[St. John's Law Review](https://scholarship.law.stjohns.edu/lawreview)

Volume 71, Winter 1997, Number 1 Article 3

Has Congress Learned Its Lesson? A Plain Meaning Analysis of the Private Securities Litigation Reform Act of 1995

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NOTES

HAS CONGRESS LEARNED ITS LESSON? A PLAIN MEANING ANALYSIS OF THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

INTRODUCTION

In the first congressional override of an executive veto since President Clinton took office,[1] the 104th Congress officially enacted the Private Securities Litigation Reform Act of 1995[2] ("PSLRA" or "Act") on December 22, 1995.[3] Criticism and support of the PSLRA are widespread. Some commentators consider the Act to be the "most comprehensive revision of private litigation under the federal securities laws since the New Deal."[4] Others contend that it is little more than a fragile attempt by Congress to enact some measure of tort reform.[5]

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[1] *See* Francis J. Menton, Jr. & Elizabeth S. Stong, *Evaluating Claims Under Reform Act*, N.Y. L.J., Jan. 4, 1996, at 5.

[2] Pub. L. No. 104-67, 109 Stat. 737 (1995).

[3] The House of Representatives initially passed the legislation by a vote of 320 to 102. *See* 141 CONG. REC. D1423-01, at H14055 (1995). The Senate's initial vote was 65 to 30. *See* 141 CONG. REC. D1415-01, at S18035-36 (1995). The House voted 319 to 100 on December 20, 1995. On December 22, 1995, the Senate voted 68 to 30 to override President Clinton's December 19, 1995 veto. *See* Anne Elsele, *Litigation Bill Override Hailed But Not by All*, NEW TECH. WEEK, Jan. 2, 1996; *Legislative Status Report*, 315 BOND BUYER 29811, Jan. 8, 1996.

[4] Harvey L. Pitt & Karl A. Groskaufmanis, *Securities Reform Act Offers Limited Safe Harbor*, NAT'L L.J., Jan. 15, 1996, at B4.

[5] *See* Nickie McWhirter, *Tort Reform Symbolizes Special Interest Influence*, DETROIT NEWS, Apr. 2, 1996, at A7 ("Promises made; promises kept! Never mind the quality of the product."); Andrew Rainer, *Private Securities Litigation Reform Act A Step in the Wrong Direction*, MASS. L. WKLY., Mar. 25, 1996, at B8 (labeling

The Joint Conference Committee ("Committee" or "Conference Committee") issued a report ("Conference Report") regarding the PSLRA, stating that the Act's general purpose was to curb perceived abuses in the area of private securities litigation.[6] Specifically, the PSLRA was designed to discourage "serious injuries to innocent parties" including frivolous litigation, targeting of deep-pocket defendants, abuse of discovery, and manipulation of clients by class action lawyers.[7] In an attempt to effect reform, Congress amended two fundamental pieces of securities legislation: the Securities Act of 1933[8] ("1933 Act") and the Securities Exchange Act of 1934[9] ("1934 Act").

The changes incorporated into federal securities law by the PSLRA, most notably a safe harbor for forward-looking statements,[10] are intended to encourage companies to disclose information by limiting the rights of private parties to bring suit. By establishing a safe harbor, Congress enables those companies which meet the statutory criteria to escape potential private causes of action arising from forward-looking statements.

In its Conference Report, the Conference Committee extensively sets forth its legislative intent and its desired judicial interpretation. Whether the Committee's purposes and goals will be realized, however, has yet to be determined. It is unlikely that the Committee's lengthy explanation in its Conference Report will have the force intended, given the evolving trend of the United States Supreme Court to place primary emphasis on the language of a statute, all but ignoring legislative history and intent.[11] Additionally, since the Act applies only to private lawsuits and does not cover actions initiated by the Securities and Exchange Commission ("SEC"), the Act will ultimately do little to encourage disclosure.[12]

Act "a distinct step in wrong direction"); Benjamin J. Stein, *Tort 'Reform' Is a License to Steal*, N.Y. TIMES, July 30, 1995, § 4, at 15 ("The supposed rationale for these measures is absurd."); *see also Industry Hails Veto Override, Consumer Groups, Others Opposed*, B.N.A. SEC. L. DAILY, Dec. 28, 1995 (mentioning original version of PSLRA as part of Contract With America).

[6] H.R. CONF. REP. NO. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

[7] *Id.*

[8] 15 U.S.C. § 77a *et. seq.* (1994 & Supp. 1995).

[9] 15 U.S.C. § 78a *et. seq.* (1994 & Supp. 1995).

[10] 15 U.S.C. § 77z-2 (1994 & Supp. 1995).

[11] *See infra* note 27 (discussing Supreme Court's trend in securities statutory interpretation).

[12] *See infra* note 84 and accompanying text (discussing failure of Act to encour-

This Note will use the PSLRA's safe harbor to illustrate[13] how the Act, or at least the Conference Committee's stated intent, falls apart upon critical examination. Part I will consider the evolution of the Supreme Court's tendency to utilize a plain meaning approach when interpreting securities statutes. Part II will explore the Committee's explanation and intended interpretation of the changes which the PSLRA made to the 1933 and 1934 Acts, focusing on the safe harbor provisions. Part III will discuss the apparent ambiguities and problems with the PSLRA's safe harbor.

I. SUPREME COURT INTERPRETATION OF SECURITIES LAWS

In a movement championed by the "intellectually aggressive" Justice Antonin Scalia of the United States Supreme Court, the Court has been reconsidering the role of legislative history in statutory interpretation.[14] Early in his tenure on the Court, Justice Scalia made it clear that he was a staunch supporter of the plain meaning approach to statutory interpretation when he refused to join a Court opinion because he felt it contained an irrelevant discussion of legislative history.[15] Justice Scalia wrote, "th[e] doctrine [that a statute's plain meaning is less significant than legislative history] ... is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity."[16]

Justice Scalia's position on statutory interpretation, dubbed "the new textualism," suggests that the legislative history of a

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age meaningful disclosure).

[13] Arguably, the safe harbor is also the most significant provision of the PSLRA. *See infra* notes 46-48 and accompanying text (discussing Act's most notable provisions).

[14] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) [hereinafter Eskridge, *New Textualism*]; *see also* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State,* 95 COLUM. L. REV. 749, 750 (1995) (noting change in Court's approach to statutory construction in favor of textualism).

[15] *See* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) ("[W]e are not free to replace [the clear language of the legislature] with an unenacted legislative intent."); Eskridge, *New Textualism, supra* note 14, at 623. Justice Scalia's position on statutory interpretation can be traced to his pre-Supreme Court opinions. *See* Richard Nagareda, Comment, *The Appellate Jurisprudence of Justice Antonin Scalia,* 54 U. CHI. L. REV. 705, 720-26 (1987).

[16] *Cardoza-Fonseca,* 480 U.S. at 452 (Scalia, J., concurring) (citations omitted).

particular statute is immaterial when its language is clear and the Court has discerned its plain meaning.[17] To emphasize a committee report, floor debate, or hearing testimony over the text of a statute elevates the view of a congressional subgroup above that of the entire Congress, which presumably voted not on the basis of a committee report, but rather on each member's "plain" interpretation of the statutory text.[18] The new textualism approach suggests that courts interpret a statute through the use of accepted definitions, grammatical rules, statutory construction, related statutory provisions, and judicial canons.[19]

The idea that one universal "plain" meaning could exist in a statute if Congress would clearly draft securities legislation is an attractive one. Such an approach to statutory interpretation, however, incorporates numerous assumptions which, in turn, would require subsequent interpretation.

The problem with plain meaning interpretation is that meaning is seldom plain. As Justice Oliver Wendell Holmes once opined, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[20] For example, what is the accepted definition of a given word? Accepted by whom? If one concludes that the dictionary is the best place to look for a definition, the question remains which of the dictionary's several definitions to employ. The meaning of a given word may vary greatly, not only in general usage, but more so in a complicated statute that uses the word as a term of art. Should courts look for a word's meaning when the statute was enacted or when a case is litigated? Context may also be highly relevant. A word's meaning may not be plain without considering the context, and yet contextual analysis can lead a court to analyze the very materials that the plain

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[17] *See* Eskridge, *New Textualism, supra* note 14, at 623-24 (discussing Scalia and theory of new textualism).

[18] *See* Eskridge, *New Textualism, supra* note 14, at 654. According to Justice Scalia, legislative history is a "frail substitute[] for bicameral vote upon the text of a law .... It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions." Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in part) (citation omitted).

[19] William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 610 (1990).

[20] Towne v. Eisner, 245 U.S. 418, 425 (1918).

meaning approach to statutory interpretation seeks to avoid.[21] Similarly, judicial canons[22] and rules of statutory construction tend to fall in and out of favor. When is a given rule or canon no longer appropriate? Interpretation utilizing related statutory provisions does not adequately address the issues of how to determine when a particular provision is actually related, and whether the prior interpretation of the plain meaning was correct. On a broader scale, the new textualism approach necessarily presumes that members of Congress, individually or collectively, weigh such considerations more than they would a committee report or a floor debate before voting on a given bill. For better or worse, because of Justice Scalia's staunch support of the plain meaning rule,[23] the Court apparently has adopted it as the predominant method of interpreting securities laws.[24]

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[21] Justice Scalia concedes the relevance of context in statutory analysis. *See* United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme–because the same terminology is used elsewhere in a context that makes its meaning clear ...."). For an analysis of Justice Scalia's support of a word's structural context, see Eskridge, *New Textualism*, *supra* note 14, at 660-63 (discussing Justice Scalia's consideration of word usage in same and in other statutes, statute as whole, and interaction of different statutory schemes).

[22] Judicial canons are general rules used by judges to aid them in statutory interpretation. For example, canons may involve grammatical rules, allocation of authority, and deference to administrative agencies. *See* Eskridge, *New Textualism, supra* note 14, at 663-66. Canons have also been referred to as rules that courts lay down for Congress, to guide Congress in drafting laws which will have credence with the courts. *See Group Discussion on the Supreme Court's Recent Administrative Jurisprudence,* 7 ADMIN. L.J. AM. U. 287, 288 (1993) [hereinafter *Group Discussion*].

[23] According to Eskridge, Scalia's opinions influenced the Court's approach to general statutory interpretation, affecting the Court's analysis even outside the securities area. *See* Eskridge, *New Textualism, supra* note 14, at 624-25. "[T]he Court has been much more willing to ignore legislative history, [and] has been slightly more reluctant to deviate from the apparent meaning of the statutory text ...." *Id.* at 625; *see also* Nat Stern, *The Constitutionalization of Rule 10b-5,* 27 RUTGERS L.J. 1, 9 (1995).

[24] *See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 174 (1994) ("Adherence to the text ... is consistent with our decisions interpreting other provisions of the Securities Acts."); Nathan F. Coco, *Has Legislative History Become History?: A Critical Examination of* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 20 J. CORP. L. 555, 563-64 (1995) (discussing Court's departure from legislative history analysis to textual methodology in securities litigation); *see also* Pierce, *supra* note 14, at 777-78 (noting that between 1988 and 1994, Justice Scalia's textualism approach has had profound effect on Court's evaluation of statutes).

Scholars recognize Justice Anthony Kennedy and, more recently, Justice Clarence Thomas as supporters of Justice Scalia's approach to statutory interpreta-

Beginning well before Justice Scalia joined the Court, and culminating in the 1994 decision of *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[25] the Court migrated toward a policy of strictly construing the federal securities laws.[26] During this twenty year period, the Court began to focus on statutory language by criticizing all implied rights of action, refusing to recognize new implied rights of action, and restricting old implied rights of action.[27]

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tion. *See* Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 401 (1994) (referring to Justice Kennedy as important ally of Justice Scalia and suggesting that other Justices' opinions reflect this approach); Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 244 n.22 (1994) ("Justice Thomas has characterized plain meaning as the 'cardinal canon [to be looked to], before all others,' ... and routinely joins many of Justice Scalia's opinions attacking the use of legislative history.") (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992)).

[25] 511 U.S. 164 (1994).

[26] In 1982, for example, the Ninth Circuit noted that "[t]he Supreme Court has rejected [a broad policy] justification for an expansive reading of the statutes and instead prescribed a strict statutory construction approach to determining liability under the acts." Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1311 n.12 (9th Cir. 1982). Not every Court decision in this era, however, relied on the statutory language. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 386-87 (1983) (employing policy-based standard premised on flexible principles of statutory construction in evaluating rights of action under 1993 and 1934 Acts); United States v. Naftalin, 441 U.S. 768, 772-77 (1979) (looking partly to statutory language and partly to broad Congressional objectives).

[27] Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 648 n.64 (1988) (citations omitted). The Court began narrowing the scope of federal securities laws in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). For a discussion of *Blue Chip Stamps* as marking the beginning of the Supreme Court's trend toward restrictive interpretation, see Roberta S. Karmel, *Implications of the* Central Bank of Denver *Case*, N.Y. L.J. June 16, 1994, at 3. Looking to the language of section 10(b) and Rule 10b-5, the Court in *Blue Chip Stamps* narrowly construed Rule 10b-5 to allow as possible plaintiff only one who purchases or sells securities in a fraudulent transaction. *Blue Chip Stamps*, 421 U.S. at 730-31. In the 1976 case, *Ernst & Ernst v. Hochfelder*, the Court looked to the statutory language and held that scienter was a required element in private causes of action brought under section 10(b). Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976). The Court wrote that statutory language is " '[t]he starting point in every case involving construction of a statute ....' " and looked to the language's commonly accepted meaning. *Id.* at 197 (quoting *Blue Chip Stamps*, 421 U.S. at 756 (Powell, J., concurring)). Shortly thereafter, in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), the Court again used a plain meaning approach to find the language of section 10(b) does not indicate that Congress meant to prohibit conduct not involving manipulation or deception. *Id.* at 473. Similarly, in *Chiarella v. United States*, 445 U.S. 222 (1980), the Court reasoned that "the 1934 Act cannot be read 'more broadly than its language and the statutory scheme reasonably permit.' " *Id.* at 234 (citing Touche Ross & Co. v. Redington, 442 U.S. 560,

In *Central Bank*, the Court seized the opportunity to solidify further its policy of strictly interpreting securities legislation. In a five to four ruling that rejected decisions in nearly every circuit,[28] the Court held that liability under section 10(b) of the 1934 Act does not extend to private causes of action against those who aid and abet a primary violation of section 10(b).[29] Writing for the majority, Justice Kennedy[30] determined that "the text of the statute controls [the Court's] decision."[31]

After determining that the *text* of the 1934 Act does not cover one who aids and abets a violation, the Court concluded that such a determination was sufficient to resolve the case.[32] The Court wrote, "[i]t is inconsistent with settled methodology ... to extend liability beyond the scope of conduct prohibited by the

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578 (1979) (quoting SEC v. Sloan, 436 U.S. 103, 116 (1978)). That same year, the Court also employed a plain meaning approach in requiring the SEC show scienter in its actions based on section 10(b). Aaron v. SEC, 446 U.S. 680, 695 (1980). More recently, the Court, relying on the text, interpreted the meaning of "seller" in the context of section 12(1) of the 1934 Act. Pinter v. Dahl, 486 U.S. 622, 641-44 (1988). Justice Blackmun commented that "ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section." *Id.* at 653. Emphasizing congressional language, the Court proceeded on the assumption that "Congress meant what it said." *Id.* Through the twenty year progression, strict statutory construction evolved as the predominant approach for interpreting securities legislation. *See generally supra* note 24 and accompanying text (discussing Court's tendency to use strict statutory construction).

[28] *See Central Bank,* 511 U.S. at 192-93 n.1 (Stevens, J., dissenting) (citations omitted); David J. Baum, Comment, *The Aftermath of* Central Bank of Denver: *Private Aiding and Abetting Liability Under Section 10(b) and Rule 10b-5*, 44 AM. U. L. REV. 1817, 1825 n.47 (1995). Baum cites the following circuit court decisions that have recognized private causes of action for aiding and abetting; Schatz v. Rosenberg, 943 F.2d 485, 495 (4th Cir. 1991); Robin v. Arthur Young & Co., 915 F.2d 1120, 1123 (7th Cir. 1990); Moore v. Fenex, Inc., 809 F.2d 297, 305 (6th Cir. 1987); Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1011 (11th Cir. 1985); Cleary v. Perfectune, Inc., 700 F.2d 774, 777 (1st Cir. 1983); Harmsen v. Smith, 693 F.2d 932, 944-45 (9th Cir. 1982); Stokes v. Lokken, 644 F.2d 779, 783-84 (8th Cir. 1981); IIT v. Cornfeld, 619 F.2d 909, 917-18 (2d Cir. 1980); Monsen v. Consolidated Dressed Beef Co., Inc., 579 F.2d 793, 802-04 (3d Cir. 1978); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975); Zabriskie v. Lewis, 507 F.2d 546, 553-54 (10th Cir. 1974); SEC v. Coffey, 493 F.2d 1304, 1318 (6th Cir. 1974).

[29] *Central Bank*, 511 U.S. at 191 (holding as such "[b]ecause the *text* of § 10(b) does not prohibit aiding and abetting") (emphasis added).

[30] Justice Kennedy was joined by Justices Rehnquist, O'Connor, Scalia, and Thomas. *Id.* at 166. Justice Stevens, joined by Justices Blackmun, Souter, and Ginsburg, dissented. *Id.* at 192; *see supra* note 24 (discussing Justices Kennedy and Thomas as Justice Scalia's allies in plain meaning approach to statutory interpretation).

[31] *Central Bank*, 511 U.S. at 173.

[32] *Id.* at 177.

statutory text."[33] Evidently, the Court chose not to consider the legislative history surrounding the 1934 Act.

After establishing that the statutory language controls, however, the Court did in fact discuss legislative history, in part discrediting it, and in part explaining how the Court would have reached the same result had legislative history been a factor.[34] Not surprisingly, the Court's explanation traces back to a Scalia dissent:

> It does not follow ... that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation.... Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President.... Congressional inaction cannot amend a duly enacted statute."[35]

The Court then cited precedent downplaying the role of inferences made from Congressional silence.[36]

The Court in *Central Bank* not only condemned the practice of legislative interpretation by subsequent Congresses,[37] but also that of the production by Congress of a documented legislative

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[33] *Id.*

[34] *See id.* at 178. ("[T]he statute itself resolves the case, but even if it did not, we would reach the same result.").

[35] *Id.* at 186 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) (quoting Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting))) (alterations in original).

[36] *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction....") (quoting United States v. Wise, 370 U.S. 405, 411 (1962)); Helvering v. Hallock, 309 U.S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."). "Policy considerations cannot override [the Court's] interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." *Central Bank*, 511 U.S. at 188 (quoting Demarest v. Manspeaker, 498 U.S. 184, 191 (1991)); *see also* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535-36 n.26 (1982) (dismissing policy argument for interpretation of Title IX). *See generally* John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into 'Speculative Unrealities,'* 64 B.U. L. REV. 737 (1984).

[37] *Central Bank*, 511 U.S. at 185 (stating that "[w]e have observed on more than one occasion that the interpretation given by one Congress to an earlier statute is of little assistance in discerning the meaning of that statute") (citing Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989)).

history to accompany each bill.[38] Critics of such an approach find it "confining" and claim that a complete disregard of legislative history "ignores the realities of the political process."[39] Perhaps

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[38] *Central Bank*, 511 U.S. at 187. No inference may be drawn from congressional inaction regarding legislative history because the statute itself may incorporate all the necessary information. *Id.* The only time that courts should look beyond the statutory text is when a plain meaning interpretation of the legislation is " 'so bizarre' that Congress could not have intended it." *Id.* at 188 (citations omitted). "[L]egislative history may not be used to support a construction that adds to or takes from the significance of the words employed." *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929). Only where there is doubt as to Congress' intent may committee reports and other legislative history be employed. Literature on statutory interpretation, by enacting and subsequent Congresses, is abundant. *See* Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129 (1992) (discussing intent of enacting Congress in context of legislative supremacy); Grabow, *supra* note 36, at 737 (discussing intent of subsequent Congresses); *see also* Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 300-10, 311-18 (1989) (showing Court's focus on text of statute in determining duty to represent indigent defendants and dissent's focus on Congressional intent in passing statute); Pittston Coal Group v. Sebben, 488 U.S. 105, 113, 124 (1988) (exemplifying Court's focus on text of interim labor regulation which outlined when miners would obtain presumption of entitlement, and dissent's analysis of legislative history). *But see* Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("It is a well-established canon of construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."); Philibrook v. Glodgett, 421 U.S. 707, 714 (1975) (" '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' ") (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)); United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of the words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' ") (citations omitted).

[39] Marc I. Steinberg, *The Ramifications of Recent U.S. Supreme Court Decisions on Federal and State Securities Regulation*, 70 NOTRE DAME L. REV. 489, 496 (1995). "Such a wooden construction ignores the realities of the political process, demands a 'crystal ball' approach from the Congress enacting the legislation, ill serves a body as eminent as the Supreme Court, and frustrates the effectuation of legitimate, if not sometimes noble, public policy objectives." *Id.*

Professor Steinberg has written often in the field of implied rights of action, critiquing what he perceives as the Court's "unduly restrictive approach." *See* Marc I. Steinberg & William A. Reece, *The Supreme Court, Implied Rights of Action, and Proxy Regulation*, 54 OHIO ST. L.J. 67 (1993) (discussing implied rights of action under federal law, scope of section 14(a) private right of action, and causation issues raised by *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991)); Marc I. Steinberg & William E. Kaulbach, *The Supreme Court and the Definition of 'Security:' The 'Context' Clause, 'Investment Contract' Analysis, and Their Ramifications*, 40 VAND. L. REV. 489, 503-39 (1987) (criticizing Court in *Weaver v. Marine Bank*, 455 U.S. 551 (1982), for relying on "context clause" and disregarding legislative history of federal regulatory scheme regarding fraud); Marc I. Steinberg, *The Propriety and Scope of Cumulative Remedies Under the Federal Securities Laws*, 67 the ultimate goal of plain meaning interpretation is to teach Congress a lesson. By repeatedly interpreting statutes according to the generally accepted meaning of their words, the Court might "teach" Congress to compose its legislation carefully, covering various possibilities of potential conflict that may arise under each statute.[40] In theory, such a lesson would be ideal for Congress to learn.

The Supreme Court's strong pronouncement in favor of strict statutory interpretation in the securities context suggests that the Court will give little weight to the lengthy Conference Report which accompanied the PSLRA. Adherence to the *Central Bank* rationale dictates that once a court determines that the legislation's text resolves the issue, any consideration of the legislative history would be unnecessary and improper, especially where the language is neither ambiguous nor patently absurd.[41]

Upon examining the text of the Act, various ambiguities and potential problems become apparent. Even proponents of the plain meaning approach recognize that when the text of a statute is vague or absurd on its face, it may be appropriate to consider legislative history.[42] Unfortunately, resorting to the Conference

CORNELL L. REV. 557, 560-71 (1982) (explaining that Supreme Court's restrictive decisions in this area have led lower courts to adopt incorrectly exclusive construction when express remedies are available); Marc I. Steinberg, *Implied Private Rights of Action Under Federal Law,* 55 NOTRE DAME L. REV. 33, 44-52 (1979) (stating that refusal of courts to imply private rights of action when Congress declines to act in its legislative capacity would result in great injustice).

[40] Judge Patricia M. Wald, of the United States District Court of Appeals for the District of Columbia Circuit, has written opinions on judicial canons which support this theory. Judge Wald suggests that the Court is sending a message to Congress that if Congress wants the Court to lend credence to a law, Congress must make a clear, unequivocal statement. *See Group Discussion, supra* note 22, at 288; *see also* Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) ("[A statute is] an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts.").

[41] *See Central Bank*, 511 U.S. at 173-78; *see also* Pinter v. Dahl, 486 U.S. 622, 641-42 (1988) (interpreting word "seller" in § 12(1) by first looking at statutory language to determine if defendant may be held liable for sale of unregistered securities); Sante Fe Indus., Inc. v. Green, 430 U.S. 462, 473 (1977) ("The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception."); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) (defining scope of prohibited conduct under § 10(b) through plain meaning of text).

[42] *See* Steven A. Meetre, *Textualist Statutory Interpretation Kills Section 10(B) "Aiding and Abetting" Liability*, DEF. COUNS. J. 58, 60 (1996) (noting that statutory interpretation is broad inquiry which may consider other elements, such as legislative history, to give meaning to provisions); Melvin A. Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 24 (1995) (describing strict textual approach as

Report to interpret the PSLRA is similar to resorting to a faulty dictionary to define a word. The Committee's proffered intent often differs significantly from the statute as written.

II. SAFE HARBOR PROVISION OF THE PRIVATE SECURITIES LITIGATION REFORM ACT: AN OVERVIEW

When the Private Securities Litigation Reform Act of 1995 became law on December 22, 1995, some attorneys believed the Act would have an immediate, profound impact on the daily workings of securities law.[43] Ultimately, however, such a prediction will be dissipated by the fact that the Act is a mere conglomeration of diverse measures, each reflecting concerns of various, often conflicting, constituencies.[44] For illustrative pur-

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"intellectually incoherent").

[43] *See* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995,* 51 BUS. LAW. 335, 335-36 (1996) ("It will significantly alter the way in which private actions are conducted under the federal securities laws, the consequences of liability in those actions, and even the standards for such liability."); Pitt & Groskaufmanis, *supra* note 4, at B4 ("[T]he act's implications affect the day-to-day affairs of thousands of public companies and their senior managers.").

[44] *See* Avery, *supra* note 43, at 336; Aronson et al., *Fewer Securities Lawsuits To Come?*, CORP. LEGAL TIMES, Apr. 1996, at 1 ("Among the certain implications of the new 'safe harbor' protections are additional litigation over what it means."); Dominic Bencivenga, *Securities Litigation: Experts Question New Law's Ability to Reform*, N.Y. L.J., Nov. 30, 1995, at 5 (quoting Harvey J. Goldschmid, securities law professor at Columbia University Law School as stating, "through a combination of poor thinking in several instances and vague drafting, it is going to create a lot of unnecessary litigation ...."); Menton & Stong, *supra* note 1, at 5. Most scholars agree on which of the Act's provisions, next to the safe harbor, are most significant. *See* Avery, *supra* note 43, at 336 (listing statutory safe harbor among most significant measures instituted by Act). One such provision establishes a system of proportionate liability to replace joint and several liability, with an exception for defendants who "knowingly commit[] a violation." PSLRA, Pub. L. No. 104-67, sec. 201, 109 Stat. 737, 758 (1995), *codified at* 15 U.S.C. § 78u-4(g)(2) (1994 & Supp. 1995) (adding section 21D(g) to 1934 Act); *see also SEC Lawyer Predicts Bigger Awards in Actions Over Corporate Projections,* 11 Sec. Reg. & L. Rep. (BNA) 368 (Mar. 15, 1996) (stating that amendment may result in higher judgments because more cases are weeded out at early stage so those proceeding to trial receive generous awards); Menton & Strong, *supra* note 1, at 5 (discussing proportionate several liability). Sanctions are now mandatory for violations of Federal Rule of Civil Procedure 11(b). PSLRA, Pub. L. No. 104-67, sec. 101, 109 Stat. 737, 742 (1995), *codified at* 15 U.S.C. § 78u-4(c)(2) (1994 & Supp. 1995) (amending section 27(c) of 1934 Act); *id.* sec. 101, 109 Stat. 737, 748, *codified at* 15 U.S.C. § 77z-1(c)(2) (1994 & Supp. 1995) (amending section 21D(c) of 1933 Act). Also under the new law, a lead plaintiff provision for class action suits requires that courts choose the most appropriate plaintiff to represent a class, with the assumption that the most appropriate representative is the one with the largest financial interest in the case. PSLRA, Pub. L. No. 104-67, sec.

poses, this Note focuses on the safe harbor provisions for forward-looking statements,[45] arguably the most important change to the federal securities laws,[46] and the subject of most of the final legislative debate.[47]

The statutory safe harbor for forward-looking statements amends the securities law by adding a new section 27A to the 1933 Act and a new section 21E to the 1934 Act.[48] The Confer-

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101, 109 Stat. 737, 738-39 (1995) (amending section 27(a)(3) of 1933 Act), *codified at* 15 U.S.C. § 77z-1(a)(3) (1994 & Supp. 1995); *id.* sec. 101, 109 Stat. 737, 743-44, *codified at* 15 U.S.C. § 78u-4(a)(3) (1994 & Supp. 1995) (amending section 21D(a)(3) of 1934 Act).

[45] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 749-53 (1995) (adding section 27A to 1933 Act), *codified at* 15 U.S.C. § 77z-2 (1994 & Supp. 1995); *id.* sec. 102, 109 Stat. 737, 753-56 (adding section 21E to 1934 Act), *codified at* 15 U.S.C. §78u-5 (1994 & Supp. 1995).

[46] *See* John C. Coffee, Jr., *Safe Harbor for Forward Looking Statements*, N.Y. L.J., Nov. 30, 1995, at 5 [hereinafter Coffee, *Safe Harbor*] (noting that safe harbor was "long-awaited"); Pitt & Groskaufmanis, *supra* note 4, at B4 (stating that PSLRA is "most comprehensive revision of private litigation under the federal securities laws since the New Deal"); *Technology Companies No Longer Fair Game*, VENTURE CAP. J., Jan. 1, 1996 (referring to safe-harbor provisions as "key").

[47] Bencivenga, *supra* note 44, at 5.

[48] *See* PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 749-53 (1995), *codified at* 15 U.S.C. § 77z-2 (1994 & Supp. 1995) (adding section 27A to 1933 Act); *id.* sec. 102, 109 Stat. 737, 753-56, *codified at* 15 U.S.C. §78u-5 (1994 & Supp. 1995) (adding section 21E to 1934 Act); *see also infra* notes 53-58 and accompanying text (discussing exclusions under statute); *infra* note 54 and accompanying text (discussing to whom statute applies). The safe harbor provision reads as follows:

> Except as provided in subsection (b), in any private action arising under this title that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that —
>
> (A) the forward-looking statement is —
>
> (i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or
>
> (ii) immaterial; or
>
> (B) the plaintiff fails to prove that the forward-looking statement —
>
> (i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or
>
> (ii) if made by a business entity; was —
>
> (I) made by or with the approval of an executive officer of that entity, and
>
> (II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

This language was not the first attempt at legislation aimed at creating a meaningful safe harbor for forward-looking statements. Long before the numerous drafts and suggestions that led to the enactment of this provision, the SEC promulgated ence Committee maintains that the safe harbor provision helps to preserve the integrity of private securities litigation. Whether truly an epidemic or merely a conglomeration of one-sided anecdotal evidence, the threat of abusive securities litigation and fear of open-ended liability may have discouraged issuers from disseminating critical market information needed by investors to make educated business decisions. Alleged abusive practices which the Committee suggests Congress was responding to include:

> (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.[49]

The Conference Committee posited that the PSLRA would have broad effects. Most notably, the Committee maintained that the Act would protect both investors and issuers from abusive securities litigation.[50] In addition, it claimed that the PSLRA restricts liability to those individuals who *knowingly* violate securities laws and cause damage.[51] This new protection

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Rule 175 under the 1933 Act, 17 C.F.R. § 230.175 (1996), and Rule 3b-6 under the 1934 Act, 17 C.F.R. § 240.3b-6 (1994), that provided a safe harbor for certain forward-looking statements made, reaffirmed, or later published with a reasonable basis in good faith. These Rules did not, however, result in meaningful protection from liability for issuing companies with provisions drafted in accordance with them. *See* Avery, *supra* note 43, at 354 n.137 (discussing 1979 safe harbor). While, in theory, the Rules protected issuers from liability for disclosing projections, they did not protect issuers from strike suits which arose when the projection as to the future state of the company was not realized. The potential for such an expansive interpretation of the Rules resulted in the inclusion of a safe harbor provision by the Conference Committee as part of the PSLRA.

[49] H.R. CONF. REP. NO. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

[50] *Id.* (commenting that "[private securities litigation] promote[s] public and global confidence in our capital markets and help[s] to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs").

[51] *Id.* at 32, *reprinted* in 1995 U.S.C.C.A.N. 730, 731 ("It protects outside direc-

afforded by the PSLRA to non-knowing individuals might encourage companies to provide more forward-looking information upon which investors may rely. Before disseminating any new information, however, an issuing company must first determine whether the disclosure would be encompassed by the Act. If so, the safe harbor protects the company from suit by private individuals.

First and foremost, the Act applies only to a "forward-looking statement."[52] To fit within the statutorily defined term of art, a statement must contain one of the following items: (1) a projection of revenues, income, earnings per share, or other forms of financial items; (2) management's future plans and objectives for operations; (3) future economic performance; (4) assumptions underlying or relating to the above; (5) a report from an outside reviewer assessing a forward-looking statement; or (6) some other projection or estimate that the SEC may later specify.[53] After satisfying the definition of a forward-looking statement, however, the issuer or related individual[54] must still overcome several hurdles in order to escape potential liability.

The identity of the speaker is necessary to determine if the forward-looking statement is covered by the Act. An individual who makes a forward-looking statement must either be an issuer subject to the reporting requirements of section 13(a) or section 15(d) of the 1934 Act, someone acting on behalf of the issuer (i.e. an officer, director, or employee), an outside reviewer retained by the issuer making a statement on the issuer's behalf, or an underwriter with respect to information provided either directly or indirectly by the issuer.[55]

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tors, and others who may be sued for non-knowing securities law violations, from liability for damage actually caused by others.").

[52] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 749 (1995), *codified* at 15 U.S.C. § 77z-2(a) (1994 & Supp. 1995) (adding section 27A(a) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 753, *codified at* 15 U.S.C. § 78u-5(a) (1994 & Supp. 1995) (adding section 21E(a) to 1934 Act).

[53] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 752 (1995), *codified at* 15 U.S.C. § 77z-2(i)(1) (1994 & Supp. 1995) (adding section 27A(i)(1) to 1933 Act); *id.* sec. 102 , 109 Stat. 737, 755-56, *codified at* 15 U.S.C. § 78u-5(i)(1) (1994 & Supp. 1995) (adding 21E(i)(1) to 1934 Act); *see* Avery, *supra* note 43, at 366 n.141.

[54] *See infra* note 55 and accompanying text (explaining to whom safe harbor may apply)

[55] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 749 (1995), *codified at* 15 U.S.C. § 77z-2(a) (1994 & Supp. 1995) (adding section 27A(a) 1933 Act); *id.* sec. 102, 109 Stat. 737, 753, *codified at* 15 U.S.C. § 78u-5(a) (1994 & Supp. 1995) (adding section 21E(a) to 1934 Act); *see supra* note 48 (providing text of applicability provision).

The safe harbor also has certain exclusions. It does not apply to forward-looking statements made in conjunction with particular documents, including certified financial statements prepared in accordance with generally accepted accounting principles, initial public offering registration statements, and beneficial ownership filings.[56] Further, the safe harbor is not applicable to forward-looking statements issued in connection with several types of transactions including tender offers, roll-up transactions, and going private transactions.[57] Lastly, if the issuer has been convicted of securities fraud or the subject of an SEC administrative order within the three years prior to the statement, such statement is not covered by the Act.[58]

After avoiding the numerous exclusions, a forward-looking statement must then fit within one of two prongs of the Act's bifurcated analysis: "(A) the forward-looking statement is ... [identified and] accompanied by meaningful cautionary statements ... or ... [is] immaterial; or (B) the plaintiff fails to prove that the forward-looking statement ... was made with actual knowledge ... that the statement was false or misleading."[59] If *either* prong is satisfied, the maker of the statement is protected from private litigation under both the 1933 Act and the

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Additionally, the Committee Report specifies to whom the statute applies. H.R. CONF. REP. NO. 104-369, at 45 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 741. Regarding underwriters, only information "derived from" issuers fulfills the statutory requirement because underwriters are typically viewed as adversarial to issuers. *Id.* at 45, *reprinted in* 1995 U.S.C.C.A.N. 730, 744. The Report specifically denies safe harbor protection to forward-looking statements made in conjunction with a broker's sales practices. *Id.*

[56] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 749-50 (1995), *codified at* 15 U.S.C. § 77z-2(b) (1994 & Supp. 1995) (adding 27A(b) 1933 Act); *id.* sec. 102, 109 Stat. 737, 753-54, *codified at* 15 U.S.C. § 78u-5(b) (1994 & Supp. 1995) (adding section 21E(b) to 1934 Act); *see supra* note 46 (providing text of provision).

[57] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 749-50 (1995), *codified at* 15 U.S.C. § 77z-2(b) (1994 & Supp. 1995) (adding 27A(b) 1933 Act); *id.* sec. 102, 109 Stat. 737, 753-54, *codified at* 15 U.S.C. § 78u-5(b) (1994 & Supp. 1995) (adding section 21E(b) to 1934 Act).

[58] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995), *codified at* 15 U.S.C. § 77z-2(b) (1994 & Supp. 1995) (adding 27A(b) 1933 Act); *id.* sec. 102, 109 Stat. 737, 753-54, *codified at* 15 U.S.C. § 78u-5(b) (1994 & Supp. 1995) (adding section 21E(b) to 1934 Act).

[59] PSLRA, sec. 102, 109 Stat. 737, 750 (1995), *codified at* 15 U.S.C. § 77z-2(c)(1) (1994 & Supp. 1995) (adding section 27A(c)(1) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754, *codified at* 15 U.S.C. § 78u-5(c)(1) (1994 & Supp. 1995) (adding section 21E(c)(1) to 1934 Act); *see* H.R. CONF. REP. NO. 104-369, at 44 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 743; Coffee, *Safe Harbor*, *supra* note 46, at 5.

1934 Act.[60] Such a flexible safe harbor was designed to cover a broad class of issuers who seek to take advantage of the safe harbor's protection.[61] This statutory protection, however, may actually create numerous problems and extensive litigation, as discussed below.[62]

The first prong protects the maker of a written or oral[63] forward-looking statement from private liability when the statement is "immaterial," or is identified as forward-looking and is accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially" from those predicted in the statement.[64] The Conference Committee maintains that under this prong, mere "boilerplate warnings will not suffice."[65] A meaningful cautionary statement, according to the Committee, is one which conveys substantive information regarding factors that "realistically could cause results to differ materially from those projected."[66] The Committee classifies as "important" those factors that are relevant to the projections and that are of such a nature that they could affect whether those projections do in fact occur.[67]

The Committee notes that while it expects cautionary

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[60] *See* Coffee, *Safe Harbor, supra* note 46, at 5 (noting that use of disjunctive indicates statement will be protected if either prong is satisfied). It is important to remember, however, that nothing in the PSLRA changes or diminishes the enforcement powers of the SEC. *See infra* note 96 (discussing SEC's enforcement powers under Rule 10b-5).

[61] H.R. CONF. REP. NO. 104-369, at 43 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 742.

[62] *See infra* notes 76-102 and accompanying text (discussing ambiguities and potential problems).

[63] "[T]he Conference Committee has provided for an optional, more flexible rule for oral forward-looking statements that will facilitate these types of oral communications by an issuer while still providing to the public information it would have received if the forward-looking statement was written." H.R. CONF. REP. NO. 104-369, at 45 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 744. This oral safe harbor, however, is limited to the "issuers or the officers, directors, or employees of the issuer acting on the issuer's behalf." *Id.* For further elaboration on oral statements satisfying the safe harbor protection, see Coffee, *Safe Harbor, supra* note 46, at 5.

[64] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995), *codified at* 15 U.S.C. § 77z-2(c)(1)(A) (1994 & Supp. 1995) (adding section 27A(c)(1)(A) 1933 Act); *id.* sec. 102, 109 Stat. 737, 754, *codified at* 15 U.S.C. § 78u-5(c)(1)(A) (1994 & Supp. 1995) (adding section 21E(c)(1)(A) to 1934 Act).

[65] H.R. CONF. REP. NO. 104-369, at 43 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 742.

[66] *Id.* (providing example of statement containing "information about the issuer's business").

[67] *Id.* at 43-44, *reprinted in* 1995 U.S.C.C.A.N. 730, 742-43.

statements to identify important factors that could cause materially different results from those predicted, it does not intend the Act to require identification of all such factors.[68] Thus, a cautionary statement is not removed from safe harbor protection merely because it fails to identify the particular factor which ultimately prevents the statement from reaching its projected result.[69] Additionally, the first prong makes no mention of the issuer's intent. Therefore, the Committee maintains that a court may decide a motion to dismiss by considering the cautionary statement and the forward-looking statement without considering the defendant's state of mind.[70] Further, an immaterial forward-looking statement is not actionable.[71]

Alternatively, the forward-looking statement may fall within the second prong, which requires courts to consider the state of mind of its maker.[72] This "actual knowledge" prong protects the speaker from liability if the plaintiff does not meet the burden of proving that the statement was made with actual knowledge that it was false or misleading.[73] The Act also provides that

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[68] *Id.*

[69] John C. Coffee, Jr., *Speed Bumps or Revolution?: A Preliminary Evaluation of the 'Private Securities Litigation Reform Act of 1995', in* 953 REFORM: LITIGATING AND BESPEAKING CAUTION UNDER THE NEW SECURITIES LAW 645, 651-52 (Pract. L. Inst. ed. 1996) (noting that legislative history does not support interpretation of Act that "meaningful cautionary statements" must identify principal reasons that were most likely to cause actual results to differ from predicted outcomes); Julia B. Strickland & Mary D. Manesis, *Litigating a Safe Harbor: The Private Securities Litigation Reform Act of 1995 and the Bespeaks Caution Doctrine, in* SWEEPING REFORM 147 (Pract. L. Inst. ed., 1996) (stating that "failure to identify the particular factor that prevented the forward looking statement from being realized does not preclude protection under the safe harbor").

[70] H.R. CONF. REP. NO. 104-369, at 44 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 743 (stating that "[c]ourts should not examine the state of mind" of the issuer).

[71] *See supra* note 48 and accompanying text (providing relevant statutory provision).

[72] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995), *codified at* 15 U.S.C. § 77z-2(c) (1)(B) (1994 & Supp. 1995) (adding section 27A(c)(1)(B) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754, *codified at* 15 U.S.C. § 78u-5(c)(1)(B) (1994 & Supp. 1995) (adding section 21E(c)(1)(B) to 1934 Act); *see also* H.R. CONF. REP. 104-369, at 44 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 743. Several authors discuss the second prong's focus on state of mind. *See, e.g.,* Strickland & Manesis, *supra* note 69; Joel I. Greenberg et al., *Forward Looking Statements: Safe Harbor Provisions of Federal Act Create Controversy,* N.Y. L.J., Oct. 17, 1996.

[73] *See* PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995), *codified at* 15 U.S.C. § 77z-2(c) (1)(B) (1994 & Supp. 1995) (adding section 27A(c)(1)(B) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754, *codified at* 15 U.S.C. § 78u-5(c)(1)(B) (1994 & Supp. 1995) (adding section 21E(c)(1)(B) to 1934 Act).

when a statement is made by a business entity, the plaintiff must prove that the statement was made by or with the approval of an executive officer of the entity, and that such executive officer had actual knowledge that the statement was false or misleading.[74] Significantly, the Committee also notes that the Act itself provides no duty to update forward-looking statements.[75]

III. A PLAIN MEANING APPROACH—AMBIGUITIES AND POTENTIAL PROBLEMS

If the Supreme Court has been trying to teach Congress a lesson, it has all but been ignored. The PSLRA is far from being a clear expression of legislation drafted in such a way that the reader may employ common definitions to understand the Act.[76] The Conference Report, if it accurately reflects Congress' intent, is at times inconsistent with the Act itself. Remaining focused on the safe harbor, the Act leaves open several important questions which, if answered according to the Supreme Court's trend in statutory interpretation, may have significantly different results from those which the Committee stated that it intended.

Even President Clinton, in his veto message, indicated his support for the language of the Act creating the safe harbor, but not for the explanation given to the provision by the Conference Committee.[77] Without pin-pointing a specific section, the Presi-

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[74] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995), *codified at* 15 U.S.C. § 77z-2(c) (1)(B)(ii) (1994 & Supp. 1995) (adding section 27A(c)(1)(B)(ii) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754, *codified at* 15 U.S.C. § 78u-5(c)(1)(B)(ii) (1994 & Supp. 1995) (adding section 21E(c)(1)(B)(ii) to 1934 Act).

[75] H.R. CONF. REP. NO. 104-369, at 46 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 745 (noting provision does not impose any duty to update forward-looking statements); *see* PSLRA, sec. 102, 109 Stat. 737, 751 (1995), *codified at* 15 U.S.C. § 77z-2(d) (1994 & Supp. 1995) (adding section 27A(d) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 755, *codified at* 15 U.S.C. § 78u-5(d) (1994 & Supp. 1995) (adding section 21E(d) to 1934 Act).

[76] *See supra* notes 50-62 and accompanying text (discussing Committee's intended interpretation of Act). According to A. Jared Silverman, the former chief of the New Jersey Bureau of Securities, " '[w]e're in a grey area .... What Congress has done is really outline a structure, then put a framework out. Someone else has to put in the plumbing and the electricity. It may be the courts, it may be the SEC, or it may be a combination.' " Russ Bleemer, *Securities Law Changes Welcomed, But Caution Reigns*, N.J. L.J., Jan. 1, 1996, at 3. Based on the uncertainty, attorneys are reluctant to advise corporate clients to test the safe harbor. *See id.* (quoting one New Jersey attorney as stating, " '[o]ur advice for a long time has been not to include [forward looking statements]' in reporting materials. Even with the reforms ... 'it's still safer to avoid making [them].' ").

[77] *See* 141 CONG. REC. H15214, H15215 (daily ed. Dec. 20, 1995).

dent indicated that the Conference Report weakened the cautionary language required for a forward-looking statement to be protected by the safe harbor.[78] President Clinton's concerns may prove to be unwarranted. If lower courts and, ultimately, the Supreme Court continue the trend of strictly interpreting securities legislation, the Committee's language will prove to be mere surplusage.

A. Ambiguities

The application of a plain meaning analysis to the PSLRA highlights certain important ambiguities. Most notably, the Act calls for "meaningful" disclosure of "important" factors.[79] Included within the safe harbor are statements identified as forward-looking and accompanied by meaningful cautionary language.[80] The Act is unclear as to whether the speaker must identify the factors that are most likely to cause actual results to differ from projected ones, or if it is enough that only some "important" factors are identified.[81] Between these alternatives lies an enormous range of possibilities yet to be determined. Absent further guidance, a company will undertake great risk by testing the waters of the safe harbor. Over time, either through a series of litigation or through SEC promulgated rules, a standard will likely develop defining what is "important" and how much of this "important" information must be disclosed. For the moment, one can only hypothesize, and would be wise to proceed with caution in relying upon anything more than a conservative interpretation.

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[78] *Id.*

[79] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995) *codified at* 15 U.S.C. §77z-2(c)(1)(A)(i) (1994 & Supp. 1995) (adding section 27A(c)(1)(A)(i) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754 (1995), *codified at* 15 U.S.C. § 78u-5(c)(1)(A)(i) (1994 & Supp. 1995) (adding section 21E(c)(1)(A)(i) to 1934 Act).

[80] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995) *codified at* 15 U.S.C. §77z-2(c)(1)(A)(i) (1994 & Supp. 1995) (adding section 27A(c)(1)(A)(i) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754 (1995), *codified at* 15 U.S.C. § 78u-5(c)(1)(A)(i) (1994 & Supp. 1995) (adding section 21E(c)(1)(A)(i) to 1934 Act).

[81] *See* John C. Coffee, Jr., *Securities Litigation Reform Act: Emerging Issues*, N.Y. L.J., Feb. 29, 1996, at 5, 35 [hereinafter Coffee, *Emerging Issues*] (noting that adjective "meaningful" could convey either idea of honest attempt intended to convey some of most important factors or that only some information must be provided). *But see* Greenberg et al., *supra* note 72, at 11 (noting that "while it is clear that disclosure of all factors that could cause the forward-looking statement not to be realized is not required, a good faith effort should be made to identify the most important factors").

For the brave issuers willing to risk possible private liability, ample space exists to remain arguably within the safe harbor. A strict examination of the statutory language of this first prong suggests that an issuer potentially could retain its protected status by disclosing only a few of several important factors that could cause a material difference between the actual and predicted results.[82] Even deliberate omission of one or more important factors appears not to subject the issuer to private liability, since some important factors would still be identified, just not all of them.[83] Apparently, an issuer could even omit the most likely factors and still be protected, provided that the factors which the issuer does state are important.[84]

Similarly, the Act does not explicitly require that the issuer identify the factor which ultimately causes a material difference between projected and actual results.[85] This is reasonable, since when a company makes a forward-looking statement it often will not know what later will become the ultimate causing factor. The ultimate causing factor of a material difference, however, would seem to fit well within the common definition of the word "important." In such a case, the causing factor would be important and yet, as discussed above, since not all important factors need be identified, the issuer could still deliberately fail to disclose even a known causing factor. Upon engaging in such analysis, one begins to see how the Act's plain meaning is not so plain.

To complicate matters further, a cautionary statement may not be "meaningful," as the word is commonly defined, if the statement does not include the ultimate causing factor or at least the most likely factors. Also unclear under the Act is the result

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[82] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995) *codified at* 15 U.S.C. §77z-2(c)(1)(A)(i) (1994 & Supp. 1995) (adding section 27A(c)(1)(A)(i) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754 (1995), *codified at* 15 U.S.C. § 78u-5(c)(1)(A)(i) (1994 & Supp. 1995) (adding section 21E(c)(1)(A)(i) to 1934 Act).

[83] *See* Coffee, *Emerging Issues, supra* note 81, at 35.

[84] *But see* Greenberg et al., *supra* note 72, at 7 (asserting that issuer should still make good faith effort to disclose all important factors); Phillip D. Parker, *The New Safe Harbor For Forward-Looking Statements, in* SWEEPING REFORM: LITIGATING AND BESPEAKING CAUTION UNDER THE NEW SECURITIES LAW 269, 285-86 (Prac. L. Inst. ed., 1996) (arguing that "[s]tating that there is no requirement to disclose 'all' factors is simply not the same as stating that the 'most important' factor need not be disclosed.").

[85] *But see* Greenburg et al., *supra* note 72, at 7 (suggesting that issuer should still make good faith effort).

of identifying a factor in the forward-looking statement, but not mentioning that its potential risk is known to be substantial.[86] The Act seemingly affords safe harbor protection to the mere mention of a known substantial risk. What actually constitutes meaningful disclosure of important factors remains uncertain, particularly since the trend of the Supreme Court is to give little or no weight to the Conference Committee's stated intentions absent ambiguity or absurdity in the legislation. Such an atmosphere of uncertainty is not likely to encourage companies to disclose information. As long as this uncertainty remains, a company risks exposing itself to liability by releasing information in reliance on the Act.

Additionally, the Committee indicates that under the first prong, courts should consider the cautionary statement, but not the state of mind of the person making the statement.[87] A plain meaning analysis, however, reveals that there is no textual basis in the Act for the Committee's assertion. Contrary to the Conference Report, an examination of the issuer's state of mind may be needed in order to determine whether the first prong's requirements are met.[88] Depending on the interpretation of the words "important" and "immaterial," the issuer's state of mind at the time of the statement could be considered relevant to whether the cautionary statement was actually meaningful. No basis exists, therefore, for the Committee's claim that courts should not examine it.[89]

Further ambiguity arises when an issuer learns that information provided when the forward-looking statement was made, though correct at the time, has subsequently become incorrect.[90] There is no duty under the PSLRA to update a forward-looking statement.[91] A close reading of this language indicates that the

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86 *See* Coffee, *Safe Harbor*, *supra* note 46, at 6 (asserting that SEC should promulgate rule addressing issue posed by cautionary language which identifies risk factor but omits disclosing that risk is very substantial).

87 H.R. CONF. REP. NO. 104-369, at 44 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 743.

88 *See supra* notes 70-72, 75, 87 and accompanying text (discussing Committee Report).

89 *See* Coffee, *Emerging Issues*, *supra* note 81, at 35 (asserting that issuer's state of mind could be "highly relevant" to whether statement provided meaningful cautionary information or was deceptive, misleading statement).

90 Dennis J. Block & Jonathan M. Hoff, *Securities Litigation Reform Law*, N.Y. L.J., Dec. 21, 1995, at 6; Coffee, *Safe Harbor*, *supra* note 46, at 6.

91 The Act indicates that "[n]othing in this section shall impose upon any per-

Act does not declare that there is no duty to update but, instead, that the Act itself does not impose such a duty where one is not otherwise present. In addition, the Act does not prohibit such a duty from being imposed by other applicable law.[92]

A similar question which arises is whether an issuer must correct a forward-looking statement that the issuer later learns was false when made. A distinction could be raised between "updating" a statement and "correcting" it, where updating would refer to a statement correct when made, and correcting would refer to a statement that was false when made. The Act does not specifically address correcting a previously issued statement. Therefore, it appears that while the Act imposes no duty to update a forward-looking statement, liability may arise for failure to correct it.

Pursuant to the second prong of the safe harbor, an issuer who is a natural person is protected if the plaintiff fails to prove that the issuer made the forward-looking statement with actual knowledge that it was false or misleading.[93] Where the issuer is an entity, the plaintiff must prove that the statement was made by or with approval of an executive who had actual knowledge that the statement was false or misleading.[94] The Act is ambiguous as to the consequences of releasing a forward-looking statement on behalf of a corporation when the speaker does not have appropriate approval.[95] Under the plain meaning of the Act, there appears to be no duty to correct the unapproved statement. It appears that the safe harbor would still apply to a statement which is known by the entity to be false. The same result appears likely for a projection made by a natural person which the

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son a duty to update a forward-looking statement." PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 751 (1995) *codified at* 15 U.S.C. §77z-2(d) (1994 & Supp. 1995) (adding section 27A(d) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 755 (1995), *codified at* 15 U.S.C. § 78u-5(d) (1994 & Supp. 1995) (adding section 21E(d) to 1934 Act).

[92] Examples of such law include the general anti-fraud provisions of § 10(b) of the 1933 Act and Rule 10b-5 promulgated thereunder.

[93] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995) *codified at* 15 U.S.C. §77z-2(c)(1)(B) (1994 & Supp. 1995) (adding section 27A(c)(1)(B) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754 (1995), *codified at* 15 U.S.C. § 78u-5(c)(1)(B) (1994 & Supp. 1995) (adding section 21E(c)(1)(B) to 1934 Act).

[94] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995) *codified at* 15 U.S.C. §77z-2(c)(1)(B)(ii) (1994 & Supp. 1995) (adding section 27A(c)(1)(B)(ii) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754 (1995), *codified at* 15 U.S.C. § 78u-5(c)(1)(B)(ii) (1994 & Supp. 1995) (adding section 78u-5(c)(1)(B)(ii) to 1934 Act).

[95] Note that the speaker is still potentially liable under basic misrepresentation theory, which is not protected by the Act's safe harbor.

person later learns was false when made. Since the plaintiff could not prove that the statement was made with actual knowledge that it was false or misleading, the statement would remain protected.

B. Potential Problems

In addition to the numerous ambiguities which arise from a plain meaning analysis of the Act, two potential problems are readily apparent.[96] In no unequivocal terms, the PSLRA allows individuals to disseminate information they know to be false by surrounding such information with cautionary language. Additionally, the Act allows individuals to escape liability by avoiding actual knowledge of the truth or falsity of forward-looking statements, even in the absence of cautionary language.

A significant problem arising from a plain meaning examination of the Act is that it creates what some experts have called a "license to lie."[97] Strict interpretation of the safe harbor provi-

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[96] A separate and distinct problem arises since the PSLRA applies only to private plaintiffs and does not restrict SEC action. Consequently, Congress may have wasted its efforts. In light of the continuing presence of the SEC as an enforcement mechanism, the PSLRA accomplishes few practical benefits for either companies or investors. A plain meaning interpretation of the Act could easily cause it to self destruct. There is little incentive for companies to disclose information because the SEC may still bring suit. Coffee, *Safe Harbor, supra* note 46, at 6 (noting that SEC and NASD enforcement powers remain under Rule 10b-5). Similarly, investors should be wary to rely on disseminating information because of the license to lie. As this result is neither ambiguous nor absurd, courts must adhere to the statutory language and interpret the Act in such a way that it spins its own wheels.

An obvious and important feature of the PSLRA is that it applies only to private causes of action. Regardless of how the Act's several ambiguities and problems are resolved, nothing in the Act will diminish the authority of the SEC to bring an action against a company. This remains true even if the company is well within the new safe harbor protecting it from private suit. Knowing that it is not completely safe from potential liability will hardly encourage a company to disclose a great deal more information.

Congress, it seems, does not trust the private citizen who would otherwise maintain a valid cause of action against a company. Limiting the private causes of action opens the door to potential abuse, and will force many shareholders to sit idly back and hope that the SEC decides to bring a cause of action to protect their rights. Therefore, who truly benefits from Congress' enactment of the PSLRA? Private plaintiffs will lose at least some of their options when faced with securities violations. Additionally, investors still cannot safely rely on disclosed information because of the license to lie and the immense burden of proving actual knowledge. Companies are not truly afforded protection when they disclose information because the potential for SEC action remains. Members of Congress, on the other hand, can return to their constituencies boasting of finally reforming private litigation.

[97] The term "license to lie" is borrowed from Coffee, *Safe Harbor, supra* note

sion shows its two prongs to be set forth in the disjunctive. A forward-looking statement is protected *either* if it is accompanied by meaningful cautionary statements *or* if the plaintiff fails to prove that the statement was made with actual knowledge that it was false or misleading.[98] Consequently, a forward-looking statement that is known to be untrue can be protected under the safe harbor by the presence of cautionary language. This does little to encourage public investment in a company, for any statement accompanied by statutorily sufficient cautionary language might be a blatant lie, and yet remain protected by the safe harbor.[99]

Even if a court considered the section ambiguous or absurd, and found it appropriate to consider legislative history, the Conference Committee itself emphasizes that the two prongs are set forth in the disjunctive.[100] It further states definitively that, "[f]orward-looking statements will have safe harbor protection if they are accompanied by a meaningful cautionary statement."[101] The Committee then claims, however, that a cautionary statement is not covered by the safe harbor if it misstates historical facts.[102] The Act's language does not support the Committee's last assertion, for it appears to provide companies with a license to lie even in the form of a misstatement, so long as the lie is accompanied by cautionary statements. Perhaps this is just a distinction made between historical facts and forward-looking statements. More likely, however, the Committee is attempting to put its own spin on the statutory language. If the Court remains true to its plain meaning approach, it will ignore the Committee's pronouncement. Either way, a license to lie still exists as a result of the Act's disjunctive phrasing of the two prongs. When an issuer can receive safe harbor protection for an

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46, at 6.

[98] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995) *codified at* 15 U.S.C. §77z-2(c)(1) (1994 & Supp. 1995) (adding section 27A(c)(1) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754 (1995), *codified at* 15 U.S.C. §78u-5(c)(1) (1994 & Supp. 1995) (adding section 21E(c)(1) to 1934 Act).

[99] *But see* Nicholas E. Chimicles, *The Future of Securities Litigation Under the Private Securities Litigation Reform Act of 1995, in* 935 FINANCIAL SERVICES LITIGATION 375, 390 (Pract. L. Inst. ed., 1996) (asserting that safe harbor is not likely to constitute 'license to lie' in light of corporate goals of investors and securities analyst credibility).

[100] H.R. CONF. REP. NO. 104-369, at 43, 44 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 742-43.

[101] *Id.* at 44, *reprinted in* 1995 U.S.C.C.A.N. 730, 743.

[102] *Id.*

outright lie, any disclosure is far from meaningful.

Another potential problem arises from the safe harbor's actual knowledge requirement.[103] Examining the language of the second prong, which can apply even when no cautionary language accompanies a forward-looking statement, shows that the statement still receives safe harbor protection if the plaintiff does not prove that the statement was made with *actual knowledge* that it was false or misleading. Note, further, that the burden is placed upon the private plaintiff to prove actual knowledge by the company.[104] Thus, under this prong, the required level of culpability is not recklessness but, rather, the heightened standard of actual knowledge.[105] In all practicality, meeting such a burden can be nearly impossible, given the likelihood of an uncooperative defendant.

While the Act itself does not define or specifically adopt another definition of actual knowledge, this level of culpability is clearly quite high. Accordingly, even in the absence of cautionary language, a recklessly issued forward-looking statement is protected from private liability by this second prong. Potentially liable company representatives might, therefore, make efforts to shield themselves from liability by purposefully remaining ignorant regarding specific instances of false statements.

CONCLUSION

The language of the safe harbor provision of the Private Securities Litigation Reform Act of 1995 exemplifies the Act's imprecise, ambiguous, and problematic nature. One thing which is clear from the Act is that Congress has not learned the lesson that the Supreme Court has repeatedly tried to teach. The Court has routinely relied on strict interpretation of securities laws, each time conveying a message to Congress that its language should be clear and conform to commonly accepted definitions. Only where the text is ambiguous or absurd may a court turn to legislative history for guidance. Unfortunately, the Conference

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[103] PSLRA, Pub. L. No. 104-67, sec. 102, 109 Stat. 737, 750 (1995) *codified at* 15 U.S.C. §77z-2(c)(1)(B) (1994 & Supp. 1995) (adding section 27A(c)(1)(B) to 1933 Act); *id.* sec. 102, 109 Stat. 737, 754 (1995), *codified at* 15 U.S.C. § 78u-5(c)(1)(B) (1994 & Supp. 1995) (adding section 21E(c)(1)(B) to 1934 Act).

[104] *See, e.g.*, Block & Hoff, *supra* note 90, at 5 (asserting that burden is on plaintiff to prove actual knowledge).

[105] Coffee, *Safe Harbor, supra* note 46, at 5.

report is of little use, as it often differs significantly from the text of the Act.

The Court fails to realize the near impossibility of trying to teach Congress such a lesson. The Act will result in uncertainty and litigation rather than an immediate, effective, and substantive reform of securities law. Lower courts will be burdened with resolving the uncertainties and framing their opinions according to their respective views as to what is "plainly" set forth in the Act. Potential private plaintiffs will lose at least some right to bring an otherwise valid action. Companies will be able to shield themselves from liability by exploiting the license to lie and actual knowledge provisions of the safe harbor which likely result from a plain meaning interpretation of the Act. Whether Congress will finally learn its lesson remains to be seen.

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* The author thanks Claire Moore Dickerson for her invaluable assistance with earlier drafts of this Note.