Analysis&Perspective

Private Securities Litigation Reform Act

The Statutory Safe Harbor for Forward-Looking Statements: A Scorecard in the Courts From January 2002 Through April 2003

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The Private Securities Litigation Reform Act includes a safe harbor for forward-looking statements, designed to protect public companies from liability for making what, in retrospect, turn out to be overly optimistic predictions about future performance. We have now had the benefit of more than six years of judicial opinions applying the safe harbor provision. This article focuses on the cases decided in the last sixteen months.

Courts continue to greet with skepticism expansive arguments that a particular statement is forward-looking, rather than a statement of historical fact. We continue to see inconsistent approaches to the more technical aspects of the safe harbor provision, such as treatment of the "identification" and "accompaniment" requirements. The most troubling aspect of the recent decisions is that many judges continue to misconceive the basic structure of the safe harbor, holding that, even if meaningful cautionary language is disclosed, the issuer cannot take advantage of the safe harbor provision if the plaintiff has alleged actual knowledge of falsity.

An Overview of the Statute and Recent Case Law. The core concepts of the safe harbor should be familiar by now. An issuer's projection or forward-looking statement is immunized from securities law liability if (1) the statement is identified as forward-looking and accompanied by meaningful cautionary statements disclosing important factors that could cause actual results to differ materially; or (2) the statement is immaterial; or (3) defendants are not shown to have had actual knowledge of the falsity of the statement.[1] Courts have now repeatedly addressed virtually every element of this statutory scheme.

There have now been six court of appeals decisions since the enactment of the PSLRA, although only one was issued in the past sixteen months. Since the safe harbor's passage, there have also been well over 100 district court opinions, thirty-three of which have come down since the beginning of 2002.[2] The district courts continue to construe the reach of the safe harbor provision almost exclusively in the context of motions to dismiss.[3] It remains to be seen, therefore, how the safe harbor will work when the courts turn to it at the summary judgment stage or at trial.

While some clear lines of precedent and other consistencies in court thinking have emerged, most of the cases remain intensely fact-specific. Even now, more than six years after statute's enactment and with a growing body of case law to draw on in almost every circuit, judges continue to write deceptively long opinions that frequently set out facts in exhaustive detail, yet apply the statute abruptly with rather conclusory reasoning invoking the same language from a small group of earlier precedents.

The Threshold Question: Is the Statement Forward-Looking? Ever since enactment of the statute, the question that has generated the largest volume of case law is whether an issuer's challenged statement is forward-looking or one of historical fact. Nine of the cases decided in the last sixteen months refuse to apply safe harbor provision on the ground that the challenged statements are not forward-looking at all, but rather statements of present or historical fact.[4] Nine courts

[1] For a comprehensive discussion of the statutory structure and the pre-2002 case law, refer to my prior articles. *See* Richard A. Rosen "Safe Harbor for Forward-Looking Statements in the Courts: A Year 2001 Scorecard," 34 SRLR 91 (January 21, 2002), 70 *U.S.L.Week* 2443 (BNA) (January 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 decision and the thirty-three district court cases are listed in Appendix A to this article. The earlier cases are all cited in my "Safe Harbor for Forward-Looking Statements in the Courts: A Year 2001 Scorecard" article.

[3] The sole exception over the last sixteen months is *In re* The Clorox Co. Sec. Litig., 2002 U.S. Dist. LEXIS 22575 (N.D. Cal. Nov. 18, 2002), in which the court granted defendants' summary judgment motion.

[4] *See* No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp., 320 F.3d 920 (9th Cir. 2003) ("America West"); *In re* Viropharma, Inc. Sec. Litig., 2003 WL 1824914 (E.D. Pa. April 7, 2003); *In re* Nortel Networks Corp. Sec. Litig., 2003 WL 42015 (S.D.N.Y. Jan. 6,

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hold that the disputed statements are protected by safe harbor as forward-looking.[5]

Many courts that held that the challenged statements are not forward-looking surely reach the correct result. A statement that "demand remained strong for [company's] products,"[6] a statement that company was leading the industry in growth,[7] or a statement explaining a company's current investment policy[8] clearly are statements about existing, knowable facts. But courts—even at the appellate level—do occasionally apply the statute incorrectly. In *America West*, a case decided just in February 2003, the Ninth Circuit incorrectly ruled that certain projections made by an airline—(1) that the recent settlement of administrative enforcement actions "will not have a material adverse affect on the Company's operations or financial results," and (2) that the airline was not "anticipating any major increase in [costs] ... going forward as a result of" that settlement—were statements of present fact.[9] These pronouncements were predictions of settlement's impact on company's *future* operational costs, the accuracy of which could only be determined after the passage of time, and thus were plainly forward-looking statements.

Many courts will often parse issuer statements clause by clause, making discrete determinations as to the applicability of the safe harbor to each. In *In re Sun Healthcare Group, Inc. Sec. Litig.*,[10] the court examined disclosures made by a health care provider shortly after it had acquired a leading competitor in an effort to increase efficiency and stem revenue losses. The court found that the majority of challenged statements—such as those about company's plans "to integrate promptly [its] operations, facilities and personnel" after the merger, or claims that the new Medicare reimbursement system "will favor [the company's] operating model"—were "clearly" forward-looking.[11] However, the remaining statements were found to concern historical or presently known facts, including the assertion that the company "continued to reduce its cost of operations" and "instituted new operational procedures to neutralize the impact" of Medicare reform on the company.[12]

Similarly, in *In re U.S. Interactive, Inc. Sec. Litig.*,[13] the court correctly held that company's projection that it had sufficient resources to meet its needs for capital in the next eighteen months, was "necessarily a contingent statement" in that it "convey[ed] a hope by corporate managers based on the amount of money that [the company] might obtain through" the secondary offering of its stock.[14] On the other hand, a statement that the company "believed" it possessed technical and marketing skills necessary for business success was found to be a statement of present fact.[15]

Are 'Hybrid' Statements Forward-Looking? Four years ago, in *Ivax v. Harris*,[16] the Eleventh Circuit addressed an important question of first impression: how to categorize a statement that contains both forward-looking and historical or present fact elements. The court considered a list of factors in the company's disclosure document—some containing present assessments of business conditions, others including assumptions about future events. The *Ivax* court adopted a "holistic" approach to forward-looking statements, in contrast to the clause-by-clause determinations in *In re Sun Healthcare Group, Inc. Sec. Litig.* and *In re U.S. Interactive, Inc. Sec. Litig.* Instead of separately parsing individual clauses, the court treated the list as a single "statement" under the PSLRA and accorded this list the protection of the safe harbor. The *Ivax* court based its decision both on a close and sound reading of the statutory language and on the practical understanding that forward-looking *conclusions* can rest on historical observations as well as assumptions about the future.

In two more recent cases, the courts have had occasion to address additional statements including both forward-looking and historical elements. The results are mixed—one decision adheres to the letter and spirit of *Ivax*, the other does neither. In *In re Noven Pharmaceuticals Inc. Sec. Litig.*,[17] a company made several statements in its regulatory filings that mixed together, in single sentences or paragraphs, pronouncements regarding present marketing and distribution of its new product and predictions of expected revenues from that product. The district court followed *Ivax* in holding several of such "hybrid" statements to be forward-looking "because they relate[d] to [the company's] plans, expectations, and optimism concerning the implementation and success of" the agreements to distribute the company's product.[18] The court correctly examined these statements as a whole and took into account the context in which those statements were made.

In *In re Nortel Networks Corp. Sec. Litig.*, however, another court held that a statement that had "both a forward-looking aspect and an aspect that encompasse[d] a representation of present fact" was *not* forward-looking.[19] The only "hybrid" statement

2003); Fidel v. AK Steel Holding Corp., 2002 U.S. Dist. LEXIS 18887 (S.D. Ohio Sept. 19, 2002); *In re* PSS World Medical, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 14887 (M.D. Fla. July 2, 2002); *In re* Lucent Techs., Inc. Sec. Litig., 217 F. Supp. 2d 529 (D.N.J. 2002); *In re* Penn Treaty Am. Corp. Sec. Litig., 202 F. Supp. 2d 383 (E.D. Pa. 2002); *In re* Sunterra Corp. Sec. Litig., 199 F. Supp. 2d 1308 (M.D. Fla. 2002); *In re* Ashanti Goldfields Sec. Litig., 184 F. Supp. 2d 247 (E.D.N.Y. 2002).

[5] *In re* Noven Pharmaceuticals, Inc. Sec. Litig., 238 F. Supp. 2d 1315 (S.D. Fla. 2002); *In re* The Clorox Co. Sec. Litig., 2002 U.S. Dist. LEXIS 22575 (N.D. Cal. Nov. 18, 2002); *In re* Sprint Corp. Sec. Litig., 2002 U.S. Dist. LEXIS 19275 (D. Kan. Sept. 30, 2002); Coble v. Broadvision Inc., 2002 U.S. Dist. LEXIS 17495 (N.D. Cal. Sept. 11, 2002); Meyer v. Biopure Corp., 221 F. Supp. 2d 195 (D. Mass. 2002); *In re* ATI Techs., Inc., Sec. Litig., 216 F. Supp. 2d 418 (E.D. Pa. 2002); *In re* Pacific Gateway Exchange, Inc., Sec. Litig., 2002 U.S. Dist. LEXIS 8014 (N.D. Cal. Apr. 30, 2002); *In re* Nike, Inc. Sec. Litig., 181 F. Supp. 2d 1160 (D. Or. 2002); *In re* Honeywell Int'l Inc. Sec. Litig., 182 F. Supp. 2d 414 (D.N.J. 2002).

[6] Fidel, 2002 U.S. Dist. LEXIS 14887, at *57.

[7] *See In re* Lucent Techs., Inc., Sec. Lit., 217 F. Supp. 2d at 556-57.

[8] *In re* Ashanti Goldfields Sec. Litig., 104 F. Supp. 2d at 267.

[9] America West, 320 F.3d at 936.

[10] 181 F. Supp. 2d 1283 (D.N.M. Jan. 15, 2002).

[11] *Id.* at 1288.

[12] *Id.*

[13] 2002 U.S. Dist. LEXIS 160009 (D. Pa. Aug. 23, 2002).

[14] *Id.* at *20, 33.

[15] *Id.* at *27, 34.

[16] 182 F.3d 799 (11th Cir. 1999).

[17] 238 F. Supp. 2d 1315 (S.D. Fla. 2002).

[18] *Id.* at 1320.

[19] *In re* Nortel Networks Corp. Sec. Litig., 2003 WL 42015 at *12 (S.D.N.Y. Jan. 6, 2002) (internal quotations and citation omitted).

that the judge cited in its opinion was a bullish prediction regarding company's growth prospects: "[b]ased on the momentum we have experienced during the first nine months and the strong order backlog, we continue to expect our percentage growth in 2000 over 1999 will be in the low 40's."[20] But this statement—a forward-looking conclusion based on observations of historical fact—clearly *should* have been considered forward-looking under *Ivax*.

Is the Cautionary Language 'Meaningful'? Defendants continue to obtain mixed results in their efforts to persuade district courts that the safe harbor provision applies because the cautionary language used was sufficiently "meaningful" and related to the prediction at issue. One of the more interesting recent cases is *In re Noven Pharmaceuticals, Inc. Sec. Litig.*[21] In that case, a pharmaceutical company entered into a licensing agreement with its European competitor to distribute a new drug. The company's Form 10-Q disclosure cautioned that its future earnings could be affected by "the recent shortfall in international product orders expected from" that particular European distributor.[22] It later turned out that the distributor/competitor never in fact complied with the contract. The warning was not specific enough, said the court. The judge found that the particular risk stemmed from the fact that the company's distributor, by virtue of its dual role as competitor, had insufficient incentive to distribute its new drug in Europe.[23]

If this were the standard of specificity it would almost never be met. An issuer does not have to anticipate and discuss everything that could conceivably go wrong. Most recent cases that have squarely addressed the issue continue to hold—unlike *Noven*—that it does not matter if the issuer fails to identify *all* factors that could adversely affect its projections, even if the issuer fails to anticipate the particular factor that ends up causing the earnings disappointment.[24] As one court observed, cautionary language "is sufficient when an investor has been warned of risks *similar* to that actually realized so that the investor is on notice of the danger of the investment."[25]

So how far does an issuer have to go in tailoring its risk disclosures to avoid the fatal charge that its cautionary language is mere boilerplate? The decisions do not give a consistent answer, because there is an inevitable element of subjectivity involved in assessing this issue. At one extreme stands *In re Amylin Pharmaceuticals, Inc. Sec. Litig.*,[26] decided in the Southern District of California in October of 2002. The court refused to extend safe harbor protection to the issuer's optimistic statement about the likelihood of obtaining government approval for its new drug and the drug's safety record. These predictions, in the court's view, came without adequate warnings identifying the specific risk factors that could adversely affect both the approval process and the drug's safety. The court characterized cautionary language used by the defendant as "boilerplate," and went on to hold:

> Individuals commonly ignore ... boilerplate warnings. Even if investors read them, merely warning investors that FDA may not approve the drug tells them something they already know. The cautionary language d[id] not warn investors about some of the specific shortcomings of the Phase III trials (i.e. that FDA has suggested the need for additional testing using varying dosages of insulin) or [the new drug's] correlation with severe hypoglycemia.[27]

At the other end of the spectrum is *Meyer v. Biopure Corp.*,[28] in which a company's optimistic assessments that its new drug would be approved by the government were held to be protected because the cautionary language "identif[ied] the risks at issue in the complaint."[29] The language in the press release was found to be sufficiently meaningful because it was geared to, and described with reasonable accuracy, the pitfalls commonly associated with development of a new drug: general problems in development of a new line of products; uncertainty surrounding successful completion of clinical trials; necessity of seeking government approval; and risks associated with market acceptance.[30] The press release also referred the reader to the company's 1934 Act filings and a particular section of its Web site for more detailed descriptions of specific factors that could affect financial performance.[31]

Not surprisingly, the more specific and concrete the projection, the more specific the correlative risk factors have to be. Recent decisions indicate an increased willingness to dismiss a case at an early stage if a court finds that predictions were paired with sufficiently specific warnings.[32]

There are a number of steps issuers can take to maximize the likelihood that their cautionary language will

[20] *Id.* at *11.

[21] 238 F. Supp. 2d 1315 (S.D. Fla. 2002).

[22] *Id.* at 1322.

[23] *Id.* Another recent pronouncement on the meaningfulness issue is found in *In re Nortel Networks Corp. Sec. Litig.*, a January 2003 decision from the Southern District of New York. In that case, the company's press releases incorporated its most recent annual report, which contained warnings about risks from "intense competition in the telecommunications industry, the highly volatile nature of the technology sector, and ... the conditions in the domestic or global economy." *In re* Nortel Networks Corp. Sec. Litig., 2003 WL 42015, at *12 (S.D.N.Y. Jan. 6, 2003). The court rejected application of the safe harbor because these warnings remained overly "generic" in the face of specific risks posed to the company's growth prospects caused by reductions in orders from major customers that occurred after the annual report had been released. *Id.*

[24] *See In re* Nike, Inc. Sec. Litig., 181 F. Supp at 1172; Fidel. 2000 U. S. Dist. LEXIS 18887, at *23; *In re* U.S. Interactive, Inc. Sec. Litig., 2002 U. S. Dist. LEXIS 160009, at *31-32.

[25] *In re* U.S. Interactive, Inc. Sec. Litig. 2002 U.S. Dist. LEXIS 160009, at *32; *see also In re* Nike, Inc. Sec. Litig., 181 F. Supp. 2d at 1172 (relying on *Ivax* in holding that cautionary statement is sufficiently meaningful "as long as the stated and actual risks have similar significance").

[26] 2002 U.S. Dist. LEXIS 19481 (S.D. Cal. Oct. 9, 2002).

[27] *Id.* at *26-27.

[28] 221 F. 2d 195 (D. Mass. 2002).

[29] *Id.* at 201.

[30] *Id.* at 200-201.

[31] *Id.* at 201.

[32] For other examples of cautionary statements that were found to satisfy the safe harbor requirements, *see In re* Noven Pharmaceuticals Inc. Sec. Litig., 238 F. Supp. 2d 1315 (S.D. Fla. 2002); *In re* The Clorox Co. Sec. Litig., 2002 U.S. Dist. LEXIS 22575 (N.D. Cal. Nov. 18, 2002); *In re* Sprint Corp. Sec. Litig., 2002 U.S. Dist. LEXIS 19275 (D. Kan. Sept. 30, 2002); Coble v. Broadvision Inc., 2002 U.S. Dist. LEXIS 17495 (N.D. Cal. Sept. 11, 2002); Meyer v. Biopure Corp., 221 F. Supp. 2d 195 (D. Mass. Sept. 4, 2002); *In re* ATI Techs., Inc., Sec. Litig., 216 F. Supp. 2d 418 (E.D. Pa. 2002); *In re* Pacific Gateway Exchange, Inc., Sec. Litig., 2002 U.S. Dist. LEXIS 8014 (N.D. Cal. Apr. 30, 2002); *In re* Nike, Inc. Sec. Litig., 181 F. Supp. 2d 1160

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pass muster. The company and its counsel should be monitoring the risk disclosures of its competitors, suppliers, and customers. If a competitor has fleshed out a risk factor that your client has ignored, you need to inquire further. Similarly, it is always helpful to review the research reports of the analysts who follow the company. Often, their insights into industry-wide phenomena, and their nonpartisan view of the company and its prospects, will help to identify risk factors that it might be prudent to flag.

Issuers that fail to review and revise their risk factor disclosure quarterly are asking for trouble. It remains a favorite plaintiffs' tactic in support of an argument that the cautionary language is boilerplate to show the judge how many quarters in a row the issuer used identical language, irrespective of changes in its business or in the marketplace.[33] This argument can have a significant impact on the outcome of motions to dismiss.

The 'Accompaniment' and 'Identification' Requirements. Recent cases indicate that the courts are not construing the "identification" requirement with any discernible consistency. Methods of identification upheld by the courts have ranged from explaining, in a separate section entitled "Forward Looking Statements," that certain words, such as "anticipate," "believe" or "estimate," are used to identify forward-looking statements[34] to stating that any pronouncement that is "not strictly historical" may be forward-looking, in a paragraph immediately following such statements.[35]

Issuers can take no comfort that the "identification" test will be applied forgivingly in the crucible of litigation. At least two recent decisions hold that forward-looking statements were never identified as such and that the safe harbor was therefore unavailable.[36]

The "accompaniment" requirement also continues to present a danger to unwary companies. Two recent decisions are the latest in the line of cases that find forward-looking statements ineligible for safe harbor treatment because these statements are not "accompanied" by cautionary language.[37] In *In re Sprint Corp. Sec. Litig.*, the court held that optimistic statements about the proposed merger of two large telecommunications companies were not "accompanied" by the admittedly detailed warnings that were contained in the Joint Proxy Statement released more than seven weeks before the companies made these bullish pronouncements.[38] In *In re Apple Computer, Inc. Sec. Litig.*, the court ruled that cautionary language contained in company's Form 10-K and Form 10-Q filings could not "accompany" subsequent forward-looking statements that were unrelated to any of the disclosures included in those filings.[39]

Several decisions, including one from the District of Maryland in May 2002, *In re Humphrey Hospitality Trust, Inc. Sec. Litig.*,[40] hold that written forward-looking statements need not actually contain the text of the cautionary language, but can incorporate it by reference from other documents.[41] However, this approach remains risky in light of the requirement that the projection be "accompanied" by the risk factors.[42]

Oral Forward-Looking Statements. Several recent cases address the safe harbor for oral statements in detail, in the context of analyst meetings and conference calls.[43] In *Coble v. Broadvision*,[44] decided in September 2002, a district court interpreted, for the first time, the statutory requirement that an oral forward-looking statement be "accompanied" by cautionary language.[45] In that case, a conference call with investment analysts was preceded by a broad cautionary statement that explicitly called the listeners' attention to specific 1934 Act disclosure documents filed by the company. Predictably, the plaintiffs asserted that, at the very time

(D. Or. 2002); *In re* Honeywell Int'l Inc. Sec. Litig., 182 F. Supp. 2d 414 (D.N.J. Jan. 15, 2002).

[33] *See, e.g., In re* Nortel Networks Corp. Sec. Litig., 2003 WL 42015, at *3-4 (S.D.N.Y. Jan. 6, 2003); *cf. In re* Pacific Gateway Exchange, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 8014 (N.D. Cal. April 30, 2002). In that case, the plaintiffs pointed to three consecutive quarterly Form 10-Q disclosures and accompanying press releases in which the projections and cautionary language did not change substantially from one quarter to another. *Id.* at *25-26, *33-34. The court, however, held that the company's annual 10-K report was "replete with warnings about the uncertainty, riskiness, and volatility of the telecommunications business in general and [the company's] bandwidth business in particular." *Id.* at *29.

[34] *In re* U.S. Interactive, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 16009, at *29.

[35] Meyer, 221 F. Supp. 2d 195 at *200-201.

[36] *In re* Honeywell Int'l, Inc. Sec. Litig., 182 F. Supp. 2d at 427; *In re* Sun Healthcare Group, Inc. Sec. Litig., 181 F. Supp. 2d at 1288-89.

[37] *See* Bryant v. Apple South, Inc., 25 F. Supp. 2d 1372, 1382 (M.D. Ga. 1988); Molinari v. Symantec, Inc., 1998 WL 78120, at *5 (N.D. Cal. Feb. 17, 1998).

[38] *In re* Sprint Corp. Sec. Litig., 2002 U.S. Dist. LEXIS 19275, at *74-75.

[39] *In re* Apple Computer, Inc. Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 92, 407, at ¶ 92, 411 (N.D. Cal. April 30, 2003).

[40] 219 F. Supp. 2d 675, 683 (D. Md. May 7, 2002).

[41] *See, e.g., In re* Pacific Getaway Exchange, Inc. Sec. Litig. 2002 U.S. Dist. LEXIS 8014, at *35-36; Karacand v. Edwards, 53 F. Supp. 2d 1236, 1245 (D. Utah 1999).

[42] *In re* Sprint Corp. Sec. Litig., 2002 U.S. Dist. LEXIS 19275, at *74-75.

[43] *See In re* Stone and Webster, Inc. Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 92, 302 (D. Mass. March 28, 2003); *In re* Honeywell Int'l Inc. Sec. Litig., 182 F. Supp. 2d 414 (D.N.J. 2002); *In re* ATI Tech., Inc. Sec. Litig., 216 F. Supp. 2d 418 (E.D. Pa. 2002); Coble v. Broadvision Inc., 2002 U.S. Dist. LEXIS 17495 (N. D. Cal. Sept. 11, 2002); *In re* The Clorox Co. Sec. Litig., 2002 U.S. Dist. LEXIS 22575 (N.D. Cal. Nov. 19, 2002).

[44] 2002 U. S. Dist. LEXIS 17495 (N.D. Cal. Sept. 11, 2002).

[45] 15 U.S.C. § 77z-2(c)(2)(A) (Supp. II 1996) (applying safe harbor protection only if "the oral forward-looking statement is accompanied by a cautionary statement").

that the CEO was reassuring analysts that the next quarter's revenue would be "essentially flat" with the previous quarter, he knew that the company was going to incur substantial additional expenses.[46] The plaintiffs further argued that statutory language, requiring an oral statement to be "accompanied" by a warning that the "*particular* oral statement" is forward-looking, meant that *each* oral projection made during the call must have been paired with meaningful cautionary language.[47] The court disagreed. Recognizing the "absurdity of . . . repeating the warning with every forward-looking statement," the court held that a cautionary statement at the beginning of a conference call would be "sufficient."[48]

The Reform Act also requires that cautionary language that accompanies an oral forward-looking statement must be "contained in a *readily available* written document."[49] In *In re Apple Computer, Inc., Sec. Litig.*,[50] a recent decision from the Northern District of California, a computer manufacturer preceded its growth projections, made during a teleconference with financial analysts, with the statement that "actual trends could differ materially from our forecasts," and referred the analysts indiscriminately to the company's "SEC filings" for additional information.[51] The court characterized such cautionary language as "blanket warnings" insufficient to provide safe harbor protection to the forward-looking statements at issue in that case.[52] Another district court has also ruled that oral statements were not protected by the safe harbor when a company warned vaguely that the discussion "may involve forward-looking statements" and referred the listeners to "the company's filings" for more detailed disclosures, without stating specifically which filings contained these additional disclosures.[53]

Actual Knowledge of Falsity. The "actual knowledge" provision of the safe harbor continues to give difficulty to the courts, even though the language addressing this issue in the statute is clear and unambiguous. Under the statute, a forward-looking statement is not actionable as a matter of law if accompanied by meaningful cautionary language, *irrespective* of whether the defendants knew at the time that the statements were false or did not believe them.

Under a close reading of the safe harbor provision, a defendant that loses on the cautionary language issue—even a company that did not provide cautionary language at all—always has the option of arguing that, in any event, plaintiffs have failed to meet the standard of pleading defendant's actual knowledge of falsity. By now, more than twenty decisions have correctly come out for defendants on this point, with five such rulings in the last fifteen months.[54]

But the converse is *not* true. If plaintiffs *do* adequately allege actual knowledge, some courts hold that the forward-looking statement can give rise to liability, without pausing to consider whether the statement is material or whether it was accompanied with cautionary language. A number of recent decisions reach this troubling result.

In an illustration of how some courts have missed the boat, one district judge recently held that even though financial projections made during a conference call were accompanied by meaningful cautionary language, the claims related to these projections "may survive defendants' motion to dismiss only if plaintiffs have pled facts to show that defendants had actual knowledge that they were false at the time they were made."[55] Another district court denied defendants' motion to dismiss solely because "at this stage of the litigation the [p]laintiffs [had] sufficiently alleged that the [d]efendants made statements with 'actual knowledge' that they were 'false or misleading.' "[56]

Two district judges have stated that "a plaintiff can defeat [the] safe harbor by demonstrating that the statement was made with actual knowledge . . . that . . . [it] was false or misleading."[57] And most recently, the Court of Appeals for the Ninth Circuit in *America West* also observed in dictum that "it is arguable that a strong inference of actual knowledge has been raised [by the plaintiffs], thus, excepting the[] statements from safe harbor rule altogether."[58] But the three branches of the statutory safe harbor are deliberately drafted in the alternative, not the conjunctive. The defendant need only satisfy one of the three prongs, not all three.

As these cases go into discovery, more of them are likely to be disposed of at the summary judgment stage, when defendants will have an additional opportunity to demonstrate that plaintiffs cannot prove actual knowledge of falsity at the time the statement was made. Management and counsel, then, need to retain documents on which the company relied in making the projection, so that if litigation later ensues, it can be shown that the projection had a good faith basis at the time.

'Immaterial' Forward-Looking Statements. A projection is also immunized from liability under the safe harbor if it is immaterial. Six district courts have recently dismissed claims on this ground.[59]

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[46] *Id.* at *9, 25.
[47] *Id.* at *27-28.
[48] *Id.* at *28.
[49] 15 U.S.C. 77z-2(c)(2)(B)(i) (Supp. II 1996).
[50] Fed. Sec. L. Rep. (CCH) ¶ 92, 407 (N.D. Cal. April 30, 2003).
[51] *Id.* at ¶ 92, 411.
[52] *Id.* at ¶ 92, 412.
[53] *In re* ATI Tech., Inc. Sec. Litig. 216 F. Supp. 2d at 442 n. 18. *But see, In re* The Clorox Co. Sec. Litig., 2002 U. S. Dist. LEXIS 22575 at *16-17 (holding as adequate cursory warning that "some of [corporate officer's] statements would be forward-looking" coupled with reference to company's Form 10-K, which contained "additional, albeit general, statements about" potential difficulties with merger).
[54] *See In re* Lockheed Martin Corp. Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 92,424 (C.D. Cal. March 26, 2003); *In re* Commontouch Software Ltd. Sec. Litig., 2002 U.S. Dist. LEXIS 13742, at *42; *In re* ATI Techs., Inc. Sec. Litig., 217 F. Supp. 2d at 442-43; *In re* Nike, Inc. Sec. Litig., 181 F. Supp. 2d at 1170-71; *In re* Sun Healthcare Group Sec. Litig., 181 F. Supp. at 1288-89.
[55] Coble, 2002 U.S. Dist. LEXIS 17495, at *29.
[56] *In re* PSS World Medical Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 14887, at *43.
[57] *In re* Lucent Techs., Inc. Sec. Litig., 217 F. Supp. 2d at 557; *see also In re* Campbell Soup Co. Sec. Litig., 145 F. Supp. 2d 574, 589 (D.N.J. 2001).
[58] America West, 320 F. 3d at 937 n. 15.
[59] *See* Johnson v. Tellabs, Inc., Fed. Sec. L. Rep. (CCH) ¶ 92,423, ¶ 92,427 (N.D. Ill. May 19, 2003); Azurix, 198 F. Supp. 2d at 878, *In re* Humphrey Hospitality Trust, Inc. Sec. Litig., 219 F. Supp. 2d at 680, 682; *In re* ATI Techs., Inc. Sec. Litig., 216 F. Supp. 2d at 441-422; *In re* Commontouch Software Ltd. Sec. Litig., 2002 U.S. Dist. LEXIS 13742, at *42; *In re* U.S. In-

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Issuers have several arguments for immateriality. Vague statements of optimism or mere "puffery" incapable of objective application, such as "we are the only firm that integrates all of [the] skills" necessary for success, have long been held irrelevant to any reasonable investor's decision to buy or sell a security.[60] Stale information is also immaterial.[61]

A district court case from May of 2002 illustrates the potential protective sweep the "immateriality" branch of the statutory test makes available. The Court found pronouncements, such as, " '[w]e look forward to pursuing growth that both increases funds from operations and enhances the dividend stream for our shareholders," to be immaterial as a matter of law because they were "general statements of pride and optimism upon which reasonable investors would not rely."[62]

By contrast, another district court refused to characterize as immaterial puffery the CEO's statement in a newspaper interview that demand for company's products "remained robust and would enable [the company] to regain its momentum swiftly."[63] The speaker made those comments in response to specific questions from reporters and followed his statement immediately with more detailed predictions about company's growth prospects.[64] The court ruled that the CEO's statement did not "appear to be vague or generally optimistic, especially in the light of the context in which it was made."[65]

The Continuing Relevance of Pre-Reform Act Case Law. Pre-Reform Act cases remain helpful, and many judges, in considering the actionability of forward-looking statements, find the earlier decisions illuminating. For instance, cases decided under the "bespeaks caution" doctrine[66] are routinely cited on the issues of whether the cautionary language is sufficiently meaningful, or whether a statement is really forward-looking or one of present fact.[67] The continued relevance of pre-Reform Act cases should not come as a surprise because—as several courts have noted—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,[68] or to a number of entities,[69] one will continue to see cases that rely entirely on the earlier doctrines, even though none of the decisions in the last fifteen months have done so.

Courts have been receptive to the argument that the bespeaks caution doctrine remains vital in cases where the safe harbor provision may be inapplicable for purely technical reasons, *e.g.*, if an oral statement doesn't expressly refer to the public documents containing the requisite risk disclosure, but is nevertheless qualified by other publicly available information.[70] Applying the bespeaks caution doctrine, a district court recently held, in the alternative, that certain financial projections made during a conference call were rendered immaterial by both sufficiently meaningful warnings and public information available to the investors.[71] As the Court noted, this doctrine "remains alive even after Congress's passage of the safe harbor."[72] However, the bespeaks caution doctrine does not provide any *additional* protection to those forward-looking statements that already come within the ambit of safe harbor provision.[73]

Conclusion. Courts continue to apply inconsistently the safe harbor provision to an issuer's forward-looking statements, as many decisions are driven by the specific facts of a particular case. Nevertheless, more than six years after the enactment of PSLRA, some trends in the case law have emerged. These trends should give some guidance to counsel in advising issuer clients on how to mitigate against litigation risk in their forward-looking disclosures.

Appendix A

Cases Construing and Applying the Safe Harbor From January 2002 Through April 2003. No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp., 320 F.3d 920 (9th Cir. 2003); Johnson v. Tellabs, Inc., Fed. Sec. L. Rep. (CCH) ¶ 92,423 (N.D. Ill. May 19, 2003); In re Apple Computer, Inc. Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 92,407 (N.D. Cal. April 30, 2003); *In re* Newpower Holdings, Inc. Sec. Litig., No. 02 Civ. 1550 (S.D.N.Y. April 16, 2003); *In re* Viropharma, Inc. Sec. Litig., 2003 WL 1824914 (E.D. Pa. April 7, 2003); *In re* Stone & Webster, Inc. Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 92,302 (D. Mass. March 28, 2003); *In re* Lockheed Martin Corp. Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 92,424 (C.D. Cal. March 26, 2003); *In re* Nortel Networks Corp. Sec. Litig., 2003 WL 42015 (S.D.N.Y. Jan. 6, 2003); *In re* Noven Pharmaceuticals Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 25293 (S.D. Fla. Dec. 20, 2002); *In re* The Clorox Co. Sec. Litig., 2002 U.S. Dist. LEXIS 22575 (N.D. Cal. Nov. 18, 2002); Shaev v. Hampel, 2002 U.S. Dist. LEXIS 20497 (S.D.N.Y. Oct. 25, 2002); *In re* Amylin Pharmaceuticals, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 19481 (S.D. Cal. Oct. 9, 2002); *In re* Applied Micro Circuits Corp. Sec. Litig., 2002 U.S. Dist. LEXIS 22403 (S.D. Cal. Oct. 3, 2002); *In re* Sprint Corp. Sec. Litig., 2002 U.S. Dist. LEXIS 19275 (D. Kan. Sept. 30, 2002); Fidel v. AK Steel Holding Corp., 2002

teractive, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 16009, at *20-21, 34.

[60] *In re* U.S. Interactive, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 16009, at *20-21, 34; *see also* Johnson at ¶ 92,427.

[61] *See, e.g., In re* Kidder Peabody Sec. Litig., 10 F. Supp. 2d 398, 412 (S.D.N.Y. 1998).

[62] *In re* Humphrey Hospitality Trust Inc. Sec. Litig. 219 F. Supp. 2d at 680, 682.

[63] *In re* Lucent Techs., Inc. Sec. Litig., 217 F. Supp. 2d at 548.

[64] *Id.*

[65] *Id.* at 558.

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

[67] *See, e.g., In re* Amylin Pharmaceuticals, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 19481, at *28.

[68] 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).

[69] The safe harbor provision does not cover such entities as limited liability corporations ("LLCs") and partnerships. *See id.*

[70] For an earlier detailed discussion of the applicability of bespeaks caution doctrine, *see* E.P. Medsystems, Inc. v. EchoCath, Inc., 235 F.3d 865 (3d Cir. 2000).

[71] *In re* ATI Techs., Inc. Sec. Litig., 216 F. Supp. 2d at 442-43.

[72] *Id.* at 442 n. 17.

[73] *See In re* Amylin Pharmaceuticals, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 19481, at *28 (holding that "the bespeaks caution doctrine does not further insulate [defendants'] statements").

U.S. Dist. LEXIS 18887 (S.D. Ohio Sept. 19, 2002); Coble v. Broadvision Inc., 2002 U.S. Dist. LEXIS 17495 (N.D. Cal. Sept. 11, 2002); Meyer v. Biopure Corp., 221 F. Supp.2d 195 (D. Mass. Sept. 4, 2002); *In re* U.S. Interactive, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 16009 (D. Pa. Aug. 23, 2002); *In re* Commontouch Software Ltd. Sec. Litig., 2002 U.S. Dist. LEXIS 13742 (N.D. Cal. July 24, 2002); *In re* ATI Techs., Inc., Sec. Litig., 216 F. Supp.2d 418 (E.D. Pa. July 23, 2002); *In re* Lockheed Martin Corp. Sec. Litig., Fed. Sec. L. Reps. (CCH) ¶ 92,298 (C.D. Cal. July 22, 2002); *In re* PSS World Medical, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 14887 (M.D. Fla. July 2, 2002); *In re* Lucent Techs., Inc. Sec. Litig., 217 F. Supp.2d 529 (D.N.J. June 26, 2002); Rombach v. Chang, 2002 U.S. Dist. LEXIS 15754 (E.D.N.Y. June 7, 2002); *In re* Penn Treaty Am. Corp. Sec. Litig., 202 F. Supp.2d 383 (E.D. Pa. May 15, 2002); *In re* Humphrey Hospitality Trust, Inc. Sec. Litig., 219 F. Supp.2d 675 (D. Md. May 7, 2002); *In re* Pacific Gateway Exchange, Inc., Sec. Litig., 2002 U.S. Dist. LEXIS 8014 (N.D. Cal. Apr. 30, 2002); *In re* Azurix Corp. Sec. Litig., 198 F. Supp.2d 862 (S.D. Tex. Mar. 20, 2002); *In re* Sunterra Corp. Sec. Litig., 199 F. Supp.2d 1308 (M.D. Fla. Mar. 12, 2002); *In re* Ashanti Goldfields Sec. Litig., 184 F. Supp.2d 247 (E.D.N.Y. Feb. 13, 2002); *In re* Smith-Gardner Sec. Litig., 214 F. Supp.2d 1291 (S.D. Fla. Feb. 5, 2002); *In re* AT&T Corp. Sec. Litig., 2002 U.S. Dist. LEXIS 22219 (D.N.J. Jan. 28, 2002); *In re* Nike, Inc. Sec. Litig., 181 F. Supp.2d 1160 (D. Or. Jan. 25, 2002); *In re* Honeywell Int'l Inc. Sec. Litig., 182 F. Supp.2d 414 (D.N.J. Jan. 15, 2002); *In re* Sun Healthcare Group, Inc. Sec. Litig., 181 F. Supp.2d 1283 (D.N.M. Jan. 15, 2002).

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