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DISCLOSURE DUTIES ARISING UNDER SECTION 10(B): WHEN TO CORRECT OR UPDATE

by Joni S. Jacobsen, Jennifer C. Ryan and Laura A. Brake

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Perhaps to the dismay of litigious shareholder representatives and their counsel, companies and other potential defendants will not be found liable for federal securities fraud under Section 10(b)¹ and Rule 10b-5² simply because they do not disclose every piece of material information a shareholder might like to know.³ Nor are they required to be “clairvoyant” so that they can guarantee that the information they convey, or the reasons they choose to not convey certain information, will continue to be accurate.⁴ Rather, with respect to a claim of nondisclosure under Section 10(b), the premise underlying liability is that a company had a duty to disclose the information that was allegedly fraudulently withheld, and that duty either existed at the time of the omission or subsequently arose as a result of later events.⁵

Although the Securities and Exchange Commission had faced the issue earlier,⁶ a judicial determination of when a duty to disclose arises under Section 10(b) was formalized by the Supreme Court in 1980 in *Chiarella v. United States*.⁷ Since then, both district and appellate courts, as well as the Supreme Court itself, have expounded on *Chiarella*’s original reasoning. The result is a framework that provides would-be defendants with some insight to guide their disclosure decisions. Among the notable developments is the arguable establishment of two related concepts that go beyond a basic duty to disclose –a duty to correct⁸ and a duty to update⁹ –each of which has spawned its own body of case law.

This article provides an overview of situations addressed in leading case law in which the existence of a duty to disclose under Section 10(b) and Rule 10b-5 has been examined. While there is no doubt that there are potential fact patterns that have yet to be decided, the cases discussed below will aid in any analysis of whether disclosure should be made. Part I discusses the history of the duty to disclose announced in *Chiarella* and examples of its application. Part II discusses the creation of a duty to correct and its status in various jurisdictions. Part III discusses some courts’ willingness to recognize a duty to update, as well as circumstances under which courts have rejected such a duty.

I. DUTY TO DISCLOSE

More than thirty years after *Chiarella v. United States*, it is still well-settled that “[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5” and Section 10(b) and, thus, does not constitute fraud.¹⁰ We also know that a company *has* a duty to disclose material nonpublic information if “1) a regulation, statute or rule requires disclosure;¹¹ 2) disclosure is required to prevent a voluntary statement

Ms. Jacobsen is a member of the Firm’s Securities Litigation Practice Group and a partner of the Firm whose practice is focused on the defense of securities litigation and corporate governance cases. **Ms. Ryan** is a partner in the Firm’s litigation department who also focuses on the defense of securities litigation and corporate governance cases. **Ms. Brake** is an associate in the Firm’s litigation department.

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from being misleading; or 3) the defendants are engaging in insider trading.”¹² “[F]irms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose,”¹³ even if it is information “a reasonable investor would very much like to know.”¹⁴ What has also become evident, however, is that the core principles, alone, are not enough to resolve plaintiffs’ allegations of securities fraud. As a result, the progeny of decisions that have followed *Chiarella* have served to develop and elaborate upon the Supreme Court’s initial reasoning by clarifying when a duty to disclose may or may not exist.

A review of the most prominent case law regarding disclosure obligations demonstrates that, in a typical case, plaintiffs argue in favor of broad disclosure obligations and the imposition of liability for failure to comply with them, while defendants argue in favor of limited disclosure obligations and no liability. The courts, then, attempt to reconcile these forces within the confines of the initial intent behind federal securities laws.¹⁵ Ultimately, the existence of a duty will depend on the facts of each case.

A Relationship Is What Gives Rise to a Duty to Disclose

It is a relationship between the parties to a transaction that gives rise to a duty to disclose.¹⁶ If there is no relationship, there can be no duty. In *Chiarella*, the Court was faced with the appeal of a criminal conviction for violation of Section 10(b) by an outsider, an employee of a printer hired to print corporate takeover bids.¹⁷ Despite the fact that the names of the acquiring companies and takeover targets were withheld, the employee of the printer was able to figure out who they were and used that information to purchase stock in the target companies before the takeover attempts were disclosed.¹⁸ Once the news was made public, he sold the stock at a sizeable profit without ever telling the sellers what he knew about the potential takeovers.¹⁹ This activity came to the attention of the Securities and Exchange Commission, which began to investigate and ultimately entered into a consent decree with Chiarella in which Chiarella agreed to return his profits to the sellers of the stock he purchased.²⁰ Approximately eight months later, Chiarella was indicted on seventeen counts of violating Section 10(b) and Rule 10b-5.²¹ He was ultimately convicted and appealed that conviction to the Supreme Court.

Looking first to the statutory language of Section 10(b), the Court noted that neither the statute itself nor its legislative history provided any insight into “whether silence may constitute a manipulative or deceptive device.”²² Rule 10b-5 was equally unhelpful in this regard.²³ It then turned to precedent established by the Securities and Exchange Commission in *In re Cady, Roberts & Co.*²⁴ In that case, the Commission imposed liability under Section 10(b) on a broker-dealer who sold securities based on information obtained from a corporate insider, who was also affiliated with the same brokerage firm.²⁵ The Commission decided that corporate insiders have a duty to disclose all known material inside information before they can trade in the shares of their own corporation.²⁶ The duty was based on two premises: “(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure.”²⁷ “[M]ere possession of nonpublic market information” is not enough.²⁸ Following this guidance as well as the guidance of prior judicial decisions,²⁹ the Court found that Chiarella was under no duty to disclose the information:

No duty could arise from petitioner’s relationship with the sellers of the target company’s securities, for petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions.³⁰

It is simply not the case that the “petitioner owed a duty to everyone; to all sellers, indeed, to the market as a whole.”³¹ Because there was, in fact, no duty and because “not every instance of financial unfairness constitutes fraudulent activity under § 10(b),”³² the Court reversed Chiarella’s conviction.³³

A Duty Can Be Transferred from an Insider with a Relationship to a “Tippee”

Chiarella establishes that a duty to disclose arises from a special relationship, but it is also true that the duty that results from a special relationship can be transferred from an insider to a person who receives inside information, as long as that recipient is aware of the nature of the information received. In *Dirks v. Securities and Exchange Commission*,³⁴ for example, the question was whether an analyst who received material nonpublic information from an insider could be found liable under Section 10(b) for having passed that information along to investors who traded on it.³⁵

In *Dirks*, a former officer suspected that his previous employer was engaging in securities fraud and asked an analyst he knew to look into it.³⁶ Regulatory agencies had been unwilling to listen.³⁷ The analyst, Dirks, investigated but unsurprisingly, management for the company denied the allegations.³⁸ During the course of his investigation, Dirks discussed the situation, including the information he had learned, with clients and investors, some of whom were also shareholders in the company at issue.³⁹ At least five of those shareholders sold their stock upon learning what Dirks told them, liquidating holdings of more than \$16 million.⁴⁰ About the same time, the stock price plummeted, NYSE halted trading, and authorities uncovered the fraud.⁴¹ Only then did the Securities and Exchange Commission pay attention to the company, and to Dirks. After an investigation by the Commission, Dirks was censured for violations of Section 10(b), among other statutes, for “repeating the allegations of fraud to members of the investment community who later sold their [company] stock.”⁴² Dirks appealed and ultimately sought Supreme Court review.

Relying on *Cady, Roberts* again, the Court stated, “The SEC found that not only did breach of this common-law duty [between corporate insiders and shareholders] also establish the elements of a Rule 10b-5 violation, but that individuals other than corporate insiders could be obligated to disclose material nonpublic information before trading or to abstain from trading altogether.”⁴³ For example, the Court noted that such a duty might arise where nonpublic information is revealed to third parties such as underwriters, accountants, lawyers, or consultants.⁴⁴ Additionally, if a third party is simply being used by an insider to circumvent *Chiarella*, “the tippee’s duty to disclose or abstain is derivative from that of the insider’s duty”⁴⁵ and he will be deemed to be a “participant after the fact in the insider’s breach of a fiduciary duty.”⁴⁶ The tippee “assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.”⁴⁷ In *Dirks*, the Court held that the tippers wanted to expose the fraud rather than benefit from it, so there was no duty and no liability.⁴⁸

No Duty to Disclose to the Other Party in an Arm’s-Length Transaction

Very recently, the Eleventh Circuit held that the relationship necessary to impose a duty to disclose does not exist between parties to an arm’s-length transaction. In *Badger v. Southern Farm Bureau Life Insurance Company*,⁴⁹ the shareholders of a company that sold an indenture sued the company that bought the indenture for securities fraud, alleging that the purchaser’s valuation during negotiations was misleading and did not disclose all material information about potential enhancements.⁵⁰ The court’s response was that it was “aware of no case suggesting that, in an arm’s-length transaction, the buyer’s opinion of the value of the seller’s asset, unaccompanied by a misstatement of fact on which the value is based, . . . could be rendered misleading by an omission.”⁵¹ The court went on to say that, “[i]n fact, courts have uniformly declined to find a duty to disclose running from one party to an arm’s-length securities transaction to the shareholders of the counter-party to the transaction, absent some fiduciary or other special relationship between them.”⁵² A jury verdict was reversed based on the lower court’s failure to give instructions consistent with these principles.⁵³

Voluntary Statements Can Lead to the Assumption of a Duty to Speak

While some form of a duty to disclose is a predicate to liability for nondisclosure under Section 10(b), a party can assume a duty to disclose by choosing to speak on a subject, because any statements made must be “complete and accurate.”⁵⁴ This, however, does not mean that by revealing one fact about a product, one must reveal all others that, too, would be interesting, market-wise, but means only such others, if any, that are needed so that what was revealed would not be” misleading.⁵⁵ It also does not mean that a duty will arise only if a prior statement would be completely negated by omitted information.⁵⁶

For example, *Kushner v. Beverly Enterprises, Inc.*⁵⁷ involved a company and its officers that were indicted for Medicare fraud based on false hours reports.⁵⁸ The plaintiffs alleged that the criminal activity made the company’s public disclosures about compliance with Medicare regulatory requirements misleading.⁵⁹ Noting that there is no duty to disclose “soft information,” including opinions, predictions and beliefs about the legality of one’s own actions, the court held that the only basis on which liability may be possible was if the nondisclosure of the criminal activity made other statements misleading.⁶⁰ The court agreed with Sixth Circuit precedent that “even absent a duty to speak, a party who voluntarily discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully on those subjects.”⁶¹ In *Kushner*, however, the court held that the plaintiffs’ complaint did not adequately allege “that the defendants knew their statements were untruthful when made” and, therefore, there was no duty.⁶²

Very recently, in *Matrixx Initiatives, Inc. v. Siracusano*,⁶³ the Supreme Court examined whether defendants had a duty to disclose information they claimed was not statistically significant and, therefore, not material. Specifically, the plaintiffs alleged violations of Section 10(b) and Rule 10b-5 based on the “claim that Matrixx’s statements [about revenues and product safety] were misleading in light of reports that Matrixx had received, but did not disclose, about consumers who had lost their sense of smell” after using the company’s core product.⁶⁴ Defendants argued that any arguable correlation between the use of the product and loss of smell was not statistically significant and thus not material for the purposes of disclosure.⁶⁵ Finding that the materiality analysis is highly fact-specific, the Court held that a bright-line test of statistical significance was not tenable.⁶⁶ The Court also noted, “[I]t bears emphasis that § 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary ‘to make . . . statements made, in the light of the circumstances under which they were made, not misleading.’”⁶⁷

Thus, a company can exert control over what it is forced to disclose by controlling what it voluntarily discloses.⁶⁸ In the end, however, the Court held that the company’s earlier statements would be misleading without disclosure of the reports about potentially negative side-effects.⁶⁹

Additionally, the Eighth Circuit recently analyzed whether a pattern of previous disclosures could give rise to a duty to disclose.⁷⁰ In *MEMC*, the plaintiff alleged that defendants had a duty to disclose certain June 2008 production incidents at two of its facilities because “the defendants had a ‘pattern’ of disclosing similar disruptions in production.”⁷¹ Although the company disclosed the inter-quarter incidents a few weeks later in its regularly scheduled quarter-end disclosures, plaintiff argued that the disclosures should have been made immediately.⁷² The Eighth Circuit rejected plaintiff’s argument, concluding that the defendants had no duty to disclose the information allegedly improperly withheld because “we are unable to find any legal authority directly supporting Patel’s pattern theory.”⁷³ The court noted that “[p]erhaps the best support for [plaintiff’s] theory may be inferred from recent Supreme Court dictum [from *Matrixx*]: . . . ‘Even with respect to information that a reasonable investor might consider material, companies can control what they have to disclose under these provisions by controlling what they say to the market.’”⁷⁴ The Eighth Circuit ultimately held, however, that “[e]ven if we should infer from *Matrixx* that a pattern of disclosures may spawn a duty to disclose, we do not believe [plaintiff] has alleged circumstances giving

rise to such a hypothetical duty here.”⁷⁵ The Eighth Circuit explained that “[t]his is not the case, for example, in which MEMC had just told investors the [] facilities were fully operational or in perfect working order. Instead, MEMC warned investors its business was vulnerable to any disruption at those plants.”⁷⁶ The Eighth Circuit concluded that “[w]e decline to recognize a new cause of action absent extraordinary circumstances not present here.”⁷⁷ Interestingly, the court further noted that plaintiff had also failed to sufficiently plead scienter, in part due to the fact that “there was no legal precedent supporting [plaintiff’s] ‘pattern’ theory at the time of the incidents.”⁷⁸ Thus, defendants could not have known that the alleged pattern created a duty to disclose the production incidents.

II. DUTY TO CORRECT

Once a general duty to disclose was judicially established, courts began addressing the nuances of such a duty, in particular, whether plaintiffs were trying to articulate a claim based on a duty to correct theory of liability or the so-called duty to update. For decades, the duty to correct and the duty to update have frequently been ill-defined and confused with each other by plaintiffs, courts, and the government.⁷⁹ These two duties are distinguishable, with the duty to correct being a much more accepted duty in the securities disclosure arena. However, despite numerous courts espousing a “duty to correct,” very few actually find that such a duty exists. Indeed, a vast majority of cases that cite such a duty find that it does not apply in that case.

Distinguishing the Duty to Correct from the Duty to Update

*Backman v. Polaroid Corporation*⁸⁰ was one of the first circuit court cases to differentiate the oft-confused duty to correct and duty to update.⁸¹ The court stated that “[o]bviously, if a disclosure is in fact misleading when made, and the speaker thereafter learns of this, there is a duty to correct it.”⁸² The court attempted to distinguish this well-established duty to correct with the duty to update, defining the duty to update as arising where subsequent disclosure is necessary “if a prior disclosure ‘becomes materially misleading in light of subsequent events.’”⁸³ The court, however, held that it did not need to reach the question of whether a duty to update or correct existed because Polaroid’s statement regarding earnings was “precisely correct, initially” and “remained precisely correct thereafter.”⁸⁴ Thus, the court held that there was nothing to correct or update.⁸⁵

The Seventh Circuit in *Stransky v. Cummins Engine Company, Inc.*⁸⁶ more fully examined the duty to correct and duty to update, and lamented how “[l]itigants often fail to distinguish between these theories,” as the plaintiff also failed to do in that case.⁸⁷ The court succinctly differentiated the two duties as follows: the duty to correct “applies when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not. The company then must correct the prior statement within a reasonable time”⁸⁸; the duty to update, on the other hand, is described as arising “when a company makes a forward-looking statement . . . that because of subsequent events becomes untrue.”⁸⁹ The court declined to find a duty to update projections⁹⁰ but held that plaintiff could “continue on the theory that [defendant] had a duty to correct within a reasonable time” misleading historical statements or predictions that “were unreasonable when made or were not made in good faith.”⁹¹

Duty to Correct Can Arise When Certain and Reliable Information Shows Past Disclosure Lacked Reasonable Basis

The court in *In re HealthCare Compare Corporation Securities Litigation*,⁹² expounded on *Stransky*, further clarifying the duty to correct articulated therein. In *HealthCare*, the plaintiffs claimed that company made statements in early February 1993 that lacked a reasonable basis but allegedly were not discovered to be materially misleading until a few weeks later, on February 24, 1993.⁹³ The company did correct those statements on March 30, 1993, but the plaintiffs alleged that HealthCare had a duty to correct those statements prior to that time.⁹⁴ The court accepted that a duty to correct may exist in this case, stating:

“plaintiffs can only show that a duty to correct arose by alleging facts sufficient to demonstrate that the internal memorandum was certain and reliable, not merely a tentative estimate. Otherwise, it was not unreasonable for HealthCare to wait until March 30 to make a public announcement.”⁹⁵ However, because the plaintiffs did not meet “their burden to show that the internal memorandum did not merely contain tentative projections subject to revision,” the court declined to find a duty to correct and affirmed dismissal of the complaint.⁹⁶

Duty to Correct Can Apply to Both Historical Statements and Forward-Looking Statements that Lacked a Reasonable Basis

The Third Circuit, in *In re Burlington Coat Factory Securities Litigation*,⁹⁷ adopted Stransky’s definition of the duty to correct, but noted that “we think the duty to correct can also apply to a certain narrow set of forward-looking statements.”⁹⁸ The court illustrated the kinds of circumstances it envisioned: where a public company makes a forecast that appears to be reasonable when made, but “[s]ubsequently, the company discovers that it misread a vital piece of data that went into its forecast.”⁹⁹ The court imagined a scenario where a company manager sends a fax from a remote location and a sales number on the fax is blurred such that a reasonable person misreads it.¹⁰⁰ The company would have a duty to correct any erroneous forecast based on that incorrect number after it discovers the correct numbers “[s]o long as the correction in the sales figures was material to the forecast.”¹⁰¹ The court reasoned that “there is an implicit representation in any forecast (or statement of historical fact) that errors of the type we have identified will be corrected” because the public expects that company statements are accurate based on the information available at the time those statements are made.¹⁰² Thus, in examining the plaintiffs’ claims, the court declined to find that any “duty to correct” existed, because the plaintiffs “failed to allege how and what the specific error or set of errors might have been that gone into” the forecast, or when such errors were discovered, “so as to allow correction and trigger defendants’ alleged duty.”¹⁰³

No Duty to Correct Vague and Indefinite Statements

The Tenth Circuit in *Grossman v. Novell, Inc.*¹⁰⁴ did not distinguish between the duty to correct and duty to update, discussing only that “if a defendant makes a statement on a particular issue, and that statement is false or later turns out to be false, the defendant may be under a duty to correct any misleading impression left by the statement.”¹⁰⁵ Nevertheless, in a decision prior to the enactment of The Private Securities Litigation Reform Act of 1995 (“PSLRA”),¹⁰⁶ the court held that no such disclosure duty existed because the statement that “the merger would not dilute ‘future earnings’” was “too vague and indefinite to give rise to such a duty to disclose” and further, there were no allegations of fact that the statement was false when made.¹⁰⁷

Duty to Correct Arises When Statements Are False or Materially Misleading When Made

In *In re International Business Machines Corporate Securities Litigation*,¹⁰⁸ the Second Circuit weighed in on the duty to correct versus the duty to update, noting that plaintiffs incorrectly characterized their claim as involving a duty to correct.¹⁰⁹ There, the plaintiffs argued “that even if IBM’s statements were true when made, the company had a duty to correct the dividend statements at issue because its position on the dividend materially changed . . .”¹¹⁰ The court held that “if and when a speaker learns that a prior statement was misleading when made, a duty to correct arises. Here, however, IBM’s statements were not misleading when made and therefore we reject any claim by plaintiffs that IBM was under a duty to correct them.”¹¹¹ The court proceeded to analyze plaintiffs’ claim under a duty to update theory.¹¹²

The PSLRA Did Not Modify Courts’ Interpretation of the Duty to Correct

The PSLRA has not changed how courts have viewed the duty to correct. One of the first post-PSLRA circuit court cases to adopt a pre-PSLRA definition of the duty to correct is *Oran v. Stafford*.¹¹³ There, the Third Circuit adopted the definition of a duty to correct articulated in *Burlington and Stransky*:

that “the duty to correct exists ‘when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not.’”¹¹⁴ In *Oran*, the plaintiffs alleged that the company’s failure to disclose the dates on which it first learned of certain data and adverse reports was a material omission because of the light that information would have cast on the company’s potential product liability exposure.¹¹⁵ The plaintiffs further argued that the company had either a duty to correct or to update its prior disclosures regarding its potential product liability exposure for its weight-loss drug, because they failed to mention when the company first became aware of the adverse heart-valve data.¹¹⁶ The court in *Oran*, however, declined to find that a duty to correct existed because the company never made any prior statement regarding when it learned of the heart-valve data.¹¹⁷

The Seventh Circuit also continues to follow its pre-PSLRA case law concerning the duty to update.¹¹⁸ In *Gallagher*, the plaintiffs argued that the company had a duty to correct its Form 10-K report as a result of a letter from the FDA received eight days later.¹¹⁹ The court rejected the plaintiffs’ theory, citing *Stransky* and stating that “a statement may be ‘corrected’ only if it was *incorrect* when made,” and that plaintiffs were actually attempting to impose a duty to update, not correct.¹²⁰ Because plaintiffs were not stating that there was an error in the 10-K but that in light of subsequent information, certain statements needed to be updated to reflect the then-present condition, no duty to correct existed.¹²¹

Prudent Managers May Take Time to Investigate Before Correction

In contrast, in *Higginbotham*, the plaintiffs “maintain[ed] that their claim [fell] on the correction side of this line” because “the information from Brazil [that the company incorporated into its Forms 10-Q and 10-K] was false, so the annual and quarterly statements also were false when released.”¹²² There, the plaintiffs alleged that the parent company discovered mid-quarter that certain data from its Brazilian subsidiary was false or misleading but failed to disclose that until after the end of the quarter, approximately two months later.¹²³ Consistent with prior case law, the court found that even if a duty to correct existed, that “does not mean that correction must occur as soon as the statements have been questioned.”¹²⁴ The court aptly noted: “Prudent managers conduct inquiries rather than jump the gun with half-formed stories as soon as a problem comes to their attention Taking the time necessary to get things right is both proper and lawful.”¹²⁵ The court further discussed that the company “might more plausibly have been accused of deceiving investors had managers called a press conference before completing steps necessary to determine just what had happened in Brazil.”¹²⁶ The court also pointed out that it is not the delay in correction that causes a loss, but the misstatement itself.¹²⁷ Thus, the court held that, to the extent a duty to correct existed, the company did timely correct the false or misleading statements.¹²⁸

Correction Should Be Timely and Preferably Through the Same Medium

More recently the *Third Circuit in United States v. Schiff*¹²⁹ discussed the duty to correct in a criminal securities fraud action, citing its earlier decision in *Burlington*. The court stated that “[t]he duty to correct arises when ‘a company makes a *historical statement* that, at the time made, the company believes to be true, but as revealed by subsequently discovered information actually was not.’”¹³⁰ It emphasized that “[t]he key for this duty to exist is a triggering factual event after the statement is made.”¹³¹ Because the government could not identify such a triggering event, the court rejected the argument that defendants had any duty to update.¹³² The court also questioned the government’s assertion that the correction must be made in a Form 10-Q filing, as opposed to some other form of public disclosure.¹³³ The court also noted that “[s]cholars have commented that if a duty to correct or update is triggered, it should be corrected in a timely fashion and preferably by using the same medium through which the initial error was disseminated, which in this case would have been a follow-up analyst call.”¹³⁴

Duty to Correct Statements Made Outside Company

It is well-established that a “company has no duty to correct or verify rumors in the marketplace unless those rumors can be attributed to the company.”¹³⁵ However, “a company may so involve itself in the preparation of reports and projections by outsiders as to assume a duty to correct material errors in these projections.”¹³⁶ This depends on whether the company “place[d] its imprimatur, expressly or impliedly” on the third-party’s statements.¹³⁷

Third Party Liability for Duty to Correct

Third parties may have a duty to correct statements they make upon which a company relies in its public disclosures. For example, the Seventh Circuit found that an attorney and his law firm had a duty to correct a company’s offering materials in *Ackerman v. Schwartz*.¹³⁸ In *Ackerman*, the court reversed the granting of summary judgment in favor of defendants, an attorney and his law firm, on a Section 10(b) claim, because a jury could find that the attorney authorized the inclusion of an opinion letter with the offering documents after having come to doubt representations therein.¹³⁹ The court reasoned that a “duty to correct” statements made in offering materials existed “so long as the offering continues,” because “[o]ffering materials must be correct and non-misleading at the time of the sale, not just as of the time they were written.”¹⁴⁰ Thus, as soon as the attorney discovered that the statements in the letter were false or misleading and that his letter continued to circulate, he and his law firm had a duty to correct those statements.¹⁴¹

In *Wright v. Ernst & Young LLP*,¹⁴² the court recognized in dicta that accounting firms have a duty to correct “misstatements they have discovered in previous financial statements on which they know the public is relying.”¹⁴³ Subsequent case law has discussed that to the extent such a duty exists, that duty must arise during the class period.¹⁴⁴ Further, an auditor’s duty to correct can extend only to earlier financial statements the accountant had audited and for which it issued a certificate.¹⁴⁵ Finally, the court in *Overton v. Todman & Co., CPAS, P.C.*¹⁴⁶ confirmed that a duty to correct does exist for accountants and lists the exact elements required to hold that an accountant violated its duty to correct and is liable for a primary violation of Section 10b-5.¹⁴⁷

However, third parties cannot be held liable under Section 10(b) and Rule 10b-5 for statements they did not make. The Supreme Court very recently held that an investment advisor and administrator for certain mutual funds could not be liable under Section 10(b) and Rule 10b-5 because it was not the one who made the false or misleading statement.¹⁴⁸ Although the investment advisor and administrator participated in writing and disseminating the prospectuses for the mutual funds issued by its parent company, which allegedly contained false or misleading statements, it could not be held liable for those statements because it did not “make” them, as that word is used in Rule 10b-5.¹⁴⁹ This decision is in line with prior precedent on secondary liability espoused in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*¹⁵⁰ and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*¹⁵¹ Although *Overton* remains good law concerning accountant liability, time will tell how courts interpret accountant liability based on the later Supreme Court precedent, *Stoneridge* and *Janus*.

III. DUTY TO UPDATE

The “duty to update,” as that term is used herein, describes a duty to provide additional information to update or supplement a previous disclosure that was accurate when made, but became misleading due to subsequent events. As opposed to the duty to correct which, as discussed above, has been widely recognized, the duty to update has been the subject of great debate. Several circuit courts have recognized that a duty to update *may* exist in certain circumstances,¹⁵² but far fewer have actually imposed liability based upon such a duty.¹⁵³ The Sixth and Ninth Circuits have expressly declined to reach the issue,¹⁵⁴ and the Seventh Circuit has explicitly rejected the duty to update.¹⁵⁵

The circuit decisions addressing the potential duty to update suggest that, while courts may leave open the possibility that a duty to update could exist in certain special circumstances, courts are generally reluctant to judicially expand the scope of public corporations' disclosure duties.¹⁵⁶ A duty to update may arise only where the triggering statement is forward-looking and contains a definite material statement that "remains alive" in the minds of investors.¹⁵⁷ Thus, courts focus their inquiry on the original statement and whether it is the type that would trigger any duty to update. As discussed more fully below, courts are clear that to the extent a duty to update exists, the following types of statements do not trigger any such duty: (i) run-of-the-mill projections that contain no definite representation that "remains alive" beyond the date the statement is made; (ii) optimistic statements that are immaterial and not definite enough to create any lasting impression with investors; (iii) statements of historical fact which were accurate when made and do not create any lasting impression with investors; or (iv) statements that are accompanied by cautionary language which warn that they contain no forward implications and should not be relied upon beyond the date of the statement. In addition, certain circuits have limited any duty to update to statements involving a fundamental change at the company.

No Duty to Update Financial Projections

Courts have routinely rejected attempts to impose upon public companies a duty to update run-of-the-mill financial projections, because, although they are forward-looking, they are not definite enough to create a forward-looking impression that "remains alive" as accurate beyond the date the statement is made. For example, in *Burlington*, the Third Circuit addressed whether an "ordinary earnings forecast" contains an implicit representation that remains "alive" in the minds of investors as a continuing representation.¹⁵⁸ In reaching its conclusion that run-of-the-mill projections contain no such continuing representation, the court noted three features of the existing federal securities disclosure apparatus. First, except for the requirement to file quarterly and annual reports, there is no general duty to disclose all material information. Second, an accurate report of past successes does not contain an implicit representation that the trend is going to continue. Third, "the existing regulatory structure is aimed at encouraging companies to make and disclose internal forecasts that, although reasonable when made, turn out to be wrong in hindsight."¹⁵⁹ Thus, the court held that, "based on features one and two, we do not think it can be said that an ordinary earnings projection contains an implicit representation on the part of the company that it will update the investing public with all material information that relates to that forecast."¹⁶⁰ "Companies are not obligated either to produce or disclose internal forecasts, and if they do, they are protected from liability, except to the extent that the forecasts were unreasonable when made."¹⁶¹ As the Third Circuit explained, to require a company to continually modify its projections would inevitably deter the types of disclosure the securities laws seek to encourage.¹⁶²

Similarly, in *Grassi v. Information Resources, Inc.*,¹⁶³ the Seventh Circuit addressed claims relating to the defendant's February and March projections that year-end earnings would be 50 cents per share.¹⁶⁴ The Seventh Circuit framed the question as follows: "[a]lthough we know that this prediction of future earnings was inaccurate, the question is whether IRI's inaccurate earnings projections constituted securities fraud."¹⁶⁵ The court held that "[p]rojections which turn out to be inaccurate are not fraudulent simply because later events show that a different projection would have been more reasonable [A] company has no duty to update forward-looking statements merely because changing circumstances have proven them wrong."¹⁶⁶ Indeed, "projections" and "guidance" fall squarely within the PSLRA's definition of a forward-looking statement and thus, if accompanied by sufficient cautionary language, they cannot be subject to a duty to update.¹⁶⁷

No Duty to Update Vague and Optimistic Statements

Similarly, there can be no duty to update soft information or optimistic statements as a result of subsequent events because such information is immaterial and "lack[s] the sort of definite positive projections that might require later correction."¹⁶⁸ In *San Leandro*, the Second Circuit considered

whether statements regarding Philip Morris' marketing plans were rendered misleading by the company's subsequent consideration of an undisclosed alternative marketing plan. With respect to the statements that Philip Morris was "optimistic" about its earnings and "expected" its product to perform well, the court held that these statements were "puffery" which "cannot have misled a reasonable investor to believe that the company had irrevocably committed itself to one particular strategy, and cannot constitute actionable statements under the securities laws."¹⁶⁹ The court reached the same conclusion when analyzing defendants' statements projecting continued growth and profitability in 1993. The court held that such statements "reflect[ed] hope, adequately tinged with caution, and that the total mix of information available to the market cannot reasonably be found to be misleading."¹⁷⁰ In short, the Second Circuit confirmed that "such puffery is not actionable" and does not trigger any duty to update.

In *Burlington*, the court not only held that there was no duty to update ordinary projections,¹⁷¹ it also rejected the plaintiff's argument that the defendant should have updated its statement regarding its "belief" that it could "continue to grow net earnings at a faster rate than sales."¹⁷² The Third Circuit explained that "claims that vague expressions of hope by corporate managers could dupe the market have been almost uniformly rejected by the courts," and we thus hold that claims that such a statement should have been updated "fail on account of the original statement's vagueness and resultant immateriality."¹⁷³ In *In re Time Warner Securities Litigation*, the Second Circuit also clarified that the scope of any duty to update does not extend to vague statements of optimism. The court found that the defendant had a duty to update statements regarding its announced plan to raise capital, stating that the company's alternative plan should have been disclosed. However, the court affirmed dismissal of plaintiff's claims based on statements which disclosed the fact that merger discussions were ongoing and the company's "hope" that "the talks will be successful."¹⁷⁴ The Second Circuit held that "the attributed public statements [regarding the company's hope of successful discussions] lack the sort of definite positive projections that may later require correction. The statements suggest only the hope of any company, embarking on talks with multiple partners, that the talks go well These statements did not become materially misleading when the talks did not proceed well."¹⁷⁵ In 1996, the First Circuit decided two cases involving an alleged duty to update: *Glassman v. Computervision Corp.*¹⁷⁶ and *Gross v. Summa Four, Inc.*¹⁷⁷ In *Glassman*, the court examined the company's statements regarding its hope that its new product will gain acceptance in the market. The court rejected any purported duty to update such statements, stating that "mild statements of hope, couched in strongly cautionary language, cannot be said to have become materially misleading."¹⁷⁸ In *Gross*, the court addressed whether the company's statement that it received "significant orders" carried a positive implication about its future success, "and so might, arguably, be the basis for a duty to update claim." The court held that the statement "falls in the category of vague and loosely optimistic statements that this court has held nonactionable as a matter of law."¹⁷⁹ Thus, in both cases, the First Circuit acknowledged that forward-looking statements carrying a positive implication arguably could create a duty to update, but not where the statements are only optimistic statements that are too vague and loose to be actionable.¹⁸⁰

No Duty to Update Statements of Historical Fact

Likewise, true statements of current or historical fact, not alleged to be false when made, generally cannot trigger a duty to update. In *Shaw v. Digital Equipment Corporation*,¹⁸¹ the plaintiffs alleged several claims: (i) that defendants had knowledge of material facts concerning the large losses developing during the third quarter of 1994 and were under a duty to disclose the information in connection with the company's public offering; (ii) that the representation in the prospectus regarding the "adequacy" of the "then-remaining 'restructuring reserve' was materially misleading;" and (iii) that throughout the class period, defendants made "fraudulently optimistic statements to the public concerning DEC's future prospects."¹⁸² The court distinguished between the "strong affirmative duty of disclosure" in the context of a public offering and disclosure duties arising under Section 10(b).¹⁸³ The court found that plaintiffs'

complaint stated a cognizable claim under Section 11 for failure to disclose in its registration statement, filed a mere 11 days prior to quarter end, that it was substantially likely that the quarter-end results would be an “extreme departure from publicly known trends and uncertainties.”¹⁸⁴ On the other hand, in addressing the Section 10(b) claim, the court held that defendants’ statement that “[s]ervice revenues have continued to grow” simply “constitute[d] a statement of historical fact not alleged to be false, and as such, d[id] not provide the basis for a duty to update.”¹⁸⁵ In *Backman v. Polaroid Corporation*, the First Circuit initially suggested a broad duty to update, holding that although the statements regarding the anticipated success of Polaroid’s new product, Polavision, were accurate when made, Polaroid was required to update statements when it became apparent that Polavision was actually a flop, which caused them to reduce, then stop, production in Australia and give a specific instruction to its Australian supplier to keep the production cutback secret.¹⁸⁶ In an *en banc* rehearing, the court withdrew the panel decision and ultimately remanded for dismissal, holding that the previous statements were accurate statements of historical fact and thus did not trigger any duty to update.¹⁸⁷ The court noted in *dicta*, however, that a duty to update “may” exist in “special circumstances.”¹⁸⁸ Specifically, the court stated that “in special circumstances, a statement, correct at the time, may have a *forward intent* and connotation upon which parties may be expected to rely.”¹⁸⁹ Where subsequent events render the previous statement materially misleading, “further disclosure may be called for.”¹⁹⁰

Specific Cautionary Language May Negate Any Arguable Duty to Update

In *Illinois State Board of Investment v. Authentidate Holding Corporation*, the Second Circuit recently reaffirmed that precise cautionary language can defeat any arguable duty to update but clarified that general boiler-plate language is insufficient.¹⁹¹ The Second Circuit addressed whether the defendant had a duty to update its statements that it believed it had an agreement in principle with the United States Postal Service, and that it was “very confident” the agreement would be signed “in the not too distant future.”¹⁹² The court held that the defendant did not have a duty to update these statements, because they were accompanied by cautionary language; thus, “[g]iven the explicit ‘no guarantee’ warning, a reasonable investor would not have been ‘misled into thinking’ that an announcement was definitely forthcoming.”¹⁹³ The court cautioned, however, that, without the cautionary language, the company would have had a duty to update, because rather than being a vague statement of optimism, the statement was “the sort of ‘definite positive projection[]’ that this Court has found ‘require[s] later correction’ when intervening events render it misleading.”¹⁹⁴ Moreover, the court held that the statements in the conference call “were not accompanied by sufficient cautionary language to negate liability under the ‘bespeaks caution’ doctrine.”¹⁹⁵ “The statements communicated principally that an agreement to amend the metrics was imminent, if not formally concluded, and did not adequately alert investors to the risk that an agreement would not actually materialize.”¹⁹⁶ Thus, defendant was under an obligation to alert investors that the statements in the conference calls were rendered misleading by subsequent events.¹⁹⁷ Other courts have similarly held that any duty to update claim may be defeated where the initial statements are accompanied by sufficient cautionary language warning investors that the statements should not be interpreted as having any implicit representation regarding subsequent events or future disclosures by the company.¹⁹⁸

Duty to Update May Be Limited to Events Involving Fundamental Change

The Third Circuit has further narrowed any duty to update by limiting it to statements involving events that could “fundamentally change” the nature of the company involved. In assessing plaintiff’s claim that defendants had a duty to update certain statements, the Third Circuit noted in *dicta* that the previous cases in which it had recognized that a duty to update *might* exist, *Greenfield* and *Phillips*, both involved takeover attempts.¹⁹⁹ The court noted that “[w]here the initial disclosure relates to an announcement of a fundamental change in the course the company is likely to take, there may be room to read in an implicit representation by the company that it will update the public with any news of any radical change in the company’s plans—e.g., news that the merger is no longer likely to take place.”²⁰⁰ The court concluded that

"the duty to update, to the extent it might exist, would be a narrow one to update the public as to extreme changes in the company's originally expressed expectation of an event such as a takeover, merger, or liquidation."²⁰¹ In 2010, the Third Circuit reaffirmed the narrow scope of any possible duty to update. In *United States v. Schiff*, the court addressed whether statements relating to the defendants' ongoing sales volume of products to wholesalers triggered a duty to update.²⁰² The court confirmed that any duty to update is narrow and limited to cases where "the initial statement concerns 'fundamental[] change[s]' in the nature of the company—such as a merger, liquidation, or takeover attempt—and when subsequent events produce an 'extreme' or 'radical change' in the continuing validity of that statement."²⁰³ The court held that statements concerning sales volume "do not come close to fitting within the narrow range of this duty."²⁰⁴

Indeed, several courts that have actually allowed a duty to update claim to survive a motion to dismiss have done so in cases involving mergers, strategic partnership discussions or other situations involving fundamental changes in the company. In *Weiner v. The Quaker Oats Co.*,²⁰⁵ the court addressed plaintiff's claim that the company failed to update its projected debt equity ratio in light of an impending but undisclosed merger, because the company had disclosed the ratio in numerous documents and had suggested that it intended to comply with the ratio in the future. These statements, the court reasoned, "could indeed have induced a reasonable investor to expect either that the ratio guideline would remain in 'the upper-60 percent range' or that Quaker would announce any anticipated significant change."²⁰⁶ Similarly, in *In re Time Warner Securities Litigation*, the Second Circuit allowed plaintiff's claim to survive a motion to dismiss where the claim was based on statements relating to strategic partnership goals and defendant's failure to disclose alternative approaches to those already disclosed.²⁰⁷ In reaching its decision, the court stated that, while materiality and duty are generally distinct concepts, "where the disclosure duty arises from the combination of a prior statement and a subsequent event, which, if not disclosed, renders the prior statement false or misleading, the inquiries as to the duty and materiality coalesce."²⁰⁸ The court initially articulated a broad scope of a duty to update, stating that if a reasonable investor would regard the omitted fact as significantly altering the total mix of information available "it is difficult to imagine a circumstance where the prior statement would not be rendered misleading in the absence of the disclosure."²⁰⁹ The court continued, however, and noted:

It is important to appreciate the limits of our disagreement with the District Court. We do not hold that whenever a corporation speaks, it must disclose every piece of information in its possession that could affect the price of its stock. Rather, we hold that when a corporation is pursuing a specific business goal and announces that goal as well as an intended approach for reaching it, it may come under an obligation to disclose other approaches to reaching that goal when those approaches are under active and serious consideration.²¹⁰

IV. CONCLUSION

There is no question that liability for nondisclosure will only lie where there was a duty to speak, and we know that certain circumstances will almost certainly give rise to such a duty (e.g., when it is required by law). What will force those crafting disclosures to make some difficult decisions, though, are the nuances of each individual case. Fortunately, decades of case law provide valuable guidance to refine one's understanding of a basic duty to disclose, and, although not quite as well-developed yet, there is a significant amount of case law analyzing the more recently-coined duty to correct and duty to update.

For companies wading through courts' interpretations of the duty to correct, the most important takeaway is that all historical statements must be accurate as of the time those statements are made, and all forward-looking statements must be accurate based on the material available and relied upon as of the date of those statements.²¹¹ Therefore, if a public company discovers that it made a material error in a public statement of historical fact, or one of their public forward looking statements relied upon an incorrect piece of data, that company may have a duty to correct those public statements *if the error*

*was material.*²¹² To be on the safe side, the company should assume that any information a reasonable investor would be interested in knowing is material.²¹³ Also, to require correction, the statement needs to be one of fact or definitive projection, and the duty to correct will likely not apply to any vague or opinion statements.²¹⁴

Where the dispute is more likely to arise is how quickly a company must correct its prior statements after it discovers those statements are incorrect, or, more likely, discovers that there is a significant chance those statements may be incorrect. Because the Supreme Court has not squarely addressed how quickly a company must correct its prior statements, there is not necessarily a consensus on how expeditiously correction must occur, and the outcome would likely be based upon the facts and circumstances of each case. Based on existing circuit case law, a company should assume that correction needs to be made within a reasonable time, but that it does not necessarily have to “jump the gun” and make a knee-jerk disclosure without knowing all of the facts.²¹⁵ In some cases, like the example raised in *Burlington* where a sales number was materially misread, disclosure should be made rapidly, as there is little investigation management would need to do before concluding a mistake requiring correction had occurred.²¹⁶ However, in more nuanced cases, although management should act as swiftly as is prudent, management also has a competing duty to make sure subsequent disclosures are accurate and therefore should conduct a thorough investigation before making any correction. To be sure, plaintiffs in securities fraud class actions will continue to harp on companies for not correcting their disclosures quickly enough. But at least companies will have a robust and likely successful argument to make on a motion to dismiss based on *Higginbotham*, among other cases, that they were acting prudently to conduct an investigation prior to correction.²¹⁷ Further, as noted in *Higginbotham*, plaintiffs’ damages, to the extent they exist, will arise from the initial misstatement, not the subsequent correction, and thus taking time to get things right will not likely exacerbate damages.²¹⁸

Indeed, the same reasoning espoused in *Higginbotham* concerning the timing of subsequent disclosures could also be applied to any update that may be required. If, in fact, a duty to update a statement exists, management would be prudent to make an investigation before immediately launching into an update.

Unfortunately, courts’ propensity to make comments in dicta regarding the circumstances in which a duty to update may be imposed has created great uncertainty for companies faced with disclosure decisions. In addition, the courts’ commentary has fueled plaintiffs’ attempts to expand judicially created disclosure duties by giving plaintiffs *in dicta* sound-bites, if not rulings, upon which to base their duty to update claims. For companies faced with determining if and when their previous statements fall within the “special circumstances” which may invoke a duty to update, they should keep the following suggestions in mind. To the extent that the company makes any forward-looking statements that contain any arguably definite factual representation, those statements should be accompanied by explicit cautionary language disavowing any implicit representation that further updates are forthcoming or any obligation to make any future updates on the subject – even if circumstances change. Particular care should be taken with respect to any statements involving mergers, takeovers, significant contracts, strategic alternatives, or any other statements that involve a “fundamental” or “extreme” change in the company.

1. 15 U.S.C. § 78j(b).

2. 17 CFR § 240.10b-5.

3. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)).

4. *In re K-Tel Int’l, Inc. Sec. Litig.*, 300 F.3d 881, 891 (8th Cir. 2002) (quoting *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000)) (“Corporate officials need not be clairvoyant; they are only responsible for revealing those material facts reasonably available to them.”).

5. *Chiarella v. United States*, 445 U.S. 222, 230 (1980); *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) (“[t]o be actionable, of course, a statement must also be misleading” because “[s]ilence absent a duty to disclose, is not misleading under Rule 10b-5”); *Burlington*, 114 F.3d at 1431–32; *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990) (en banc).
6. *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).
7. 445 U.S. at 228-29.
8. See *infra* Part II.
9. See *infra* Part III.
10. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-22 (2011) (citing *Basic*, 485 U.S. at [page] n. 17 (1988)); see also *Chiarella*, 445 U.S. at 234-35 (reversing conviction for violation of Section 10(b) and stating “[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak”).
11. The various regulations that govern specific disclosure duties are beyond the scope of this article. However, we note one specific disclosure obligation – a company’s duty to disclose litigation loss contingencies – that is in a state of flux. The SEC is placing renewed pressure on companies to ensure that they are in compliance with existing regulations. For example, the staff may question whether an accrual is made in the appropriate period or whether an estimate cannot be made, particularly if the litigation has progressed beyond its initial stage, and when a litigation settlement is disclosed, the staff will review the adequacy of prior filings. See Edward D. Herlihy, *The SEC Push for Enhanced Disclosure of Litigation Contingencies*, The Harvard Law School Forum on Corporate Governance and Financial Regulation, (April 5, 2011, 9:10 AM), <http://blogs.law.harvard.edu/corpgov/2011/04/05/the-sec-push-for-enhanced-disclosure-of-litigation-contingencies/>. The SEC also cautioned that companies should not rely too heavily on the long-standing treaty between lawyers and auditors when determining what to include in their financial statements about litigation contingencies. *Id.*; see also Sample Letter Sent to Public Companies on Accounting and Disclosure Issues Related to Potential Risks and Costs Associated with Mortgage and Foreclosure-Related Activities or Exposures, U.S. Securities and Exchange Commission, <http://www.sec.gov/divisions/corpfin/guidance/cfoforeclosure1010.htm> (last visited July 10, 2011). While the long-standing treaty still governs the interaction between the company’s auditor and counsel, if the treaty hinders the scope of information exchanged between company counsel and its auditors, a company’s disclosure obligations outweigh any reliance on the treaty. The Financial Accounting Standards Board (the “Board”) has also renewed its focus on the disclosure of litigation loss contingencies. In June 2010, the Board issued an Exposure Draft which proposes several changes regarding such disclosure obligations. See *id.* The Exposure Draft has received heavy criticism regarding its potential effect on attorney-client communications and the work product privilege. See Letter from Stephen N. Zack, President of the American Bar Association, to Russell G. Golden, Technical Director of the Financial Accounting Standards Board (Sept. 20, 2010), available at <http://apps.americanbar.org/buslaw/committees/CL965000pub/materials/2010091000000.pdf> (arguing, for example, that disclosing litigation accruals may establish a “floor” for any settlement discussions, may be used by plaintiff’s counsel as an admission to merits and damages, and may hinder the attorney-client privilege and work product protection as auditors will need to delve into litigation issues in order to verify the accuracy of any accruals). In late 2010, the Board announced that a final standard will not be effective for the 2010 calendar year-end reporting period. The Board also directed its staff to work with the staffs of the SEC and PCAOB to understand their efforts in addressing investor concerns, and to review filings for the 2010 calendar year-end reporting cycle to determine if those efforts have resulted in improved disclosures about loss contingencies.
12. *In re K-Tel Int’l, Inc. Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002) (citing *Backman v. Polaroid Corp.*, 910 F.2d 10, 12-13 (1st Cir. 1990) (en banc)) (ultimately finding no liability for failing to disclose delisting letter earlier because no defendants traded in stock until letter was disclosed to the public).
13. *Gallagher v. Abbott Labs.*, 269 F.3d 806, 808 (7th Cir. 2001).
14. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)).
15. See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)) (“Disclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress. We have recognized time and again, a ‘fundamental purpose’ of the various Securities Acts, ‘was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.’); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976)) (“[O]ur cases considering the scope of conduct prohibited by § 10(b) in private suits have emphasized adherence to the statutory language, ‘the starting point in every case involving construction of a statute.’”); *Higginbotham v. Baxter Int’l Inc.*, 495 F.3d 753, 760 (7th Cir. 2007) (citing *Basic*, 485 U.S. 224) (“As for the contention that Baxter should have disclosed the news in June 2004 or the first half of July, rather than on July 22: what rule of law requires 10-Q reports to be updated on any cycle other than quarterly? That’s what the ‘Q’ means. Firms regularly learn financial information between quarterly reports, and they keep it under their hats until the time arrives for disclosure. Silence is not ‘fraud’ without a duty to disclose.”).
16. *United States v. O’Hagan*, 521 U.S. 642, 661 (1997). “The Court did not hold in *Chiarella* that the *only* relationship prompting liability for trading on undisclosed information is the relationship between a corporation’s insiders and shareholders.” *Id.* (finding that *Chiarella* and *Dirks* (discussed *infra*) both left open the possibility that misappropriation theory can be the basis for liability under Section 10(b)).

17. *Chiarella v. United States*, 445 U.S. 222, 224 (1980).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 225.
22. *Id.* at 226.
23. *Id.*; cf. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (noting that “private plaintiff[s] may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b)”).
24. 40 S.E.C. 907 (1961).
25. *Chiarella*, 445 U.S. at 226–27.
26. *Id.* at 227.
27. *Id.* (citing *Cady*, 40 S.E.C. at 912 n.15).
28. *Id.* at 235.
29. *Id.* at 228-30.
30. *Id.* at 232-33.
31. *Id.* at 231 (describing inaccuracy of lower court’s jury instructions).
32. *Id.* at 232 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474-77 (1977)).
33. Since *Chiarella*, the Court has followed the same reasoning in several other cases, imposing liability only where there was a duty to disclose in the first place. See, e.g., *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 174, 180 (1994) (in decision addressing liability for aiding and abetting under Section 10(b), citing *Chiarella*’s adherence to the statutory language and its requirement of a “specific relationship”); *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) (in the context of identifying the proper standard for materiality and whether information about a potential merger was material, stating “[t]o be actionable, of course, a statement must also be misleading [and] [s]ilence absent a duty to disclose, is not misleading under Rule 10b-5”).
34. 463 U.S. 646 (1983).
35. *Id.* at 648.
36. *Id.* at 649.
37. *Id.* at 652 n.8.
38. *Id.* at 649.
39. *Id.*
40. *Id.*
41. *Id.* at 650.
42. *Id.* at 651.
43. *Id.* at 653.
44. *Id.* at 655 n.14. The Court also emphasized that a duty would not be imposed in these circumstances simply because those parties possessed nonpublic corporate information but rather because “they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.” *Id.* That is, “the corporation must expect the outsider to keep the disclosed nonpublic information confidential, and the relationship at least must imply such a duty.” *Id.*
45. *Id.* at 659.
46. *Id.* (quoting *Chiarella v. United States*, 445 U.S. 222 at 230 n.12 (1980)).
47. *Id.* at 660.
48. *Id.* at 666-67.
49. 612 F.3d 1334 (11th Cir. 2010).
50. *Id.* at 1336-37.
51. *Id.* at 1341-42.
52. *Id.* at 1343 (collecting cases).

53. *Id.* at 1342, 1345-46.
54. *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 26 (1st Cir. 1987) (quoting *Grossman v. Waste Mgmt., Inc.*, 589 F. Supp. 395, 409 (N.D. Ill. 1984) (“If . . . a company chooses to reveal relevant, material information even though it had no duty to do so, it must disclose the whole truth.”)).
55. *Backman v. Polaroid Corp.*, 910 F.2d 10, 16 (1st Cir. 1990) (en banc).
56. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993) (“A duty to disclose arises whenever secret information renders prior public statements materially misleading, not merely when that information completely negates the public statements.”).
57. 317 F.3d 820 (8th Cir. 2003).
58. *Id.* at 824.
59. *Id.* at 825.
60. *Id.* at 831.
61. *Id.* (quoting *Helwig v. Vencor Inc.*, 251 F.3d 540, 561 (6th Cir. 2001)).
62. *Id.*
63. 131 S. Ct. 1309 (2011).
64. *Id.* at 1314.
65. *Id.* at 1318-19.
66. *Id.*
67. *Id.* at 1321-22 (quoting 17 CFR § 240.10b-5(b)).
68. *Id.*
69. *Id.* at 1323.
70. *Minneapolis Firefighters’ Relief Assoc. v. MEMC Elec. Materials, Inc.*, 641 F.3d 1023 (8th Cir. 2011) (“MEMC”).
71. *Id.* at 1028.
72. *Id.* at 1025, 1027.
73. *Id.* at 1028.
74. *Id.* at 1028–29 (quoting *Matrixx*, 131 S. Ct. at 1321-22).
75. *Id.* at 1029.
76. *Id.*
77. *Id.*
78. *Id.* at 1030.
79. One of the earliest circuit court securities fraud cases to describe the “duty to correct” is *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186 (5th Cir. 1988); however, the court seems to blend the duty to correct with the duty to update because the SEC had done the same. The court describes at length in a footnote the SEC’s position on the duty to correct, which was articulated in a 1979 release. *Id.* at 205 n.13. The release states: “With respect to forward-looking statements of material facts made in relation to specific transactions or events . . . , there is an obligation to correct such statements prior to consummation of the transaction where they become false or misleading by reason of subsequent events which render material assumptions underlying such statements invalid. Similarly, there is a duty to correct where it is discovered prior to consummation of a transaction, that the underlying assumptions were false or misleading from the outset.” *Id.* The SEC appears to be blending the duty to update statements that were true when made with the duty to correct statements that were discovered to be false when made. See also *Weiner v. The Quaker Oats Co.*, 129 F.3d 310, 316–17 (3d Cir. 1997) (confusing a duty to correct with a duty to update); *In re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236, 1245 (3d Cir. 1989) (same).
80. 910 F.2d 10 (1st Cir. 1990) (en banc).
81. An unpublished Fourth Circuit case from 1989, *Data Controls North, Inc. v. Fin. Corp of Am., Inc.*, No. 88-2866, 1989 WL 50223 (4th Cir. May 3, 1989), discussed the duty to correct, but did not distinguish it from the duty to update. There, the plaintiffs “contend[ed] [that] the defendants had a duty to correct previous management’s materially false and misleading statements” *Id.* at *4 (emphasis in original). However, on summary judgment, the court did not accept this duty to correct theory, because the plaintiffs could not prove that the defendants actually knew of the veracity of statements made by previous management. *Id.*
82. *Backman*, 910 F.2d at 16-17.
83. *Id.* at 17.
84. *Id.*

85. *Id.* at 17-18.
86. 51 F.3d 1329 (7th Cir. 1995).
87. *Id.* at 1331.
88. *Id.*
89. *Id.* at 1332.
90. *Id.* at 1333.
91. *Id.* at 1336.
92. 75 F.3d 276 (7th Cir. 1996).
93. *Id.* at 278-79, 282.
94. *Id.* at 282.
95. *Id.*
96. *Id.* at 283-84.
97. 114 F.3d 1410 (3d Cir. 1997).
98. *Id.* at 1431.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* (emphasis in original).
103. *Id.*
104. 120 F.3d 1112 (10th Cir. 1997).
105. *Id.* at 1125.
106. Pub. L. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).
107. *Grossman*, 120 F.3d at 1125.
108. 163 F.3d 102 (2d Cir. 1998).
109. *Id.* at 109-10.
110. *Id.*
111. *Id.*
112. *Id.* at 110. Although decided in 1997, the case was filed in 1992 and thus was decided under pre-PSLRA pleading standards.
113. 226 F.3d 275 (3d Cir. 2000).
114. *Id.* at 286 (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1431 (3d Cir. 1997)); *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331-32 (7th Cir. 1995).
115. *Oran*, 226 F.3d at 285.
116. *Id.* at 286.
117. *Id.*
118. See *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 761 (7th Cir. 2007); *Gallagher v. Abbott Labs.*, 269 F.3d 806, 810 (7th Cir. 2001).
119. 269 F.3d at 810.
120. *Id.* (emphasis in original).
121. *Id.*
122. 495 F.3d at 760.
123. *Id.* at 758.
124. *Id.* at 760.
125. *Id.* at 760-61.
126. *Id.* at 761.
127. *Id.* at 760-61.

128. *Id.*
129. 602 F.3d 152 (3d Cir. 2010).
130. *Id.* at 170 (emphasis in original) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1431 (3d Cir. 1997) (noting that the duty “can also apply to a certain narrow set of forward-looking statements”).
131. *Id.*
132. *Id.* at 171.
133. *Id.* at 171 n.24.
134. *Id.* (citing ALAN R. BROMBERG & LEWIS D. LOWENFELS, Bromberg and Lowenfels on Securities Fraud & Commodities Fraud § 5:328, at 5-542 (2d ed. 2007) (“[A] press release will normally be corrected by a press release . . . An ad in a major newspaper would normally be corrected by an ad or announcement in that same paper.”) (collecting cases)).
135. *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 850 (2d Cir. 1981); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 162 n.8 (2d Cir. 1980) (nothing in securities laws requires a company to correct a misstatement in the press not attributable to a company, but other sources may impose such a duty).
136. *Herman v. Legent*, No. 94-1445, 1995 WL 115879, at *9 (4th Cir. Mar. 20, 1995) (quoting *Elkind*, 635 F.2d at 163).
137. *Id.* at *10 (affirming that company was not liable for claims arising from an analyst’s report where management was not directly quoted and had no control over the content of the report).
138. 947 F.2d 841 (7th Cir. 1991).
139. *Id.* at 848-49.
140. *Id.* at 848.
141. *Id.* at 848-49.
142. 152 F.3d 169 (2d Cir. 1998).
143. *Id.* at 177 (quoting *IIT v. Cornfeld*, 619 F.2d 909, 927 (2d Cir. 1980)). Although the court acknowledged the existence of a duty, the alleged duty was not pleaded in the amended complaint and thus could not be raised for the first time in an opposition brief to the motion to dismiss. *Id.* at 178. The court also noted that “secondary actors such as accountants may not be held primarily liable unless they themselves have made ‘a statement (or omission) on which a purchaser or seller of securities relies.’” *Id.* at 177 (citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* 511 U.S. 164, 191 (1994)); see also *Ponce v. SEC*, 345 F.3d 722, 733-35 (9th Cir. 2003) (detailing accountant’s duty to correct and finding a violation).
144. *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 154-56 (2d Cir. 2007) (collecting cases, and assuming such a duty exists).
145. *Id.* at 154 (“Absent an audit opinion, the existence of a duty to correct cannot by itself translate Deloitte’s silence regarding the 10-Qs into an actionable misstatement.”).
146. 478 F.3d 479 (2d Cir. 2007).
147. The elements are: “when [an accountant] (1) makes a statement in its certified opinion that is false or misleading when made; (2) subsequently learns or was reckless in not learning that the earlier statement was false or misleading; (3) knows or should know that potential investors are relying on the opinion and financial statements; yet (4) fails to take reasonable steps to correct or withdraw its opinion and/or the financial statements; and (5) all the other requirements for liability are satisfied.” *Id.* at 486-87.
148. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304-05 (2011).
149. *Id.* at 2302-05.
150. 511 U.S. 164, 180 (1994).
151. 552 U.S. 148, 165 (2008).
152. See, e.g., *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1431 (3d Cir. 1997) (The duty to update “concerns statements that, although reasonable at the time made, become misleading when viewed in the context of subsequent events.”); *In re Time Warner Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) (same); *Rubenstein v. Collins*, 20 F.3d 160, 170 n. 41 (5th Cir. 1991) (same); *Backman v. Polaroid Corp.*, 910 F.2d 10, 17 (1st Cir. 1990) (same); cf. *Grossman v. Novell*, 120 F.3d 1112, 1125 (citing *In re Time Warner* for the proposition that a “definite positive projection,” later creating a misimpression, might give rise to a duty to disclose).
153. For cases finding the duty arose on the facts alleged, see *Illinois State Bd. of Investment v. Authentidate Holding Corp.*, No. 09-1751-CV, 2010 WL 889294, at *2 (2d Cir. Mar. 12, 2010) (allegations were sufficient to give rise to a duty to inform investors that conference call statements had been rendered misleading); *In re Cabletron Sys., Inc.*, 311 F.3d 11, 36 (1st Cir. 2002) (finding complaint adequately stated claim for duty to revise, because statements regarding SmartSwitch product could be read to create the impression that it was already available on a large scale, and “the company may then have a duty to revise that impression if later developments substantially undermined the accuracy of the earlier statements”); *Weiner v. The Quaker Oats Co.*, 129 F.3d 310, 317 (3d Cir. 1997) (finding actionable a failure to update a projected debt-to-total capitalization ratio).

154. *In re Foxhollow Tech., Inc. Sec. Litig.*, No. 08-16469, 2009 WL 4913215, at *1 (9th Cir. Dec. 4, 2009) (refusing to decide on this “novel question of law”); *Helwig v. Vencor*, 251 F.3d 540, 561 (6th Cir. 2001) (“Though the [PSLRA] does not impose a duty to update, and we do not decide today whether such an obligation exists, we at least require an actor to provide complete and non-misleading information with respect to the subjects on which he undertakes to speak.” (internal quotations and citations omitted)).

155. See *Eistenstadt v. Centel Corp.*, 113 F.3d 738, 746 (7th Cir. 1997) (companies are not required to update forward-looking statements merely because changing circumstances have proven them wrong); see also *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 760 (7th Cir. 2007) (rejecting duty to update).

156. See, e.g., *Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 219 (4th Cir. 1994) (failure to update “predictions” not actionable because requiring a company “continually to correct and modify its projections would inevitably discourage the types of disclosure the securities laws seek to encourage”).

157. See *Authentidate*, 2010 WL 889294 at *2 n.2. In *Authentidate*, the court explained that when the initial statements were made regarding the dividend, “IBM did not have a plan or need to alter the dividend. There was no representation of forward intent or any intimation that IBM would maintain its dividend indefinitely [and] [e]ach statement was accompanied by qualifying language indicating the speaker was only referring to the short term.” Because “IBM was able to cover its dividend at the stated level in the short term, the challenged statements remained precisely correct even though IBM subsequently cut its dividend in July 1993.” *Id.*

158. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1433 (3d Cir. 1997).

159. *Id.* at 1432.

160. *Id.* at 1433.

161. *Id.* at 1432.

162. *Id.* at 1432-33.

163. 63 F.3d 596 (7th Cir. 1995).

164. *Id.* at 598.

165. *Id.* at 599.

166. *Id.* (quoting *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1333 n.9 (7th Cir. 1995)). See also *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 536-37 (3d Cir. 1999) (stating that there is no duty to update “a projection of revenues”); *Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 219 (4th Cir. 1994) (“Assuming there can ever be a duty to update, there was no such duty here. The statements at issue here were predictions . . . [and] [t]here is no duty to update such statements on the basis of subsequent events.”); *Roots P'ship v. Lands' End, Inc.*, 965 F.2d 1411, 1418 (7th Cir. 1992) (“[S]imple differences between the company's stated earnings goal and its internal earnings estimates do not alone suggest that the defendants' statements lacked a reasonable basis.”).

167. See 15 U.S.C. § 78u-5(c), (d) (2006). A statement is not actionable under the PSLRA's safe harbor if it 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 if the plaintiff fails to demonstrate that the statement was made with “actual knowledge” that it was false or misleading. 15 U.S.C. § 78u-5(c) (1)(A)-(B). A “forward looking statement” is one “containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items” and includes assumptions underlying or relating to any such statements. 15 U.S.C. § 78u-5(i)(1)(A)-(D). Thus, earnings projections fall squarely within the PSLRA's definition of forward-looking statements.

168. *San Leandro Emerg. Med. Group Profit Sharing Plan v. Philip Morris Co., Inc.*, 75 F.3d 801, 811 (2d Cir. 1996) (quotations omitted).

169. *Id.* at 811. The court further held that the company's reference to marketing plans designed to narrow the price difference between premium and discount brands “simply reflected company policy at the time; they were not promises to maintain that policy in the future, and thus were not rendered misleading by the company's subsequent consideration of an alternative plan.” *Id.*

170. *Id.*

171. See *supra* notes 159-63 and accompanying text.

172. 114 F.3d 1410, 1427 (3d Cir. 1997).

173. See *id.* at 1428; see also *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1219 n.33 (statements that sales were “going reasonably well,” company “should show progress quarter over quarter, year over year,” and defendant was “pretty optimistic” company would “start to grow revenue” were actionable and did not trigger a duty to update); *Nadoff v. Duane Reade, Inc.*, No. 03-9352, 2004 WL 1842801, at *3 (2d Cir. Aug. 17, 2004) (a firm has “no duty to update [such] vague statements of optimism or expressions of optimism’ in light of changed circumstances”) (quoting *In re Int'l Bus. Machs. Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998)).

174. 9 F.3d 259, 266 (2d Cir. 1993).
175. *Id.* at 267.
176. 90 F.3d 617, 636 (1st Cir. 1996).
177. 93 F.3d 987, 995 (1st Cir. 1996).
178. *Glassman*, 90 F.3d at 636.
179. *Gross*, 93 F.3d at 995.
180. *Id.*
181. 82 F.3d 1194 (1st Cir. 1996).
182. *Id.* at 1201.
183. *Id.* at 1202.
184. *Id.* at 1211.
185. *Id.* at 1219 n.33; *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) (finding it “well settled” that “an accurate report of past successes does not contain an implicit representation that the trend is going to continue” and does not trigger a duty to update mid-quarter); *San Leandro Emerg. Med. Group Profit Sharing Plan v. Philip Morris Co., Inc.*, 75 F.3d 801, 811 (2d Cir. 1996) (holding that company’s reference to marketing plans designed to narrow the price difference between premium and discount brands “simply reflected company policy at the time; they were not promises to maintain that policy in the future, and thus were not rendered misleading by the company’s subsequent consideration of an alternative plan”); *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 401-02 (6th Cir. 1997) (“[t]he proposition that the company was engaging in illegal promotion of its products . . . is not a proposition that can fairly be said to fall in the category of ‘hard’ information;” soft information need only be disclosed if “virtually as certain as hard facts”).
186. 893 F.2d 1405, 1415 (1st Cir. 1990).
187. 910 F.2d 10, 17 (1st Cir. 1990) (en banc).
188. *Id.*
189. *Id.* (emphasis added).
190. *Id.*
191. No. 09-1751-CV, 2010 WL 889294, at *2 (2d Cir. Mar. 12, 2010).
192. *Id.*
193. *Id.*
194. *Id.* at *2 n.2 (quoting *In re Time Warner Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)).
195. *Id.* at *2.
196. *Id.*
197. *Id.*
198. See, e.g., *Grossman v. Novell*, 120 F.3d 1112, 1119 (10th Cir. 1997) (finding some statements too vague and others not actionable because of specific cautionary language that prevented them from being materially misleading); *Glassman v. Computervision Corp.*, 90 F.3d 617, 636 (1st Cir. 1996) (“Computervision’s mild statements of hope, couched in strongly cautionary language, cannot be said to have become materially misleading.”).
199. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1433-34 (3d Cir. 1997) (citing *Greenfield v. Heublein, Inc.*, 742 F.2d 751, 758 (3d Cir. 1984) and *In re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236, 1243 (3d Cir. 1989)).
200. *Id.*
201. *Id.* at 1434 n.20.
202. 602 F.3d 152, 170 (3d Cir. 2010).
203. *Id.*
204. *Id.*
205. 129 F.3d 310, 317 (3d Cir. 1997).
206. *Id.*
207. 9 F.3d 259, 267 (2d Cir. 1993) (imposing duty to update definitive statements about approaches to strategic partnership goals, but finding no duty to update “hope” that partnership talks proceed smoothly).
208. *Id.*

209. *Id.* at 268.
210. *Id.*
211. See *supra* at pp. 13-21.
212. See, e.g., *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1431 (3d Cir. 1997).
213. See *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)).
214. See *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1125 (10th Cir. 1997).
215. See *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 760-61 (7th Cir. 2007).
216. See *supra* text accompanying notes 98-101, citing *Burlington*, 114 F.3d at 1431.
217. See *supra* text accompanying notes 123-27, citing *Higginbotham*, 495 F.3d at 760-61.
218. See *Higginbotham*, 495 F.3d at 761 (“After all, delay in correcting a misstatement does not cause the loss; the injury to investors comes from the fraud, not from a decision to take the time necessary to ensure that the corrective statement is accurate. Delay may affect which investors bear the loss but does not change the need for *some* investors to bear it, or increase its amount.”).



Joni S. Jacobsen

Partner

Chicago

p / 312.902.5383

f / 312.577.4429

joni.jacobsen@kattenlaw.com

Joni S. Jacobsen is a partner in the firm's Litigation and Dispute Resolution Practice. Ms. Jacobsen's practice is focused on the defense of publicly traded companies and their directors and officers in securities actions, directors' and officers' liability actions, SEC investigations, corporate governance disputes and other complex commercial litigation. She has substantial experience counseling and conducting internal investigations for public and private companies, boards of directors and special committees. Ms. Jacobsen has represented clients in a wide range of matters arising from allegations of options backdating, accounting irregularities, insider trading, inadequate or misleading public disclosures, breaches of fiduciary duties and short-swing trading. In addition, she has handled a number of commercial litigation matters, including class actions involving allegations of unfair consumer practices. Ms. Jacobsen is also a member of the firm's Electronic Discovery and Evidence Practice.

Education and Bar Admissions

Ms. Jacobsen received her Juris Doctor degree from the University of Chicago Law School in 1997. She received her bachelor's degree in history from the University of Utah in 1991. Ms. Jacobsen is admitted to practice in Illinois and before the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth, Eighth and Ninth Circuits, and the U.S. District Courts for the Northern District of Illinois and Eastern District of Michigan.

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Katten Muchin Rosenman LLP

www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND WASHINGTON, DC

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