J. 2004) (unpublished opinion) (citing *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 535-36 (3d Cir. 1999)); *In re NUI Sec. Litig.*, 314 F. Supp. 2d 388, 417 n.21 (D.N.J. 2004). The Second Circuit has not yet had the issue before it, and the lower courts are split on how to interpret the statute. *Compare In re Aegon N.V. Sec. Litig.*, No. 03 Civ. 0603 (RWS), 2004 U.S. Dist. LEXIS 11466, at *34-39 (S.D.N.Y. June 29, 2004) (noting that each prong of the safe harbor operates independently to provide defendants with immunity) *with Wagner* v. *Barrick Gold Corp.*, No. 03 Civ. 4302 (RMB), at *11 (S.D.N.Y. Sept. 29, 2004) (unpublished opinion) (''No degree of cautionary language will protect material misrepresentations or omissions where defendants knew their statements were false when made.'') (quoting *Milman* v. *Box Hill Sys. Corp.*, 72 F. Supp. 2d 220, 231 (S.D.N.Y. 1999)) *and In re Duane Reade Sec. Litig.*, 2003 U.S. Dist. LEXIS 21319, at *18 (S.D.N.Y. Nov. 25, 2003), *aff'd by Nadoff* v. *Duane Reade, Inc.*, No. 03-9352, 2004 WL 1842801 (2d Cir. Aug. 17, 2004).

[57] *See In re Aegon N.V. Sec. Litig.*, No. 03 Civ. 0603 (RWS), 2004 U.S. Dist. LEXIS 11466, at *32-33 (S.D.N.Y. June 28, 2004); *In re Blockbuster Inc. Sec. Litig.*, 3:03-CV-0398-M (LEAD), 2004 U.S. Dist. LEXIS 7173, at *12 (N.D. Tex. Apr. 26, 2004); *In re Copper Mountain. Sec. Litig.*, 311 F. Supp. 2d 857, 880 (N.D. Cal. 2004) (citing *In re Splash Tech. Holdings Sec. Litig.*, 2000 U.S. Dist. LEXIS 15369, at *17 (N.D. Cal. Sep. 29, 2000)); *In re Kindred Healthcare, Inc. Sec. Litig.*, 299 F. Supp. 2d 724, 738 (W.D. Ky. 2004) (citing *Harris* v. *Ivax Corp.*, 182 F.3d 799, 805 (11th Cir. 1999)); *In re Ravisent Technologies, Inc. Securities Litigation,* No. 00-CV-1014, 2004 U.S. Dist. LEXIS 13255, at *48 (E.D. Pa. July 12, 2004); *Friedman* v. *Rayovac Corp.*, 295 F. Supp. 2d 957, 989 (W.D. Wisc. 2003).

[58] *In re Seachange Int'l, Inc. Sec. Litig.*, No. Civ.A. 02-12116-DPW, 2004 WL 240317, at *5-6 (D. Mass. Feb. 6, 2004); *Irvine* v. *ImClone Systems, Inc.*, No. 02 Civ.109 RO, 2003 WL 21297285, at *1-2 (S.D.N.Y. June 4, 2003).

[59] *Kindred Healthcare*, 299 F. Supp. 2d at 737-38; *see also GSC Partners CDO Fund* v.*Washington*, 368 F.3d 228, 242 (3d Cir. (N.J.) 2004) (''[B]ecause the statement about collectability is a prediction of the likelihood of collection on change orders and claims, it is a classic forward-looking statement.'').

torical or present fact elements. Five years ago in *Harris* v. *Ivax*,[60] the Eleventh Circuit adopted a ''holistic'' approach to mixed statements, treating a list of factors in the company's disclosure document—some containing present assessments of business conditions, others including assumptions about future events—as a single forward-looking statement.[61] The court based its decision both on a close reading of the statutory language and on the practical understanding that predictions can rest on historical observations.[62]

Some courts seem to have taken the *Ivax* approach to an extreme. For example, in *Baron v. Smith*,[63] the First Circuit dispensed with almost all analysis and simply found that the press release, which plaintiffs claimed was misleading due to material omissions, ''*contained* forward-looking statements . . . and therefore comes under the protection of the statutory safe harbor.''[64]

Not all courts, however, will afford safe harbor protection to factual statements intermingled with predictions. Some require that statements of present fact form the basis for forward-looking statements in order to fall within the safe harbor. In *Miller* v. *Champion Enterprises, Inc.*,[65] the Sixth Circuit reviewed two mixed statements that plaintiffs asserted were not forward-looking. The court determined that the phrase, ''given the continuation of outstanding earnings growth and the successful implementation of our retail strategy,'' included in a letter to shareholders discussing earning estimates, might fall within the safe harbor because, though not inherently forward-looking, it was ''the basis for later forward looking statements.''[66] However, a statement announcing that second quarter earnings per share grew thirteen percent was not protected by the safe harbor because the earnings statement was ''easily separable'' from the protected forward-looking statements and was not an assumption underlying them.[67] Therefore, according to *Miller*, statements of present or historical fact will only be afforded safe harbor protection if they form the basis of predictions.[68]

At the other extreme from *Ivax*, for some courts, any intermingling of statements of present fact with predictions removes the entire statement from safe harbor eligibility.[69] In *AOL Time Warner*, the court found that a forecast about revenue growth fell outside the scope of the PSLRA safe harbor because it was ''combined with statements of existing fact.''[70] Similarly, in *Wagner* v. *Barrick Gold Corp.*, the court declared, ''[i]t is well recognized that even when an allegedly false statement has both a forward-looking aspect and an aspect that encompasses a representation of present fact, the safe harbor provision of the PSLRA does not apply.''[71]

IV. The 'Accompaniment' Requirement

The safe harbor protects predictions ''accompanied'' by meaningful cautionary language, but courts differ in their interpretations of what this means. For example, while some courts will only apply the safe harbor to predictions in a press release if the release itself contains cautionary language,[72] others have interpreted ''accompany'' broadly, examining cautionary language in SEC filings (even if they are not specifically referenced) to determine whether forward-looking statements fall within the safe harbor. Cautious issuers should not rely on such a broad an interpretation of ''accompany,'' but a specific reference to SEC filings may suffice. Issuers that include independent cautionary language would benefit from also referencing SEC filings, thereby adding any cautionary language in the filings to the analysis.

In *GSC Partners CDO Fund* v. *Washington*,[73] the Third Circuit indicated that cautionary language ''does not have to actually accompany the alleged misrepresentation.''[74] The court applied a ''total mix'' analysis taking into account cautionary language from the totality of information available. In *Stavros* v. *Exelon Corp.*,[75] the court held that cautionary language need not actually accompany the projection because ''it is the total mix of information available to investors at the time of the alleged fraudulent statements that is relevant, not whether the warnings were contained in the same document.''[76] Therefore the court considered cautionary language ''not only in the documents containing the forward-looking statements at issue, but also in Exelon's filings with the SEC.''[77] Specifically referencing

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[60] 182 F.3d 799 (11th Cir. 1999).
[61] *Id.* at 805-07.
[62] *See id.*
[63] 380 F.3d 49 (1st Cir. 2004).
[64] 380 F.3d 49, 55 n.3 (emphasis added).
[65] 364 F.3d 660, 676-80 (6th Cir. 2003).
[66] *Id.* at 677.
[67] *Id.* at 679; *see also id* at 680; *In re Blockbuster Inc. Sec. Litig.*, 3:03-CV-0398-M (LEAD), 2004 U.S. Dist. LEXIS 7173, at *20-21 (N.D. Tex. Apr. 26, 2004) (finding that the safe harbor does not apply to independently actionable material misrepresentations and omissions).
[68] Note that the result in *Miller* was that plaintiffs no longer had to prove actual knowledge for liability, only recklessness. Without the protection of the safe harbor issuers are liable if plaintiffs show ''an extreme departure from the standard of ordinary care.'' *Miller*, 364 F.3d at 681 (citing *Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017, 1025 (6th Cir. 1979)).
[69] *In re American Express Co. Sec. Litig.*, No. 02 Civ. 5533 (WHP), 2004 WL 632750, at *10 (S.D.N.Y. Mar. 31, 2004) (''A statement will not be protected as forward-looking if it also includes representations as to current or historical facts.''); *In re AOL Time Warner, Inc. Sec. and ''ERISA'' Litig.*, 02 Civ. 5575 (SWK), 2004 U.S. Dist. LEXIS 7917, at *71 (S.D.N.Y. May 5, 2004); *New Jersey* v. *Sprint Corp.*, No. 03-2071-JWL, 2004 U.S. Dist. LEXIS 17765, at *34-35 (D. Kan. Sept. 3, 2004) (noting, without deciding, that seemingly forward-looking statements rendered misleading due to defendant's omissions concerning present fact are not ''forward-looking''); *Wagner* v. *Barrick Gold Corp.*, No. 03 Civ. 4302 (RMB), at *10 (S.D.N.Y. Sept. 29, 2004) (unpublished opinion).
[70] *AOL*, 02 Civ. 5575 (SWK), 2004 U.S. Dist. LEXIS 7917, at *71 (citing *In re APAC Teleservices Inc., Sec. Litig.*, 1999 U.S. Dist. LEXIS 17908 at *8 (S.D.N.Y. Nov. 19, 1999)).
[71] *Wagner*, No. 03 Civ. 4302 (RMB), at *13 (citing *In re Prudential Sec. Ltd. P'tshps. Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) (''The doctrine of bespeaks caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away.'')).
[72] *See In re Apple Computer, Inc. Sec. Litig.*, 243 F. Supp. 2d 1012, 1025 (N.D. Cal. 2002).
[73] 368 F.3d 228 (3d Cir. 2004).
[74] *Id.* at 243 n.3; *see also In re Aegon N.V. Sec. Litig.*, No. 03 Civ. 0603 (RWS), 2004 U.S. Dist. LEXIS 11466, at *34-39 (S.D.N.Y. June 28, 2004).
[75] 266 F. Supp. 2d 833 (N.D. Ill. 2003).
[76] *Id.* at 843-44 (cautioning, however, that ''remote language is likely less effective'').
[77] *Id.*

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SEC filings will make it even more likely that a court will consider their cautionary language.[78]

A twist on the ''total mix'' analysis can be found in *Asher*.[79] The basis for the suit was the fraud-on-the-market theory: though plaintiffs themselves had not read or heard the allegedly misleading statements, they argued that others—investors, analysts, fund managers—had, and thus that the statements affected the price, which in turn affected the plaintiffs. The court found that this theory of liability presupposes an efficient market and, just as all positive predictions reached the investors, so too did any cautionary statements.[80] Therefore, the court found that ''Baxter's cautionary language [contained in SEC filings and other documents] must be treated as if attached to every one of its oral and written statements.''[81]

V. The 'Accompaniment' Requirement and Oral Forward-Looking Statements

References to SEC filings may also protect oral forward-looking statements, such as those made in analyst meetings or conference calls.[82] For example, in *Teamsters Local* v. *Clorox*,[83] the Ninth Circuit found that the caveat ''actual results will depend on a number of competitive and economic factors . . . . [W]e refer you to our form 10K filing,'' sufficed to meet the safe harbor's accompaniment requirement.[84]

If sued for fraudulent oral predictions, defendant issuers should bring all cautionary statements to the court's attention. In *Friedman v. Rayovac Corp.*,[85] the court refused to consider cautionary language in an SEC filing alongside an oral forward-looking statement, because the defendant issuer failed either to provide a citation to the document or to identify what the cautionary language was.[86] The court concluded, that ''district courts are not required to scour the record for relevant information.''[87] Similarly, in *In re QLT, Inc. Securities Litigation*,[88] the court ruled that the safe harbor does not apply to oral sales projections when the defendants fail to state that cautionary language accompanied the projections.[89] The court ''could not infer, on the basis of other instances of cautionary language QLT included, that such language had been provided in conjunction with [defendant's] statement or that it was in fact meaningful and adequate.''[90]

VI. The 'Identification' Requirement

A number of recent cases focus specifically on the 'identification' requirement,[91] but there remains no bright-line rule on what is sufficient language. While some courts have found that certain buzz words, such as ''anticipate'' or ''predict'' are sufficient to satisfy the identification requirement,[92] others continue to require that issuers explicitly label even clearly forward-looking statements in order to take advantage of the safe harbor. Requiring explicit identification guards against the possibility that ''investors might see or hear such statements and . . . not undertake the effort to read the accompanying press releases or SEC filings'' that indicate such statements are forward-looking and carry risk.[93] For example, in *Southland Securities Corp.* v. *Inspire Insurance Solutions Inc.*,[94] the Fifth Circuit determined that statements not explicitly identified as forward-looking were not protected by the safe harbor, even though the statements in substance were forward-looking.[95] Similarly in *In re Blockbuster Inc. Securities Litigation*,[96] a statement that ''we think retail business will continue to grow and we think rental business will continue to grow'' was not protected by the safe harbor

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[78] *Id*. at 845; *see also Barr* v. *Matria Healthcare, Inc., et al.*, 324 F. Supp. 2d 1369, 1381-82 (N.D. Ga. 2004); *In re Blockbuster Inc. Sec. Litig.*, 3:03-CV-0398-M (LEAD), 2004 U.S. Dist. LEXIS 7173, at *12-14 (N.D. Tex. Apr. 26, 2004); *In re Midway Games, Inc. Sec. Litig.*, 332 F. Supp. 2d 1152, 1167 (N.D. Ill. 2004); *Taubenfeld* v. *Hotels.com*, No. 3:03-CV-0069, at *6 (N.D. Tex. Sept. 27, 2004) (unpublished opinion) (finding that cautionary language from Hotels.com's Form 10-K filing ''may be incorporated by reference into a forward-looking statement to help meet the safe harbor requirement''). *Friedman* v. *Rayovac Corp.* further reminds practitioners to provide the actual language of SEC filings to the court. 295 F. Supp. 2d 957, 989-90 (W.D. Wisc. 2003).

[79] 377 F.3d 727 (7th Cir. 2004).

[80] *Id*. at 731-33 (''An investor who invokes the fraud-on-the-market claim theory must acknowledge that *all* public information is reflected in the price.'')

[81] *Id*. at 732.

[82] *But see In re Skechers U.S.A., Inc. Sec. Litig.* No. CV 03-0294 PA (Ex), 2004 U.S. Dist. LEXIS 12570, at *17 (C.D. Cal. May 10, 2004). In *Skechers*, the court ruled that when neither party provides transcripts of a conference call the court will evaluate the statement only on the basis of whether plaintiffs prove actual knowledge of falsity. The court would not make determinations as to whether statements were identified as forward-looking, were accompanied by cautionary language, or included references to the cautionary language in readily available written documents. *Id.* This ruling underscores the importance for issuers of keeping transcripts of conference calls. Without the transcript issuers may lose the absolute protection provided for in the first prong of the safe harbor.

[83] 353 F.3d 1125, 1131-32 (9th Cir. 2004).

[84] *Id*. at 1132-33; *see also In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 882 (N.D. Cal. 2004).

[85] 295 F. Supp. 2d 957 (W.D. Wisc. 2003).

[86] *Id.* at 989-90.

[87] *Id*.

[88] 312 F. Supp. 2d 526 (S.D.N.Y. 2004)

[89] *Id.* at 533-34.

[90] *Id*. at 533; *see also Southland Secs. Corp. v. Inspire Ins. Solutions Inc.*, 365 F.3d 353, 379 (5th Cir. 2004).

[91] *See Rombach* v. *Chang*, 355 F.3d 164 (2d Cir. 2004); *Southland*, 365 F.3d at 372; *Miller* v. *Champion Enterprises, Inc.*, 364 F.3d 660, 676-80 (6th Cir. 2003); *Barr* v. *Matria Healthcare, Inc.*, 324 F. Supp. 2d 1369 (N.D. Ga. 2004); *Gavish* v. *Revlon, Inc.*, No. 00 Civ. 7291(SHS), 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004); *In re Blockbuster Inc. Sec. Litig.*, 3:03-CV-0398-M (LEAD), 2004 U.S. Dist. LEXIS 7173, at *17 (N.D. Tex. Apr. 26, 2004); *In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 882 (N.D. Cal. 2004); *In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F. Supp. 2d 256 (S.D.N.Y. 2004); *In re Kindred Healthcare, Inc. Sec. Litig.*, 299 F. Supp. 2d 724 (W.D. Ky. 2004); *In re NUI Sec. Litig.*, 314 F. Supp. 2d 388 (D.N.J. 2004); *In re Transkaryotic Therapies, Inc. Sec. Litig.*, 319 F. Supp. 2d 152, 162 n.11 (D. Mass. 2004); *New Jersey* v. *Sprint Corp.*, No. 03-2071-JWL, 2004 U.S. Dist. LEXIS 17765 (D. Kan. Sept. 3, 2004); *Taubenfeld* v. *Hotels.com*, No. 3:03-CV-0069 (N.D. Tex. Sept. 27, 2004) (unpublished opinion); *Friedman* v. *Rayovac Corp.*, 295 F. Supp. 2d 957, 989-90 (W.D. Wisc. 2003).

[92] *NUI*, 314 F. Supp. 2d 388; *see also Gavish*, No. 00 Civ. 7291(SHS), 2004 WL 2210269; *Transkaryotic*, 319 F. Supp. 2d at 162 n. 11.

[93] *Copper Mountain*, 311 F. Supp. 2d at 882.

[94] 365 F.3d 353.

[95] *Id.* at 372.

[96] *Blockbuster*, 3:03-CV-0398-M (LEAD), 2004 U.S. Dist. LEXIS 7173.

because it was not specifically identified as forward-looking.[97]

Identification may be accomplished through a relatively general statement and need not accompany each individual forward looking statement within the same document. In *In re Copper Mountain Securities Litigation*,[98] the court ruled that a ''statement at the end of each release or filing stating that forward-looking statements in this release or report are made pursuant to the safe harbor provisions of the PSLRA are considered sufficient.''[99] The court reasoned that companies are not required to label each forward-looking statement individually because, ''to saddle companies with such a duty would be impractical at best and impossible at worst.''[100] Nevertheless, the court in *Copper Mountain* cautioned that a total failure to identify forward-looking statements—even if such statements occurred within days of press releases and other filings that were properly identified—would disqualify statements from the protection of the safe harbor.[101]

VII. 'Immaterial' Forward-Looking Statements

A projection is also immunized from liability under the safe harbor if it is immaterial. Four court of appeals and seven district court cases have recently dismissed claims on this ground.[102] Others, however, have indicated that this is a question best left to the trier of fact.[103]

In *Rosenzweig* v. *Azurix Corp.*,[104] the Fifth Circuit ruled that representations made in defendant's prospectus were not actionable because ''generalized, positive statements about the company's competitive strengths, experienced management, and future prospects . . . are immaterial.''[105] The court reasoned that analysts, who rely on facts in determining the price of a security, would not be misled by the prospectus because the statements were not specific enough to perpetrate fraud.[106]

Courts continue to dismiss claims for immateriality when the statement in question is mere puffery or when it is a vague statement of optimism. In *Rombach* v. *Chang*,[107] the Second Circuit observed that, ''companies must be permitted to operate with a hopeful outlook . . . [and] 'they can be expected to be confident about their stewardship and the prospects of the business they manage.' ''[108] In *Taubenfeld* v. *Hotels.com*,[109] the court found claims that ''we're not seeing any slowing,'' ''we're seeing very large increases and we expect that to continue,'' and ''we're still . . . doing incredibly well'' to be ''vague assertions of the condition of the company on which no reasonable investor would rely.''[110] In *Gavish* v. *Revlon*,[111] the court found Revlon's statements, ''our program to broaden distribution of our Ultima II line is showing significant strength'' and ''despite the challenges we now face, we are confident that our long-term outlook remains positive and we intend to pursue the fundamental business strategy that fueled our success to date'' were ''so vague, general, and hedged that they qualify for the PSLRA's safe harbor for 'immaterial' forward-looking statements.''[112] More problematic, according to the court, was the statement, ''the business fundamentals of our Company are strong.''[113] The court ultimately found this statement to be ''patently immaterial,'' however, because it found that ''fundamentals'' referred to the strength of Revlon, a fact not alleged to be false.[114]

Nevertheless, puffery arguments are not always successful for defendants. In *Friedman* v. *Rayovac Corp.*,[115] the court cautioned that there are no buzzwords for puffery, writing, ''a statement is not immaterial as a matter of law simply because the speaker prefaces it with 'I believe' or 'I think.' ''[116] To determine whether a statement is puffery, courts will look at who is speaking, who the audience is, and what aspect of the company the speaker is addressing.[117]

Of perhaps more concern to issuers is the reluctance by some courts to rule on puffery at the pleading stage. In *In re Vivendi Universal, S.A. Securities Litigation*,[118] the court held that whether a statement is actionable, ''depends on all relevant circumstances of the particular case, and is generally not an appropriate basis on

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[97] *Id.* at *17.
[98] 311 F. Supp. 2d at 882.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 881-882.
[102] *In re Adams Family Golf Sec. Litig.*, 381 F.3d 267, 279 (3d Cir. 2004) (also finding adequate cautionary language); *Rombach* v. *Chang*, 355 F.3d 164, 174 (2d Cir. 2004); *Southland Secs. Corp. v. Inspire Ins. Solutions Inc.*, 365 F.3d 353, 374 (5th Cir. 2004); *Rosenzweig* v. *Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003); *In re QLT, Inc. Sec. Litig.*, 312 F. Supp. 2d 526, 532-33 (S.D.N.Y. 2004); *Gavish* v. *Revlon, Inc.*, No. 00 Civ. 7291(SHS), 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004); *Orton* v. *Parametric Technology Corp.*, __ F. Supp. 2d __, No. CIV.A.03-10290-WGY, 2004 WL 2475330, at *12 (D. Mass. Dec. 3, 2004); *Taubenfeld* v. *Hotels.com*, No. 3:03-CV-0069, at *8-11 (N.D. Tex. Sept. 27, 2004) (unpublished opinion); *In re Vivendi Universal, S.A. Sec. Litig.*, 02 Civ. 5571 (HB), 2003 US Dist. LEXIS 19431, at *62-64 (S.D.N.Y. Nov. 3, 2003); *Friedman* v. *Rayovac Corp.*, 295 F. Supp. 2d 957, 990-991 (W.D. Wisc. 2003).
[103] *Vivendi*, 02 Civ. 5571 (HB), 2003 U.S. Dist. LEXIS 19431, at *63; *see also Ong* v. *Sears, Roebuck & Co.*, No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425, at *105-06 (N.D. Ill. Sept. 24, 2004).
[104] 332 F.3d 854.
[105] *Id.* at 869.
[106] *Id.* (citing *Raab* v. *Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993)).
[107] 355 F. 3d 164.
[108] *Id.* at 174 (citing *Shields* v. *Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129-30 (2d. Cir. 1994)).
[109] *Taubenfeld* v. *Hotels.com*, No. 3:03-CV-0069 (N.D. Tex. Sept. 27, 2004) (unpublished opinion).
[110] *Id.* at *8 (citing *Rosenzweig* v. *Azurix Corp.*, 332 F.3d 854, 869-70 (5th Cir. 2003); *see also In re QLT, Inc. Sec. Litig.*, 312 F. Supp. 2d 526, 532-33 (S.D.N.Y. 2004).
[111] No. 00 Civ. 7291(SHS), 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004).
[112] *Id.* at *21.
[113] *Id.*
[114] *Id.* at *22.
[115] 295 F. Supp. 2d 957 (W.D. Wisc. 2003).
[116] *Id.* at 990.
[117] In *In re Ravisent Technologies, Inc. Securities Litigation* the court found that statements such as ''the year-over-year improvement in gross margins illustrates the growing momentum in our software and technology license business'' were not mere puffery because they were made by the CEO and CFO to the general public about the financial condition of the company. No. 00-CV-1014, 2004 U.S. Dist. LEXIS 13255, at *31 (E.D. Pa. July 12, 2004).
[118] No. 02 Civ. 5571 (HB), 2003 U.S. Dist. LEXIS 19431 (S.D.N.Y. Nov. 4, 2003).

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which to dismiss a complaint at this stage of the action.''[119] The *Vivendi* court also took into account the speaker's state of mind, rejecting defendant's argument that statements that Vivendi was ''financially solid'' were puffery, because plaintiffs pleaded sufficient facts to show that defendants could not reasonably have believed the statements when they made them.[120]

VIII. The Continuing Relevance of the Pre-Reform Act Case Law

Cases decided under the pre-Reform Act ''bespeaks caution'' doctrine remain relevant in safe harbor cases.[121] Such cases are commonly cited on the issues of whether cautionary language is sufficiently meaningful,[122] or whether a statement is forward-looking or one of present fact.[123] One issue where courts relied heavily on the ''bespeaks caution'' doctrine is the accompaniment requirement. In *Rombach*, the Second Circuit incorporated the doctrine's ''total mix'' analysis in its materiality inquiry.[124] Similarly the court in *Stavros* v. *Exelon Corp.*[125] imported the total mix analysis from ''bespeaks caution'' doctrine case law and determined that courts may consider cautionary language from other available sources.[126]

The continued relevance of the pre-Reform Act cases should not come as a surprise because the Reform Act, in many respects, codified prior, judicially developed law. In addition, because the safe harbor provision does not apply by its terms to various types of transactions, [127] or to a number of entities,[128] we will continue to see cases rely on earlier doctrines.

[119] *Id.* at *63. Similarly, the *Ong* court declined to rule on the question of materiality because ''it presents a mixed question of law and fact and requires . . . determinations that are particularly appropriate for resolution by the trier of fact.'' *Ong* v. *Sears, Roebuck & Co.*, No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425, at *105-06 (N.D. Ill. Sept. 24, 2004).

[120] *Vivendi*, No. 02 Civ. 5571 (HB), 2003 U.S. Dist. LEXIS 19431, at *62-68.

[121] *See In re Donald Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir. 1993).

[122] *See In re Priceline.com Sec. Litig.*, __ F. Supp. 2d __, No. 3:00 CV 01884 DJS, 2004 WL 2378408 (D. Conn. Oct. 7, 2004); *Gavish* v. *Revlon, Inc.*, No. 00 Civ. 7291(SHS), 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004).

[123] *See*, *e.g.*, *In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857 (N.D. Cal. 2004); *In re QLT, Inc. Sec. Litig.*, 312 F. Supp. 2d 526 (S.D.N.Y. 2004).

[124] *Rombach* v. *Chang*, 355 F.3d 164, 173 (2d Cir. 2004); *see also Gavish* v. *Revlon, Inc.*, No. 00 Civ. 7291(SHS), 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004); *Wagner* v. *Barrick Gold Corp.*, No. 03 Civ. 4302 (RMB), at *10 (S.D.N.Y. Sept. 29, 2004) (unpublished opinion).

[125] 266 F. Supp. 2d 833 (N.D. Ill. 2003).

[126] *Id.* at 843-44 (citing *Grossman* v. *Novell, Inc.*, 120 F.3d 1112, 1122-23 (10th Cir. 1997) (''The Tenth Circuit, however, in discussing the analogous bespeaks caution doctrine, held that cautionary language need not be contained in the same document as the projection.'')).

[127] Transactions not covered by the safe harbor provision include initial public offerings (''IPOs''), rollups, and tender offers. *See* 15 U.S.C. 77z-2(b) (Supp. II 1996); *see also P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92, 97-99 (2d Cir. 2004).

[128] The safe harbor provision does not cover such entities as limited liability corporations (''LLCs'') and partnerships. *See Stolz*, 355 F.3d at 97-99.

IX. Conclusion

While courts differ in their applications of the safe harbor, there is enough case law to assist counsel in advising a issuer on how to make forward-looking statements with relative safety from liability. The cautious counselor will advise clients, among other things, to update cautionary language frequently, with an eye to internal and external indicators of risk; to segregate factual statements from forward-looking ones unless the facts form the basis for the predictions; to identify forward-looking statement with appropriate vocabulary, such as ''anticipate'' or ''predict,'' and a general identifying statement; and, at the very least, to refer to specific cautionary statements in SEC filings when making oral or written predictions.

Appendix A

Asher v. *Baxter Int'l Inc.*, 377 F.3d 727 (7th Cir. 2004); *Baron* v. *Smith*, 380 F.3d 49 (1st Cir. 2004); *GSC Partners CDO Fund* v. *Washington*, 368 F.3d 228 (3d Cir. 2004); *In re Adams Family Golf Sec. Litig.*, 381 F.3d 267 (3d Cir. 2004); *P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92 (2d Cir. 2004); *Rombach* v. *Chang*, 355 F.3d 164 (2d Cir. 2004); *Southland Secs. Corp. v. Inspire Ins. Solutions Inc.*, 365 F.3d 353 (5th Cir. 2004); *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund* v. *Clorox Co.*, 353 F.3d 1125 (9th Cir. 2004); *Miller* v. *Champion Enters., Inc.*, 364 F.3d 660 (6th Cir. 2003); *Rosenzweig* v. *Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003); *Barr* v. *Matria Healthcare, Inc.*, 324 F. Supp. 2d 1369 (N.D. Ga. 2004); *Gavish* v. *Revlon, Inc.*, No. 00 Civ. 7291(SHS), 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004); *In re Aegon N.V. Sec. Litig.*, No. 03 Civ. 0603 (RWS), 2004 U.S. Dist. LEXIS 11466 (S.D.N.Y. June 28, 2004); *In re American Express Co. Sec. Litig.*, No. 02 Civ. 5533 (WHP), 2004 WL 632750 (S.D.N.Y. March 31, 2004); *In re AOL Time Warner, Inc. Sec. and ''ERISA'' Litig.*, 02 Civ. 5575 (SWK), 2004 U.S. Dist. LEXIS 7917 (S.D.N.Y. May 5, 2004); *In re AT&T Corp. Sec. Litig.*, Civ. No. 00-5364 (GEB) (D.N.J. 2004) (unpublished opinion); *In re Blockbuster Inc. Sec. Litig.*, 3:03-CV-0398-M (LEAD), 2004 U.S. Dist. LEXIS 7173 (N.D. Tex. April 26, 2004); *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, (S.D.N.Y. 2004); *In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857 (N.D. Cal. 2004); *In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F. Supp. 2d 256 (S.D.N.Y. 2004); *In re Intermune, Inc. Sec. Litig.*, No. C 03-2954 SI, 2004 U.S. Dist. LEXIS 15382 (N.D. Cal. July 30, 2004); *In re Kindred Healthcare, Inc. Sec. Litig.*, 299 F. Supp. 2d 724 (W.D. Ky. 2004); *In re Loral Space & Communications Ltd. Sec. Litig.*, No. 01 Civ.4388(JGK), 2004 WL 376442 (S.D.N.Y. Feb. 27, 2004); *In re Midway Games, Inc. Sec. Litig.*, 332 F. Supp. 2d 1152 (N.D. Ill. 2004); *In re NUI Sec. Litig.*, 314 F. Supp. 2d 388, 417 (D.N.J. 2004); *In re Priceline.com Sec. Litig.*, __ F. Supp. 2d __, No. 3:00 CV 01884 DJS, 2004 WL 2378408 (D. Conn. Oct. 7, 2004); *In re QLT, Inc. Sec. Litig.*, 312 F. Supp. 2d 526 (S.D.N.Y. 2004); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-CV-1014, 2004 U.S. Dist. LEXIS 13255 (E.D. Pa. July 12, 2004); *In re Retek Inc. Secs.*, No. Civ.02-4209(JRT/SRN), 2004 WL 741571 (D. Minn. March 30, 2004); *In re Seachange Int'l, Inc. Sec. Litig.*, No. Civ.A. 02-12116-DPW, 2004 WL 240317 (D. Mass. Feb. 6, 2004); *In re Skechers U.S.A., Inc. Sec. Litig.*. No. CV 03-0294 PA (Ex), 2004 U.S. Dist. LEXIS 12570 (C.D. Cal. May 10, 2004); *In re Spiegel, Inc.*, No. 02 C 8946, 2004 U.S. Dist. LEXIS

12648 (D. Ill. Jul. 9, 2004); *In re Transkaryotic Therapies, Inc. Sec. Litig.*, 319 F. Supp. 2d 152 (D. Mass. 2004); *Johnson* v. *Tellabs, Inc.*, 303 F. Supp. 2d 941 (N.D. Ill. 2004); *New Jersey* v. *Sprint Corp.*, No. 03-20710JWL, 2004 U.S. Dist. LEXIS 17765 (N.D. Kan. Sept. 3, 2004); *Ong* v. *Sears, Roebuck & Co.*, No. 03 C 4142, 2004 U.S. Dist. LEXIS 19425 (N.D. Ill. Sept. 24, 2004); *Orton* v. *Parametric Tech. Corp.*, __ F. Supp. 2d __, No. CIV.A.03-10290-WGY, 2004 WL 2475330 (D. Mass. Dec. 3, 2004); *Rosen* v. *Textron, Inc.*, 321 F. Supp. 2d 308 (D.R.I. 2004); *Taubenfeld* v. *Hotels.com*, No. 3:03-CV-0069 (N.D. Tex. Sept. 27, 2004) (unpublished opinion); *Wagner* v. *Barrick Gold Corp.*, No. 03 Civ. 4302 (RMB) (S.D.N.Y. Sept. 29, 2004) (unpublished opinion); *Friedman* v. *Rayovac Corp.*, 295 F. Supp. 2d 957 (W.D. Wisc. 2003); *In re Duane Reade Sec. Litig.*, 02 Civ. 6478 (NRB), 2003 U.S. Dist. LEXIS 21319 (S.D.N.Y. Nov. 25, 2003), *aff'd by Nadoff* v. *Duane Reade, Inc.*, slip op., No. 03-9352, 2004 WL 1842801 (2d Cir. Aug. 17, 2004); *In re Intel Corp. Sec. Litig.*, No. C-01-20888-JF (N.D. Cal. Jul. 28, 2003) (unpublished opinion); *In re Vivendi Universal, S.A. Sec. Litig.*, 2003 U.S. Dist. LEXIS 19431 (S.D.N.Y. Nov. 3, 2003); *Irvine v. ImClone Sys., Inc.*, No. 02 CIV.109 RO, 2003 WL 21297285 (S.D.N.Y. June 4, 2003); *Stavros* v. *Exelon Corp.*, 266 F. Supp.2d 833 (N.D. Ill. 2003).

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