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SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS IN THE COURTS: A YEAR 2001 SCORECARD

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The Private Securities Litigation Reform Act (PSLRA) includes a safe harbor provision for forward-looking statements, which was designed to protect public companies from liability for making what turn out to be overly optimistic predictions about future performance.[1] Despite the passage of five years since the statute was enacted, it remains unclear whether issuers are taking full advantage of the opportunity to apprise the market of their projections of future performance. In no small part, the reticence about providing detailed soft information is attributable to the lively aggressiveness of the plaintiffs' class action bar.

Although some believed that passage of the PSLRA would significantly deter securities fraud lawsuits, those hopes proved ephemeral. Calendar year 2001 witnessed a record number of such cases.[2] To be sure, the types of cases being filed have undoubtedly been shaped by the PSLRA and the judicial precedents that have accumulated. Far fewer cases are founded merely on the claim that the issuer's optimism was unfounded and that the company knew (or was reckless in disregarding) the bad news long before it was disclosed to the market.

Nevertheless, the safe harbor shouldn't be misunderstood as providing immunity from lawsuits when an issuer's optimistic statements about the future have been belied by subsequent events. The reality is that, although suits involving restatements of earnings and inside trading make up a larger percentage of the volume of new cases than in the past, there are still more than enough suits in which the issuer's compliance—or failure to comply—with the safe harbor is a central question. This article takes a hard look at the most recent judicial decisions in this area.

An Overview of the Statute and Recent Case Law

Under the safe harbor, 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 statements.[3] Virtually every element of the statutory scheme has, by now, been heavily litigated. We are in a position to see how, in very practical terms, the safe harbor is working.

There have been now five Court of Appeals decisions since the enactment of the PSLRA, two of them decided in the last year.[4] Since the safe harbor's passage, there have also been just over one hundred district court opinions, thirty-nine of which have come down since the fall of 2000.[5] These district court rulings, it should be stressed, construe the scope of the safe harbor provision almost exclusively in the context of motions to dismiss,[6] it therefore remains to be seen how the safe harbor will work with regularity at the summary judgment stage or at trial.

What do these decisions tell us about the parameters and meaning of the safe harbor provision? And what is the significance of the fact that in twenty-three of the thirty-nine most

recent reported district court cases the defendants lost all or part of their motion to dismiss? Does this mean that the safe harbor provision does not work? Or, put another way, do the adverse rulings shed light on the limits of the protection the statute affords—and thus on the reluctance of many issuers to provide the market with detailed forward-looking information about their business?

While some trends and consistencies have emerged, most of the cases are intensely fact-specific. Moreover, even now, five years after the statute's enactment and with a long string of precedents in almost every circuit to draw on, too often judges, despite writing deceptively long opinions, cite the same materials from the legislative history (and the same general language from the same earlier cases) over and over. The application of the statute to the facts continues to be abrupt and rather conclusory.

This in itself provides us with a clue as to what is happening when lawyers advise clients on how to take advantage of the safe harbor. Beyond broad generalizations that they can deduce from the cases, because the decisions tend to be tied to idiosyncratic facts, many practitioners feel insufficient confidence that the risk disclosures they craft will indeed be bullet-proof if a projection later becomes the subject of litigation. From an advisory and corporate strategy standpoint, it is worrisome that courts are still not being entirely consistent, which perpetuates some unpredictability.

Nevertheless, my own view is that important lessons can be deduced and that in early 2002 there is a much greater ability to predict whether a forward-looking statement will be protected or not. The judgment calls that must be made in the field are no more difficult (and in some ways easier) than calls on questions of materiality. As the body of case law grows and as competitors make more meaningful forward-looking disclosures, gradually more such genuinely informative disclosures will be a standard feature of public company filings.

The Threshold Question: Is the Statement Forward-Looking?

Fourteen of the cases decided in the last fifteen months reject application of the safe harbor provision on the ground that the challenged statement is not forward looking at all, but rather a statement of present or historical fact.[7] Many of these cases surely are decided correctly. Thus, for example, a claim that synergies and cross-selling opportunities had been created as a result of an acquisition[8] or statements regarding the company's current financial status, its past decisions and past performance[9] clearly are statements about the past or present, the truth of which can be tested without regard to what happened at a later time.[10] By contrast, one case reinforced the troubling precedent of finding that statements regarding the adequacy of financial reserves are not forward-looking.[11] This finding is unfortunate, given that a reserve reflects a projection of future liability costs.[12]

Determining whether a statement is about present or historical fact, or is instead a projection, is not always easy. The issue will continue to bedevil the courts for a long time to come. One of the best analyses of the fact vs. projection issue is found in the increasingly relied-upon decision of the 11th Circuit Court of Appeals, *Harris* v. *Ivax Corp.*[13] The Court wrote:

> The August 2, 1996 press release also announced optimistically that "the challenges unique to this period in our history are now behind us." Taken in context, this statement is forward-looking. The two paragraphs of the press release preceding this statement describe two problems that contributed to a loss in the second quarter: excessive customer inventories, which reduced new orders, and a technical default in a revolving credit facility. Both problems, the statement said, were being resolved; inventories were becoming depleted, and the bank syndicate was expected to waive the default. Thus the chairman and CEO announced that things were looking up.
>
> "Forward looking statements" include "statements of future economic performance." 15 U.S.C. § 75u-501(i)(C). The chairman and CEO's hopeful conclusion that conditions are better because of two anticipated improvements in business conditions is a prediction of economic performance, however couched. The plaintiffs' purely grammatical argument to the contrary—that a present-tense statement cannot predict the future—is unpersuasive; a statement about the state of a company whose truth or falsity is discernible only after it is made necessarily refers only to future performance. Whether the worst of *Ivax's* challenges were behind it was a matter verifiable only after the chairman so declared. This statement was thus forward-looking and in the safe harbor.[14]

The Eleventh Circuit in *Ivax* also addressed a question of first impression. One of the disclosures in controversy was a press release that contained a list of factors that were expected to influence the company's results. Some factors involved business conditions that had already been observed by the company (*e.g.*, "prices have continued to decline"). Observed facts of this type are not assumptions and are not predictions, but other factors on the list did represent assumptions about future events. The claim in the case was that the list as a whole, misled anyone who was seeking an explanation of the company's projections because the list omitted an important factor—the plaintiff's claim was that the company expected a significant write down of its good will, but failed to disclose it. The Court therefore had to decide whether the safe harbor protects the entire list of factors, or only individual subparts.

The Court concluded that, since the allegation was that the whole list was misleading, it would make no sense to "slice the list into separate sentences." Rather, the list became a "'statement" within the meaning of the Reform Act, and thus had to be analyzed as a unit. The Court went on to reason that the list must either be forward-looking or not forward-looking in its entirety and concluded that the entire list must be accorded "forward-looking treatment," both because the statute does not distinguish between misleading statements and misleading omissions and for the practical reason that forward-looking *conclusions* can request both on historical observations and assumptions about the future. If, the Court said,

lists that incorporated both factual and forward-looking factors were outside the scope of the safe harbor, issuers would be inhibited from fully explaining the reasons for their expectations.[15]

It is a measure of the soundness of the reasoning in *Ivax* that it has been cited positively in at least twenty decisions, including both new Court of Appeals cases, construing the PSLRA since August of 2000. Five of those cases cite it specifically for its ruling that present tense statements can pertain to future performance,[16] and another five cite it for its holding that a section of mixed present and future statements must be taken as a whole.[17] But the trick is still to apply the *Ivax* generalizations correctly. One recent ruling that is not very *Ivax*-like involved defendant's statements that it was "on track" to meet financial expectations.[18] The Court held that the statements were about current business conditions, even though they would seem to meet *Ivax'*s criterion: "a statement about the state of a company whose truth or falsity is discernible only after it is made."[19]

Moreover, there are some recent cases that, while not expressly disagreeing with the reasoning of *Ivax*, do not actually follow *Ivax's* ruling that statements must be viewed in the context in which they were made and taken together. For example, in *Holmes* v. *Baker*,[20] the court ruled "after a review of the statements in the complaint, that the great majority of the statements alleged in the complaint do not give rise to the protection of the Reform Act's safe harbor provision."[21] It seems that the *Holmes* Court didn't really consider the context in which the statements were made, but only looked at each statement in isolation.

Similarly, in *In re:* Ribozyme, the plaintiffs alleged that "at least part of the Press Release upon which they relied concerned purported historical fact."[22] Defendants pointed out that the press release states that their "history-making leap . . . may be of great significance to cancer patients everywhere" and thus that this forward-looking clause rendered the other statements in the press release forward-looking as well.[23] Under *Ivax*, defendants' argument should probably have passed muster, because, as stated above, forward-looking *conclusions* can rest both on historical observations and assumptions about the future. However, the court in *Ribozyme* dissected the press release, stating that "'both clinical history and industry news,' and a 'history-making leap,' are not necessarily forward-looking given the full context of the Press Release," while concluding that the "may be of great significance" statement was forward-looking.[24] Therefore, the court decided that the safe harbor for forward-looking statements did not apply.[25]

Why is it that many of the safe harbor cases turn out to be about statements of *present* fact? It is evident that the plaintiffs' bar is continuing to do a good job of "picking its spots." Defendants, by contrast, don't have that luxury. Indeed, it would appear that defendants are routinely invoking the safe harbor provision even in situations where the argument is very weak. There is an enormous incentive to move to dismiss every complaint because filing such a motion triggers the automatic stay of discovery. Defendants, it appears, thus continue to feel compelled to raise the issue at every turn.

By the same token, this means that those advising companies should not overreact and conclude that it is too dangerous to permit their clients to make projections. The "scorecard" on this issue does not mean that the safe harbor provision is not working. It *does* mean that

companies cannot take false comfort that statements whose truth or falsity can be ascertained based on what is *presently* known will somehow be allowed to sail into the safe harbor.

Is the Cautionary Language 'Meaningful'?

Defendants continue to have had 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 most illuminating cases on this issue remains *In re:* Boeing Securities Litigation, decided in the Western District of Washington in September of 1998, the Paleozoic era so far as the safe harbor is concerned. The Court rejected safe harbor protection for the issuer's forward-looking statement that it was "making progress in improving efficiency" because there were no warnings identifying the specific risk factors that could adversely affect the company's development of systems to improve efficiency. By characterizing other cautionary language as boilerplate, the Court put real teeth into the requirement that cautionary statements be tailored to each projection.[26]

Another "meaningfulness" question arose in Helwig II, in which the Sixth Circuit rejected application of the safe harbor because defendant Vencor's warnings in 10-K and 10-Q filings grew increasingly vague regarding proposed Budget Act legislation that actually was becoming more concrete and potentially harmful as it neared enactment.[27]

> In Its first- and second-quarter filings of 1997, the company stated only that it could not predict the form, effect, or likelihood of any proposed legislation. Substantially similar language also appeared in Vencor's 10-K filings from 1995, 1994 and 1993. . . . Vencor's blanket statements concerning pending legislation offered investors no guidance about the consequences of health care reform upon the company's business. These statements were not meaningful and hardly even cautionary. Accordingly, they are not sheltered by the safe harbor provided by the PSLRA.[28]

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 courts are not consistent, perhaps because there is an inevitable element of subjectivity involved in assessing this issue. At one extreme, in *Kensington Capital Management* v. *Oakley, Inc.*,[29] the Company's prospectus warned that its new product, X Metal, could be delayed because of the complexity of its design and the processes needed to manufacture it. Not good enough, said the Court. The judge found that this was merely a generic warning that was not sufficiently related to the characteristics of the specific product which plaintiffs alleged required the adoption of a costly new production technology.[30]

In sharp contrast, in *Ivax*, the company's optimistic statements about its future performance in the generic drug industry were held to be protected because the Issuer identified "in detail what kind of misfortunes could befall the company and what the effect could be."[31] Thus, the company's cautionary language was found to be sufficiently meaningful because it was tailored to and described with some precision (and, as it turns out,

prescience!) the problems of the generic drug industry in which it was competing: increased competition, the purchasing decisions of existing customers, volatility in the industry, and the unpredictability of the degree and timing of price competition.[32] "[P]ress releases warned that the projections contained within them could be materially affected by, among other things, increased competition and the purchasing decisions of existing customers, the volatile nature of the generic drug industry itself and the unpredictability of the degree and timing of price competition, the speed of the restructuring of the production facilities, mistaken estimates and assumptions concerning customer inventory shelf stock adjustments, as well as [other factors incorporated by reference from SEC filings]."[33]

The Eleventh Circuit's decision in *Ehlert*[34] is one of the most recent—and most well thought out—discussions of this issue:

> We conclude that there was meaningful cautionary language in the prospectus to put investors on notice that Version 8 was not Year 2000 compliant and that Version 8 users needed to purchase Version 9 in order to have a Year 2000 compliant Medical Manager program. Investors were also warned that non-Year 2000 compliant software, such as Version 8, could "fail or produce erroneous results;" that "difficulties . . . [with respect to] customer requests to upgrade to Version . . . could [have] a material adverse impact on the Company's . . . operations, financial condition or business;" and that "failures . . . traceable to the Year 2000 issue could result in product liability or breach of contract claims against the Company." Given the statement in the prospectus that MMC "encouraged users of pre-Version 9 versions of the Medical Manager software to upgrade to Version 9 in order to become Year 2000 compliant," and absent any allegation that it was the industry-wide norm for companies to provide free support and upgrade services to non-Year 2000 compliant software, we conclude that there was meaningful cautionary language to warn investors that there were risks to MMC's existing products created by the Year 2000 problem and that MMC would not provide free Year 2000 compliant upgrades to Version 8 users.[35]

Not surprisingly, then, the more specific and concrete the projection, the more specific the correlative risk factors have to be.[36] This is also the area where careful drafting can have the biggest impact on the outcome.

There are a number of steps prudent counsel can take to maximize the likelihood that the cautionary language will pass muster. The company and its counsel should be monitoring the risk disclosures of its competitors, suppliers and customers. If a competitor has highlighted 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 more distanced view of the company and its prospects, will help identify risk factors that it might be prudent to flag.

Issuers that fail to review and revise their risk factor disclosure quarterly are plainly asking for trouble. It has become 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 charges in its business or in the marketplace.

This does not mean that an Issuer has to anticipate and discuss everything that could conceivably go wrong. The cases that have squarely addressed the issue—including those from the Eleventh Circuit Court of Appeals—correctly hold 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.[37] But, as a practical matter, this rule provides little solace. If the risk that comes to pass has a sufficiently material impact on the company, there is going to be a strong tendency for a court to find that it was unreasonable not to have anticipated it and thus to have identified it in advance.

The 'Identification' and 'Accompaniment' Requirements

The recent cases seem to indicate that the courts are not consistently construing the "identification" requirement strictly. While it is true that some courts have refused to apply the safe harbor provision because the forward-looking statement wasn't "identified" as such,[38] rigorous application of the identification requirement is not a conspicuous feature of the more recent cases. It appears that in most recent cases, judges have been increasingly willing to take it upon themselves to interpret the statement and make a determination as to whether it is forward-looking, at least if the statement is, to the ordinary reader, forward-looking on its face.[39]

But so far, the results are a matter of the luck of the draw, not doctrine. Issuers can take no comfort that the "identification" test will be applied forgivingly in the crucible of litigation and must continue to insulate themselves by clearly identifying every forward-looking statement as such. For example, the court in *Manavazian* v. *Atec Group, Inc.* plainly states that one of the primary grounds for defendant's loss on its motion to dismiss was because defendant's statements were not identified as forward-looking.[40]

The "accompaniment" requirement also continues to present a danger to unwary companies. Courts have found statements ineligible for safe harbor treatment because the forward-looking statement was not "accompanied" by cautionary language.[41] Although one court has recently held that written forward-looking statements need not actually contain the text of the cautionary language, but can incorporate it by reference from other documents, this remains a high risk drafting approach in light of the requirement that the projection be "accompanied" by the risk factors.[42] Furthermore, none of the cases examined in this article have cited that case for its holding in this regard. Another court found that the cautionary statements that defendants included in their 1997 prospectus would *not* qualify as language "accompanying" earnings predictions made in 1998 and 1999.[43] Yet another court did not take issue with incorporation by reference *per se*, but still denied defendant's motion because

defendants did not argue that the referenced language in the defendant's publicly filed records contained any information regarding how the launch of defendant's internet business might be delayed.[44]

Oral Forward-Looking Statements

In the context of informal communications like press releases and oral statements, senior management needs to be reminded to be especially careful. It is essential for a company official to issue a cautionary announcement at the beginning of every analyst conference call, or require callers to hear such a message (perhaps from the company's investment relations officer) in the course of the call-in procedure.

A couple of cases have addressed the safe harbor for oral statements in detail, in the context of analyst conference calls.[45] The most illuminating is still *Karacand* v. *Edwards*, decided in June 1999.[46] The company made a number of very bullish statements concerning its future level of production and sales on a conference call with analysts. Predictably, the complaint asserted that, at that very time, demand was weakening and sales were declining. But the Court relied upon the fact that the company had properly invoked the statutory safe harbor at the beginning of the conference call, explicitly drew the listeners' attention to its 1934 Act disclosure documents, and even cautioned the analysts in the course of the call itself not to rely on backlog numbers as a good predictor of future results.

Actual Knowledge of Falsity

The "actual knowledge" provision of the safe harbor continues to trouble the courts, but to a lesser extent than in the early years. As a starting point, we note that under a close reading of the safe harbor statutory provision, a company that loses on the cautionary language issue (or which failed to use cautionary language in the first place) 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, over a dozen courts have correctly held for defendants on this alternative theory, including the Third Circuit.[47]

In several decisions, in which the plaintiffs were found to have failed adequately to allege actual knowledge of the falsity of defendants' forward-looking statements, the Court dismissed without further inquiry into the adequacy of the cautionary language.[48] These cases, too, are correctly decided.

But the converse is *not* true. If plaintiffs *do* adequately allege actual knowledge, some courts have recently held 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. This is where the courts are running into trouble.

Courts are still having difficulty with one of the most critical elements of the safe harbor provision—the fact that a forward-looking statement is non-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.

In an illustration of how courts have gone off the tracks, one district judge held that, even though the company's earnings forecast was a forward-looking statement within the meaning of the Reform Act, and even though it was accompanied by appropriate cautionary language, the motion to dismiss had to be denied.[49] The court reasoned that the plaintiffs had adequately alleged that defendants had disseminated the earnings forecasts at issue at a time when they had actual knowledge that the quarter would really turn out much worse. Another district judge noted in dictum that, even assuming the statements at issue were forward-looking, they were not protected by the safe harbor because they were not "'accompanied by meaningful cautionary statements.'"[50] A third problematic ruling came down in *Ruskin* v. *TGI Holdings, Inc*. ("TGI II"), in which the Court, in dealing with a forward-looking statement, stated that "cautionary language does not protect material misrepresentations or omissions when defendants knew they were false when made" and denied application of the safe harbor.[51]

These cases are clearly wrongly decided. At least six other district courts have ruled in accordance with this rather plainly erroneous rule.[52] One of them plainly stated that "a plaintiff can defeat the safe harbor by demonstrating that the statement was made with actual knowledge . . . that the statement was false or misleading."[53] 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 demonstrate that plaintiffs cannot prove actual knowledge of falsity at the time the statement was made. For management and counsel, this translates into an imperative 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.

The Continuing Relevance of Pre-Reform Act Case Law

Many courts, in considering the actionability of forward-looking statements continue to find pre-Reform Act cases helpful. For example, cases decided under the "bespeaks caution" doctrine[54] are routinely cited on the issue of whether a statement is really forward-looking or one of present fact, or whether the cautionary language is sufficiently meaningful.[55] This shouldn't be surprising since—as several courts have observed—the Reform Act in many respects codified prior law. Moreover, because the safe harbor provision doesn't apply by its terms to various transaction types, such as IPOs, rollups, and tender offers, or to various entities, like LLCs and partnerships, one still sees cases that rely entirely on these judicially developed doctrines.[56]

Courts are receptive to the argument that the safe harbor provision did not supplant the bespeaks caution doctrine 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.[57]

Defendants can still argue, under such circumstances, that the statement is protected under the bespeaks caution doctrine. There also have been a few cases that apply the safe harbor provision and the bespeaks caution doctrine to the same statement.[58]

'Immaterial' Forward-Looking Statements

The "immateriality" doctrine is flourishing, as well. Many courts have dismissed claims on this ground without referring to the statutory safe harbor, in which this judge-made rule has now been adopted by Congress.[59] I believe that the legislatively adopted immateriality test will become increasingly important. A projection that doesn't meet any of the requirements of the other prongs, *e.g.*, even if it is not accompanied by any cautionary language, can still be immunized from liability if it is immaterial.

Issuers have several arguments for immateriality. Vague statements of optimism or mere puffery incapable of objective application, such as "the company is well positioned for growth," have long been held irrelevant to any reasonable investor's decision to buy or sell a security.[60] Stale information is also immaterial.[61] Perhaps more importantly, the materiality requirement can be a mechanism to raise the "truth on the market" defense, that all the information available, from whatever source, apprised the market of appropriate valuation and thus rendered any optimistic statement immaterial. At least seven post-Reform Act cases appear to apply the immateriality doctrine as codified.[62]

A recent district court case illustrates the potential protective sweep the immateriality prong offers. There, the Court found statements such as, "'we look forward to higher revenue and loan volume for the remainder of fiscal 1998'" to be so "vague and optimistic" as to be immaterial as a matter of law.[63]

Note should be taken of a potentially powerful, but anomalous, immateriality decision issued by the Sixth Circuit in Helwig I[64]." There, the Court, without explicitly announcing that it was proceeding under the "immateriality" prong of the safe harbor, held that forward-looking statements were insulated by the safe harbor simply because they were "soft information" about potential earnings and projected growth. The Court stated simply that "soft information" is not actionable.[65] I would suggest caution in citing this case for such a broad proposition—and I certainly would not use it as a guidepost in counseling clients. The Court seems to have leapt from the observation that there is no obligation to disclose soft information—which itself is not always true—to the conclusion that if soft information is disclosed, it is never actionable—an observation that is plainly false. Indeed, none of the cases within the last fifteen months cited in this article cite Helwig I for this aspect of its holding.

Conclusion

Notwithstanding the Private Securities Litigation Reform Act, an issuer's forward-looking statements continue to give rise to a significant volume of class action litigation. As case law develops, however, counselors can have greater confidence that forward-looking statements can be drafted to fall within the protective ambit of the safe harbor.

Appendix A

District Court Cases Construing and Applying the Safe Harbor Through August 2000.

Ruskin v. *TIG Holdings, Inc.*, 2000 WL 1154278 (S.D.N.Y. Aug. 14, 2000); *Cheney* v. *Cyberguard Corp.*, 2000 WL 1140306 (S.D. Fla. Jul. 31, 2000); *In re:* Theragenics Corp. Sec. Litig., 2000 WL 1028754 (N.D. Ga. Jul. 20, 2000); *In re:* Staffmark Inc. Sec. Litig., 2000 U.S. Dist. LEXIS 10023 (D. Ark. June 30, 2000); *Bryant* v. *Apple South, Inc.*, 100 F. Supp.2d 1368 (June 23, 2000); *In re:* Cell Pathways, Inc. Sec. Litig., 2000 WL 805221 (E.D. Pa. June 20, 2000); *Chu* v. *Sabratek Corp.*, 100 F. Supp.2d 827 (N.D. Ill. June 13, 2000); *Sherleigh Associates, LLC* v. *Windmere-Durable Holdings, Inc.*, 2000 U.S. Dist. LEXIS 9772 (S.D. Fla. June 8, 2000); *In re:* The Vantive Corp. Sec. Litig., 2000 WL 960114 (N.D. Cal. May 19, 2000); *In re:* Milestone Scientific Sec. Litig., 103 F. Supp.2d 425 (D.N.J. May 31, 2000); *In re:* Ciena Corp. Sec. Litig., 99 F. Supp.2d 650 (D. Md. May 15, 2000); *Fellman* v. *Electro Optical Systems Corp.*, 2000 U.S. Dist. LEXIS 5324 (S.D.N.Y. Apr. 25, 2000); *In re:* World Access, Inc. Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 90,941 (D. Ga. Mar. 28, 2000); *In re:* Engineering Animation Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 90,945 (D. Iowa Mar. 24, 2000); *Ehlert* v. *Singer*, 85 F. Supp.2d 1269 (M.D. Fla. 1999); *In re:* BankAmerica Corp., 78 F. Supp.2d 976 (E.D. Mo. 1999); *In re:* Sunbeam Sec. Litig., 89 F. Supp.2d 1326 (S.D. Fla. 1999); *In re:* APAC Teleservices, Inc. Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶90,705 (S.D.N.Y. Nov. 19, 1999); *Griffin* v. *GK Intelligent Systems, Inc.*, 87 F. Supp.2d 684 (S.D. Tex. 1999); *In re:* Quintel Entertainment Inc. Sec. Litig., 72 F. Supp.2d 283 (S.D.N.Y. 1999); *Buck* v. *Piercing Pagoda, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 90,670 (E.D. Pa. 1999); *In re:* Stratosphere Corp. Sec. Litig., 66 F. Supp.2d 1182 (D. Nev. 1999); *Ruskin* v. *TIG Holdings*, Fed. Sec. L. Rep. (CCH) ¶90,657 (S.D.N.Y. 1999); *In re:* Manugistics Group, Inc. Securities Litigation, Fed. Sec. L. Rep. (CCH) ¶ 90,638 (D. Md. Aug. 6, 1999); *In re:* Cendant Corp. Sec. Litig., 60 F. Supp.2d 354 (D.N.J. 1999); *In re:* 3Com Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 90,522 (N.D. Cal. July 8, 1999); *Andrews* v. *Green*, 1999 WL 2003408 (D. Me. June 11, 1999); *Karacand* v. *Edwards*, 53 F. Supp.2d 1236 (D. Utah 1999); *In re:* Oxford Health Plans, Inc. Sec. Litig., 187 F.R.D. 133 (S.D.N.Y. 1999); *P. Schoenfeld Asset Management, LLC* v. *Cendant Corp.*, 47 F. Supp.2d 546 (D.N.J. 1999); *In re:* Ceridian Corp. Sec. Litig., 1999 U.S. Dist. LEXIS 15611 (D. Minn. Mar. 29, 1999); *In re:* PLC Systems, Inc. Sec. Litig., 41 F. Supp.2d 106 (D. Mass. 1999); *Leventhal* v. *Tow*, 48 F. Supp.2d 104 (D. Conn. 1999); *In re:* Physician Corp. of America Sec. Litig., 50 F. Supp.2d 1304 (S.D. Fla. 1999); *In re:* Aetna Inc. Sec. Litig., 34 F. Supp.2d 935 (E.D. Pa. 1999); *In re:* Home Health Corp. of America Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 90,414 (E.D. Pa. Jan. 29, 1999); *Copperstone* v. *TCSI Corp.*, 1999 U.S. Dist. LEXIS 20978 (N.D. Cal. Jan. 19, 1999); *Kensington Capital Mgmt.* v. *Oakley, Inc.*, Fed. Sec. L. Rep. (CCH) ¶90,411 (C.D. Cal. Jan. 14, 1999); *Lister* v. *Oakley, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 90,411 (C.D. Cal. Jan. 14, 1999); *Schaffer* v. *Evolving Sys., Inc.*, 29 F. Supp.2d 1213 (D. Colo. 1998); *Walsingham* v. *Biocontrol Tech., Inc.*, 66 F. Supp.2d 669 (W.D. Pa. 1998); *Allison* v. *Brooktree Corp.*, 1998 U.S. Dist. LEXIS 21859 (S.D. Cal. Nov. 25, 1998); *In re:* MobileMedia Sec. Litig., 28 F. Supp.2d 901 (D.N.J. 1998); *EP Medsystems, Inc.* v. *EchoCath, Inc.*, 30 F. Supp.2d 726 (D.N.J. 1998); *Robertson* v. *Strassner*, 32 F. Supp.2d 443 (S.D. Tex. 1998); *In re:* Employee Solutions Sec. Litig., 1998 WL 1031506 (D. Ariz. Sept. 22, 1998), *Geffon* v. *Micrion Corp.*, 1998 U.S. Dist. LEXIS 15773 (D. Mass. Sept. 24, 1998); *In re:* Olympic Fin. Ltd. Sec. Litig., 1998 U.S. Dist. LEXIS 14789 (D. Minn. Sept. 10, 1998); *In re:* Boeing Sec. Litig., 40

F. Supp.2d 1160 (W.D. Wash. 1998); *Bryant* v. *Apple South, Inc.*, 25 F. Supp.2d 1372 (M.D. Ga. 1998); *Clark* v. *TRO Learning, Inc.*, 1998 U.S. Dist. LEXIS 7989 (N.D. Ill. 1998); *Blum* v. *Semiconductor Packaging Materials Co.*, 1998 WL 254035 (E.D. Pa. May 5, 1998); *Ronconi* v. *Larkin*, 1998 WL 230987 (N.D. Cal. May 1, 1998); *Queen Uno Ltd. Partnership* v. *Coeur D'Alene Mines Corp.*, 2 F. Supp.2d 1345; (D. Colo. 1998); *In re:* Stratosphere Corp. Sec. Litig., 1 F. Supp.2d 1096 (D. Nev. 1998); *Wenger* v. *Lumisys, Inc.*, 2 F. Supp.2d 1231 (N.D. Cal. 1998); *Molinari* v. *Symantec Corp.*, 1998 WL 78120 (N.D. Ga. Nov. 10, 1997); *In re:* Valujet, Inc., Sec. Litig., 984 F. Supp. 1472 (N.D. Ga. 1997); *Rasheedi* v. *Cree Research, Inc.*, 1997 WL 785720 (M.D.N.C. Oct. 17, 1997); *Gross* v. *Medaphis Corp.*, 977 F. Supp. 1463 (N.D. Ga. 1997); *Hockey* v. *Medhekar*, Fed. Sec. L. Rep. (CCH) ¶ 99,465 (N.D. Cal. 1997); *Fugman* v. *Aprogenex, Inc.*, 961 F. Supp. 1190 (N.D. Ill. 1997).

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ENDNOTES

[1] *See* 15 U.S.C. § 77z-2 (Supp. II 1996). This article, which focuses on the cases decided between August 24, 2000 and December 9, 2001, is an updated and substantially revised version of the Scorecard presented at the 32nd Annual Institute on Securities Regulation, published by the Practicing Law Institute in November 2000. The author gratefully acknowledges the assistance of Marc A. Bonora, an associate at Paul, Weiss.

[2] *See* John Pletz, *Market Downturn Feeds Lawsuit Boom*, Law & Legal Issues, Dec. 10, 2001 (stating that "[s]ecurities class action lawsuits have nearly doubled in 2001 from their normal pace" with 415 suits being filed this year so far, compared to 216 last year).

[3] For a comprehensive discussion of the statutory structure and the earliest case law, see my prior article, 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).

[4] *See Helwig* v. *Vencor*, 251 F.3d 540 (6th Cir. 2001) ("Helwig II"); *Ehlert* v. *Singer*, 245 F.3d 1313 (11th Cir. 2001); *Helwig* v. *Vencor*, 210 F.3d 612 (6th Cir. Apr. 24, 2000) ("Helwig I"); *Harris* v. *Ivax Corp.*, 182 F.3d 799 (11th Cir. 1999); *In re:* Advanta Corp. Sec. Litig., 180 F.3d 525 (3d Cir. 1999). A sixth appellate decision, *Bryant* v. *Avado Brands, Inc.*, 187 F.3d 1271 (11th Cir. 1999), holds that a district court should consider the SEC filings of the defendant at the motion to dismiss stage of the lawsuit if the complaint attacks the adequacy of disclosure in those same documents. But the court remanded for consideration of whether the statutory safe harbor protected the company statements.

[5] *See In re:* S1 Corporation Sec. Lit., 2001 U.S. Dist. LEXIS 18808 (N.D. Ga. Oct. 23, 2001); *In re:* Sec. Lit. BMC Software, 2001 U.S. Dist. LEXIS 18713 (S.D. Tex. Sept. 30, 2001); *In re:* Xerox Corp. Sec. Lit., 165 F. Supp.2d 208 (D. Conn. Sept. 28, 2001); *In re:* Federal-Mogul Corp., Sec. Lit., 166 F. Supp.2d 559 (E.D. Mich. Sept. 20, 2001); *Lemmer* v. *Nu-Kote Holding*, 2001 U.S. Dist. LEXIS 13978 (N.D. Tex. Sept. 6. 2001); *In re:* Splash Tech. Holdings, Inc. Sec. Lit., 160 F. Supp.2d 1059 (N.D. Cal. Aug. 27, 2001) ("Splash II"); *Manavazian* v. *Atec*, 160 F. Supp.2d 468 (E.D.N.Y. Aug. 23, 2001); *Holmes* v. *Baker*, 166 F. Supp.2d 1362 (S.D. Fla. Aug. 22, 2001); *In re:* Secure Computing Corp., Sec. Lit., 2001 U.S. Dist. LEXIS 13563 (N.D. Cal. Aug. 21, 2001); *In re:* Crossroads Systems, 2001 WL 1401211 (W.D. Tex. Aug. 15, 2001); *In re:* Independent Energy Holdings PLC Sec. Lit., 154 F. Supp.2d 741 (S.D.N.Y. July 26, 2001); *Lindelow* v. *Hill*, 2001 U.S. Dist. LEXIS 10301 (N.D. Ill. July 12, 2001); *In re:* Insurance Management Solutions Group, Inc, Sec. Lit., 2001 U.S. Dist. LEXIS 9962 (M.D. Fla. July 11, 2001); *In re:* Livent, Inc. Noteholders Sec. Lit., 151 F. Supp.2d 371 (S.D.N.Y. June 29, 2001); *In re:* Unicapital Corp. Sec. Lit., 149 F. Supp.2d 1353 (S.D. Fla. June 29, 2001); *Fidel* v. *Farley*, 2001 U.S. Dist.

LEXIS 9461 (W.D. Kent June 22, 2001); *In re:* Campbell Soup Co. Sec. Lit., 145 F. Supp.2d 574 (D.N.J. June 19, 2001); *In re:* Towne Services, Inc., Sec. Lit., 2001 US. Dist LEXIS 9065 (N.D. Ga. June 4, 2001); *In re:* Party City Sec. Lit., 147 F. Supp.2d 282 (D.N.J. May 29, 2001); *In re:* Lason, Inc. Sec. Lit., 143 F. Supp.2d 855 (E.D. Mich. May 10, 2001); *In re:* Columbia Laboratories, Inc. Sec. Lit., 144 F. Supp.2d 1362 (S.D. Fla. May 9, 2001); *In re:* Champion Enterprises, Inc. Sec. Lit., 144 F. Supp.2d 848 (E.D. Mich. April 9, 2001); *Carney* v. *Cambridge Tech. Partners*, 135 F. Supp.2d 235 (D. Mass. March 30, 2001); *In re:* Complete Management Inc. Sec. Lit., 153 F. Supp.2d 314 (S.D.N.Y. March 30, 2001); *In re:* Reliance Sec. Lit., 135 F. Supp.2d 480 (D. Del. March 29, 2001); *Credit Suisse First Boston Corp.* v. *ARM Financial Group*, 2001 U.S. Dist. LEXIS 3332 (S.D.N.Y. March 27, 2001); *In re:* Technical Chemicals Sec. Lit., 2001 U.S. Dist. LEXIS 4851 (S.D. Fla. March 20, 2001); *In re:* Nice Systems. Ltd. Sec. Lit., 135 F. Supp.2d 551 (D.N.J. March 8, 2001); *In re:* Premiere Technologies, Inc. Sec. Lit., 2000 U.S. Dist. LEXIS 19207 (N.D. Ga. Dec. 8, 2000); *Eizenga* v. *Stewart Enterprises*, 124 F. Supp.2d 967 (E.D. La. Dec. 6, 2000); *Giarraputo* v. *Unumprovident Corp.*, 2000 U.S. Dist. LEXIS 19138 (D. Maine Nov. 8, 2000); *In re:* Ribozyme Pharmaceuticals, Inc., Sec. Lit., 119 F. Supp.2d 1156 (D. Col. Oct. 24, 2000); *In re:* Newell Rubbermaid Inc. Sec. Lit., 2000 U.S. Dist. LEXIS 15190 (N.D. Ill. Oct. 2, 2000); *In re:* Splash Tech. Holdings, Inc. Sec. Lit., 2000 U.S. Dist. LEXIS 15369 (N.D. Cal Sept. 29, 2000) ("Splash I"); *In re:* Telxon Corp., Sec. Lit., 133 F. Supp.2d 1010 (N.D. Ohio Sept 29, 2000); *Caprin* v. *Simon Transportation Services*, 112 F. Supp.2d 1251 (Sept. 27, 2000); *In re:* Unisys Corp. Sec. Lit., 2000 U.S. Dist. LEXIS 13500 (E.D. Pa. Sept. 21, 2000); *Tarica* v. *McDermott Int'l., Inc.* (E.D. La. Sept. 19, 2000); *In re:* USA Talks.com, Inc. Sec. Lit., 2000 U.S. Dist. LEXIS 14823 (S.D. Cal. Sept. 14, 2000). In an additional case, *In re:* Westell Technologies, 2001 U.S. Dist. LEXIS 17867 (N.D. Ill. Oct. 26, 2001), the court construed plaintiff's lack of response to defendant's safe harbor defense as concession that any forward-looking statements in defendant's press releases were within the safe harbor. Another case, *In re:* Republic Services, Inc. Sec. Lit., 134 F. Supp.2d 1355 (S.D. Fla. Feb. 12, 2001), dismisses the complaint on other grounds, but comments on whether defendant's statements are forward-looking.

The cases decided prior to August 2000 are collected in Appendix A at the end of this article.

6 *See, e.g.*, *In re:* Reliance, 135 F. Supp.2d 480 (motions for summary judgment granted in part and denied in part).

7 *See* Holmes, 166 F. Supp.2d 1362; Secure Computing, 2001 U.S. Dist. LEXIS 13563; Independent Energy, 154 F. Supp.2d 741; Lason, 143 F. Supp.2d 855; Lindelow, 2001 U.S. Dist. LEXIS 10301; Insurance Mgmt. Solutions, 2001 U.S. Dist. LEXIS 9962; Towne Services, 2001 U.S. Dist. LEXIS 9065; Reliance, 135 F. Supp.2d 480; Complete Mgmt., 153 F. Supp.2d 314; Premiere Tech., 2000 U.S. Dist. LEXIS 19207; Giarraputo, 2000 U.S. Dist. LEXIS 19138; Ribozyme, 119 F. Supp.2d 1156; Telxon, 133 F. Supp.2d 1010; Unisys, 2000 U.S. Dist. LEXIS 13500; Cyberguard, 2000 WL

1140306; Cell Pathways, 2000 WL 805221; Sunbeam, 89 F. Supp.2d 1326; APAC, 1999 U.S. Dist. LEXIS 17908; Quintel, 72 F. Supp.2d 283; 3Com, Fed. *Sec. L. Rep*. (CCH) ¶ 90,522; Oxford Health, 187 F.R.D. 133; Physician, 50 F. Supp.2d 1304; Aetna, 34 F. Supp.2d 935; Home Health, Fed. Sec. L. Rep. ¶ 90,414 (CCH); TCSI, 1999 U.S. Dist. LEXIS 20978; Biocontrol, 66 F. Supp.2d 669; MobileMedia, 28 F. Supp.2d 901; Robertson, 32 F. Supp.2d 443; Employee Solutions, 1998 WL 1031506; Micrion, 1998 U.S. Dist. LEXIS 15773; Olympic, 1998 U.S. Dist. LEXIS 14789; Valujet, 984 F. Supp. 1472; Medaphis, 977 F. Supp. 1463.

[8] *In re:* Insurance Management Solutions Group, Inc., 2001 U.S. Dist. LEXIS 9962, at *36.

[9] *In re:* Telxon Corp. Sec. Lit., 133 F. Supp.2d at 1032.

[10] Correct decisions from earlier years include: *Geffon* v. *Micrion Corp*., 1998 U.S. Dist. LEXIS 15773, at *10-*11 (D. Mass. Sept 24, 1998) (finding a statement about the size of the company's orders and backlog to not be forward-looking); Robertson, 32 F. Supp.2d 443, 450 (finding a statement that "development is progressing on the original construction schedule" not to be forward-looking); Olympic, 1998 U.S. Dist. LEXIS 14789, at *13-*14 (finding a statement about the quality of a company's loan portfolio not to be forward-looking).

[11] *In re:* Reliance Sec. Lit., 135 F. Supp.2d at 504 (finding that statements regarding loan loss reserves are not protected by the safe harbor provision) (citing *Shapiro* v. *UJB Fin. Corp.*, 964 F.2d 272, 281 (3d Cir. 1992).

[12] Similarly erroneous decisions from earlier years include, for example: Employee Solutions, 1998 WL 1031506, at *3-5 (holding that statements concerning the adequacy of insurance company reserves are statements of present fact) and *In re:* Physician Corp. of America Sec. Lit., 50 F. Supp.2d 1304, 1318 (S.D. Fla. 1999) (same).

[13] 182 F.3d 799.

[14] *Id.* at 805.

[15] *Id.* at 806. The reasoning of *Ivax* has been followed with respect to this issue. *See*, Apple South II, 100 F. Supp.2d at 1382 (citing *Ivax*); Ehlert, 85 F. Supp.2d at 1273 (same);

[16] *See* S1 Corp. Sec. Lit., 2091 U.S. Dist. LEXIS at *53; Federal-Mogul, 166 F. Supp.2d at 565; Splash II at 1067, Splash I at *17.

[17] Ehlert, 245 F.3d at 1317; Columbia Labs., 144 F. Supp.2d at 1368, Champion, 144 F. Supp.2d at 859; Republic, 134 F. Supp.2d at 1363; S1, 2001 U.S. Dist. LEXIS 18808. at *53.

[18] Secure Computing, 2001 U.S. Dist. LEXIS at *25.

[19] *Compare*, *e.g.*, *In re:* S1 Corp., 2001 U.S. Dist. LEXIS 18808, at *53 (correctly citing *Ivax* in that present-tense statements, "when put into context with the statements as a whole . . . are about the state of company whose truth or falsity is discernible only after it is made.").

[20] 166 F. Supp.2d at 1381.

[21] *Id.* (citing Sunbeam, 89 F. Supp.2d 1339; *Shipping Fin. Servs. Inc.* v. *Abel Telcom Holding Corp.*, No. 98-8633, slip op. at 18 (S.D. Fla. Dec. 7, 2000).

[22] 119 F. Supp.2d at 1163.

[23] *Id.*

[24] *Id.*

[25] *Lindelow* v. *Hill*, 2001 U.S. Dist. LEXIS 10301, follows *Ribozyme*, holding that the safe harbor did not apply because defendant's forward-looking statement could be "premised on the [current, as opposed to future,] existence of some material steps and bona fide plans for a product roll-out in 1999." *Id.* at *15 (citing *Ribozyme*, 119 F. Supp.2d at 1163).

[26] *See* Boeing, 40 F. Supp.2d at 1167-69 (concluding that warnings were not sufficiently clear nor specific to warrant dismissal under Federal Rule 12(b)(6)).

[27] 251 F.3d at 559

[28] *Id.*

[29] 1999 U.S. Dist. LEXIS 385.

[30] *See also*, World Access, 2000 U.S. Dist. LEXIS 4245 at *30 (safe harbor cautionary statement prong not applicable because warnings were minimal boilerplate language).

[31] *Id.* at *19.

[32] The 11th Circuit approvingly cited the lower court's discussion of the adequacy of the cautionary language, *id.* at * 18.

[33] *Harris* v. *Ivax*, 998 F. Supp. 1449, 1454 (S.D. Fla. 1998).

[34] Ehlert, 245 F.3d at 1313.

[35] *Id.* at 1319.

[36] For other examples of cautionary statements that were found to satisfy the safe harbor requirements, *see* Sl, 2001 U.S. Dist. LEXIS at *54; BMC, 2001 U.S. Dist. LEXIS at *72-*75; Party City, 147 F. Supp.2d at 309-10; Columbia Labs, 144 F. Supp.2d at 1369; Eizenga, 124 F. Supp.2d at 977-78; Ciena, 99 F. Supp.2d at 661; P. Schoenfeld, 47 F. Supp.2d at 556. For unsuccessful cautionary statements, *see*, Helwig II at 559; CSFB, 2001 U.S. Dist. LEXIS at *23-*24; Lindelow, 2001 U.S. Dist. LEXIS at *16-*17; Unicapital, 149 F. Supp.2d at 1375; World Access, 2000 U.S. Dist. LEXIS 4245 at *30; Sherleigh, 2000 U.S. Dist. LEXIS 9772 at *43-44.

[37] Eidert, 245 F.3d at 1319-20: "Plaintiffs also argue that the cautionary language in the prospectus is insufficient because it fails to address the consequences of MMCs discontinuance of its services to Version 8 customers, *i.e.*, that Version 8 users would need to purchase Version 9. We disagree. The PSLRA safe-harbor requires only that the cautionary language mention 'important factors that could cause actual results to differ materially from those in the forward-looking statement.' 15 U.S.C. § 77z-2(c). It does not require that the prospectus list all factors that might influence the company's financial future. See Harris, 182 F.3d at 807."

See also World Access, 2000 U.S. Dist. LEXIS 4245 at *19-*20; Rasheedi, 1997 WL at *2.

[38] Semiconductor Packaging, 1998 WL at *2 n.2.

[39] *See*, *e.g.*, Staffmark, 2000 U.S. Dist. LEXIS 10023 at 32; Electro Optical, 2000 U.S. Dist. LEXIS 5324 at 13; Medhekar, 1997 U.S. Dist. LEXIS 8558 at *14-15.

[40] 160 F. Supp.2d at 476; *see also In re:* Campbell Soup Co., 145 F. Supp.2d at 590.

[41] Apple South I, 25 F. Supp.2d at 1382; Symantec, 1998 WL at *5.

[42] Karacand, 1999 WL at *5-6, *12-13.

[43] 43 Staffmark, 2000 U.S. Dist LEXIS 10023 at *33-34.

[44] Lindelow, 2001 U.S. Dist. LEXIS at *16-*17.

[45] *See* BMC, 2001 U.S. Dist. LEXIS 18713; Champion, 144 F. Supp.2d 848; Queen Uno, 2 F. Supp.2d 1345; Lumisys, F. Supp.2d 1231.

[46] 1999 WL 396421. For another well-considered analysis of how the statutory safe harbor should apply to analysts' conference calls, see Lumisys, 2 F. Supp.2d 1231.

[47] The most recent cases on point are: Splash II, 160 F. Supp.2d 1059; *In re:* S1 Corp. 2001 U.S. Dist. LEXIS 18808; *In re:* Indep. Energy Holdings PLC, 154 F. Supp.2d 741; *In re:* Lason, Inc., 143 F. Supp.2d 855; *Credit Suisse First Boston* v. *ARM*, 2001 U.S. Dist. LEXIS 3332; *Caprin* v. *Simon Transp*., 112 F. Supp.2d 1251; *In re:* USA

Talks.com. Inc., 2000 U.S. Dist. LEXIS 14823; *In re:* Campbell Soup Co., 145 F. Supp.2d 574. Earlier cases to the same effect are: Advanta, 180 F.3d 525; *see also* Milestone, 103 F. Supp.2d at 463; Vantive, 2000 WL 960114 at *4; Ciena, 99 F. Supp.2d at 661-62; Electro Optical, 2000 U.S. Dist. LEXIS 5324 at *17; Ehlert, 85 F. Supp.2d at 1273, Ruskin I, 1999 U.S. Dist. LEXIS 14860 at *14; Green, 1999 WL 2003408 at *7; TRO Learning, 1998 U.S. Dist. LEXIS 7989 at *17; Ceridian, 1999 U.S. Dist. LEXIS 15611 at *23; Brooktree, 1998 U.S. Dist. LEXIS 21859; Medhekar, 1997 U.S. Dist. LEXIS 8558 at *13.

48 *See, e.g.*, Milestone, 103 F. Supp.2d at 464; Ciena 99 F. Supp.2d at 661-62; Emerald Green, 1999 WL 2003408 at *7-8; Ceridian, 1999 U.S. Dist. LEXIS 15611; TRO Leaning, 1998 U.S. Dist. LEXIS 7989 at *16-18.

49 Evolving Sys., 29 F. Supp.2d 1213.

50 Quintel, 72 F. Supp. at 293 n.4.

51 2000 WL 1154278 at *7 (citing *In re:* Prudential Sec. Inc. Ltd. Partnership Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996).

52 *See In re:* Campbell Soup Co. 145 F. Supp.2d 574 (stating rule incorrectly, but finding against defendant because of lack of identification of forward-looking statement and not accompanied by meaningful cautionary language), *Caprin* v. *Simon Transp.*, 112 F. Supp.2d 1251 (stating the rule incorrectly, but finding for defendants); Cell Pathways, 2000 WL 805221 at 11 (citing Cendant); World Access, 2000 U.S. Dist. LEXIS 4245 at *30; Home Health, Fed. Sec. L. Rep. (CCH) ¶90,414; Cendant, 60 F. Supp.2d at 376. For further discussion of this trend, *see* John T. Bostelman and Walter J. Clayton III, *How Recent Court Decisions Have Construed the Cautionary Statements Requirement of the Safe Harbor*, Sec. Reg. Update, Sept. 27, 1999, at 15 fn. 23.

53 *In re:* Campbell Soup Co., 145 F. Supp.2d at 589.

54 *In re:* Donald Trump Casino Sec. Litig., 7 F.3d 357 (3d Cir. 1993).

55 *See, e.g.*, *Helwig II*, 251 F.3d at 559 (regarding the quality of cautionary statements).

56 *See, e.g.*, *In re:* Number Nine Visual Tech. Corp. Sec. Litig., 51 F. Supp.2d 1 (D. Mass. June 1, 1999).

57 For a recent detailed discussion of the applicability of the bespeaks caution doctrine, *see EP Medsystems, Inc.* v. *Echocath. Inc*., 235 F.3d 865 (3d Cir. 2000).

58 *See, e.g.*, *Helwig II*, 251 F.3d at 559; *Echocath*, 30 F. Supp.2d at 760-61; Medaphis, 977 F. Supp. at 1472.

[59] *Advanta*, 180 F.3d at 538-539; *Lain* v. *Evans*, 2000 U.S. Dist. LEXIS 9257 (N.D. Tex. June 30, 2000); Manugistics, Fed. Sec. L. Rep. (CCH) ¶90,638; *In re:* Peritus Software Serv., Inc. Sec. Litig., 52 F. Supp.2d 211, 229 (D. Mass. 1999); *Krim* v. *Coastal Physician Group, Inc.*, 81 F. Supp. 621 (M.D.N.C. 1998) *Stavroff* v. *Meyo*, 987 F. Supp. 987, 998-1000 (N.D. Ohio 1995), *aff'd mem*., 129 F.3d 1265 (6th Cir. 1997); *In re:* Boston Tech., Inc. Sec. Litig., 8 F. Supp.2d 43, 71 (D. Mass. 1998).

[60] *See, e.g*., *In re:* S1 Corp., 2001 U.S. Dist. LEXIS 18808, at *48-*50; *In re: Federal-Mogul*, 166 F. Supp.2d at 563; *In re: Nice Sys., Ltd.*, 135 F. Supp.2d at 579-81; Tarica, 2000 U.S. Dist. LEXIS 14144, at *37, *Schoenhaut* v. *American Sensors, Inc.*, 986 F. Supp. 785, 792 (S.D.N.Y. 1997); Acuson, 1995 U.S. Dist. LEXIS at *13.

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

[62] *See In re:* Theragenics Corp. Sec. Litig., 2000 WL 1028754 (N.D. Ga. July 20, 2000); Lain, 2000 U.S. Dist. LEXIS 9257; Manugistics, 1999 WL 1209509; *Peritus*, 52 F. Supp.2d 211; *Krim*, 81 F. Supp. 621; *Lumisys*, 2 F. Supp.2d at 1245; *Leventhal*, 1999 U.S. Dist. LEXIS at *27-28.

[63] Lain, 2000 U.S. Dist. 9257 at *9.

[64] 210 F.3d 612.

[65] *Id*.