

Eleventh Circuit: Statements About Performance “Each Year” Held to Be Forward Looking; Actual Knowledge of Falsity Required (Securities Law Alert)

09.30.22



(Article from *Securities Law Alert*, September 2022)

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On August 1, 2022, the Eleventh Circuit affirmed a district court’s dismissal of a putative securities class action alleging that a company that manufactures human nerve repair products had overstated the market for the company’s products. [Einhorn v. Axogen](#), 42 F.4th 1218 (11th Cir. 2022) (Brasher, J.). The court held that the company’s statements about the number of nerve injuries and nerve repair procedures performed in the U.S. “each year” fell within the safe-harbor provision of the Securities Act for forward-looking statements.

Background and Procedural History

The company released various offering documents related to two public offerings of common stock. These offering documents addressed the company’s purported growth potential and incorporated statements from the company’s Form 10-Ks. For example, the company’s 2017 10-K stated that: “We believe that each year in the U.S., more than 1.4 million people suffer damage or discontinuity to peripheral nerves resulting in over 700,000 extremity nerve repair procedures.”

Subsequently, a short seller report concluded that there were only 28,000 peripheral nerve injury repair procedures each year in the U.S. The report was followed by a stock drop and plaintiff’s class action alleging violations of the Securities Act and the Exchange Act. The U.S. district court for the Middle District of Florida dismissed the complaint with prejudice holding that the challenged statements were forward looking and protected by the safe-harbor provision.

The Securities Act Recognizes a Safe Harbor for Forward-Looking Statements

While the Securities Act creates a cause of action against persons or entities that make an “untrue statement of a material fact” or material omissions from a public filing related to an offering of securities, it also recognizes a safe harbor for “forward-looking” statements. The Eleventh Circuit has “held that the key characteristic of a forward-looking statement is that its ‘truth or falsity is discernible only after it is made.’” *Harris v. Ivax Corp.*, 182 F.3d 799 (11th Cir. 1999). Under *Harris*, a court is to look to the statement’s context to evaluate whether it is forward looking or not.

The Phrase “Each Year” Is Forward Looking As It Is In Part a Prediction

The court concluded that the challenged statements were forward looking. The court explained that the “critical phrase” in the challenged statements is the company’s assertion that a certain number of nerve injuries and procedures occur “each year.” The court found that while “there is certainly an element of present or historical fact in the phrase ‘each year,’ the phrase is also forward looking” because the statement is in part a prediction about the number of injuries that will require repair. As found by the court, “[f]orward-looking statements ‘often rest both on historical observations and assumptions about future events.’” (quoting *Harris*, 182 F.3d 799). Because the statements were used to support the company’s market-size predictions, which were about “future economic performance,” the court concluded that the predictions were forward-looking statements under the statute.

Plaintiff also argued that *Omnicare v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015), relieved it of the burden to prove that the company made the statements with actual knowledge they were false or misleading. The court rejected this argument, holding that the safe-harbor provision “expressly requires a plaintiff to prove that a forward-looking statement was made with ‘actual knowledge that the statement was false or misleading,’” while *Omnicare* ruled on whether an opinion can be actionable as a statement of fact and did not address the safe-harbor provision or remove the “actual knowledge” requirement. The Eleventh Circuit held that plaintiff’s failure to plausibly allege the company’s actual knowledge that the statements were false or misleading doomed its Securities Act claims.

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