

Circuit Court Decisions Addressing the Safe Harbor for Forward-Looking Statements

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Third Circuit: Speaker's State of Mind Is Irrelevant for Purposes of the PSLRA's Safe Harbor Provided the Forward-Looking Statement Is Accompanied by Meaningful Cautionary Statements

On August 22, 2016, the Third Circuit held that if a forward-looking statement is accompanied by meaningful cautionary statements, then “the state of mind of the individual making the statement is irrelevant” for purposes of the Private Securities Litigation Reform Act (“PSLRA”). *OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481 (3d Cir. 2016) (Jordan, J.).

The Third Circuit found the PSLRA “provides two distinct entrances to the safe harbor” pursuant to which “any forward-looking statement is protected if it is either accompanied by substantive and tailored cautionary statements or if the plaintiff fails to show actual knowledge of falsehood.” The court held that “where a future-looking statement is accompanied by sufficient cautions, then . . . the statement is not actionable regardless of the plaintiff’s showing of scienter.”

Eighth Circuit: Cautionary Statements Must Provide a “Realistic Description of the Risks Applicable to the Particular Circumstances”

On February 10, 2016, the Eighth Circuit held that the warnings accompanying certain alleged misstatements were not “*meaningfully* cautionary” for purposes of the PSLRA’s safe harbor because defendants provided only “a boilerplate litany of generally applicable risk factors” rather than “a realistic description of the risks applicable to the particular circumstances.” *Rand-Heart of New York v. Dolan*, 812 F.3d 1172 (8th Cir. 2016) (Benton, J.).

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