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The circuits are split in how they apply the safe harbor in securities law

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For three decades, the Safe Harbor for forward-looking statements, codified in the Private Securities Litigation Reform Act (PSLRA), has shielded public companies and their leaders from securities fraud claims predicated on guidance and other future-oriented statements. The statutory Safe Harbor immunizes speakers from liability for forward-looking statements where either the statements are accompanied by meaningful cautionary statements or where plaintiffs fail to show that the speakers had "actual knowledge" that the statements were false when made.

In recent years, the decisions of some courts have called into question whether the Safe Harbor applies when the cautionary statements themselves omit information about risks that have materialized or are presently materializing when the cautionary statements are made. The 9th U.S. Circuit Court of Appeals' recent decision in *Constr. Laborers Pension Tr. of Greater St. Louis v. Funko Inc* ("*Funko*") deviates from the approach of other circuit courts and exacerbates a circuit split on a recurring matter. 166 F.4th 805 (9th Cir. 2026).

The 9th Circuit's view

In *Funko*, a toy manufacturer's SEC filings warned investors about the risks of "excess inventory" despite the fact that the manufacturer had already allegedly accumulated significant dead stock. *Id.* at 826-27. The plaintiffs alleged that the risk factor itself was materially misleading by omitting that the company had already accumulated significant dead stock at the time the risk factor was included in the company's SEC filings. *Id.* at 827.

The 9th Circuit held that the manufacturer's risk factors were misleading. The court explained that "where a statement about the future is in the form of a warning about a risk that might hurt business in the future, the statement implicitly serves as a comment on the *present* state of affairs, because it suggests that the circumstance posing the risk has not yet occurred." *Id.* at 825.

Because the manufacturer had already amassed significant excess inventory by the time it made its risk disclosures, the company had presented a "state of affairs that differed in a material way from the one that actually existed." *Id.* at 826 (quoting *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 948 (9th Cir. 2023)). The 9th Circuit found that this was sufficient for a securities fraud claim to survive dismissal. *Id.* at 828.

In recent years, the decisions of some courts have called into question whether the Safe Harbor applies when the cautionary statements themselves omit information about risks that have or are presently materializing when the cautionary statements are made.

The *Funko* court's conclusion echoed the 9th Circuit's prior decisions, including cases involving Facebook and Alphabet that held risk factors can be misleading by omission where they warn that certain "risks 'could' occur when, in fact, those risks had already materialized." *Facebook*, 87 F.4th at 948-49; *see also In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 702-05 (9th Cir. 2021).

In *Facebook*, risk factors presented a "hypothetical risk of improper third-party misuse of Facebook users' data" despite the fact that "Facebook [already] knew Cambridge Analytica had improperly accessed and used Facebook users' data." 87 F.4th at 948.

Under these circumstances, the 9th Circuit determined that plaintiffs had adequately pleaded that these risk statements "directly contradicted what Facebook knew at the time," and thus, may have misled investors. *Id.* at 950.

Likewise, in *Alphabet*, the 9th Circuit found risk warnings that cautioned about harms related to "detection and disclosure

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of security vulnerabilities" that "could" or "may" occur were adequately alleged to be misleading because employees were already aware of multiple vulnerabilities that were "so significant" the company had to shut down its consumer platform. 1 F.4th at 703-04.

The *Funko* decision went one step further than the 9th Circuit's precedent in cases like *Facebook* and *Alphabet*. When analyzing the separate element of scienter, the court held that the Safe Harbor's "actual knowledge" test did not apply in *Funko*. Echoing its falsity reasoning, the court held that the company's warning about a risk that might hurt business in the future "implicitly serve[d] as a comment on the *present* state of affairs." *Id.* at 825.

> *The 4th and 6th Circuits hold that risk disclosures generally need not disclose a prior or current materialization of the risk to avoid liability, because a reasonable investor infers nothing about the past or present from a risk disclosure.*

Such a statement, the court reasoned, did not fall under the Safe Harbor and was false, not because of its "failure to predict the future," but instead, because of "the implicit assertion about the present that the risk identified has not happened yet." *Id.* at 825. Consequently, the court inferred scienter under the core-operations doctrine, finding that the plaintiffs did not "need to establish affirmative knowledge so long as they raise a strong inference that Defendants would have known of the [inventory] issues given their importance to Funko's business." *Id.* at 834.

Multiple industry groups have submitted amicus briefs in support of *Funko*'s petition for rehearing *en banc* by the full 9th Circuit, given the importance of the Safe Harbor to public companies and the need for uniform rules. Amici have argued that a plaintiff could convert almost any alleged omission into an "implicit assertion" about the present in almost every case, which would risk "eviscerat[ing] the safe harbor's protection." *See* Motion Of Washington Legal Foundation For Leave To File Amicus Curiae Brief In Support Of Petition For Rehearing & Rehearing En Banc, *Funko*, 166 F.4th 805 (9th Cir. 2026) (No. 24-4909), Dkt. No. 60.2 at 13.

They contend that the 9th Circuit's ruling risks imposing a "great cost to businesses, investors, and the economy," while being "irreconcilable with the text and purpose of the PSLRA," and in conflict with the law of other circuits. *See* Motion Of Chamber Of Commerce Of The United States Of America For Leave To File Amicus Curiae Brief In Support Of Funko, Inc's Petition For Rehearing And Rehearing En Banc, *Funko*, 166 F.4th 805 (9th Cir. 2026) (No. 24-4909), Dkt. No. 58.2 at 2.

Differing views about 'materialized' risks

Other circuits have diverged from the 9th Circuit when ruling on whether a materialized risk renders a cautionary statement misleading by omission.

The 4th and 6th Circuits hold that risk disclosures generally need not disclose a prior or current materialization of the risk to avoid liability, because a reasonable investor infers nothing about the past or present from a risk disclosure. In *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. 2015), for example, the 6th Circuit explained that risk factors "warn an investor of what harms *may* come to their investment" and "are not meant to educate investors on what harms are currently affecting the company" because they are "inherently *prospective* in nature."

The 4th Circuit similarly opined in *In re Marriott Int'l, Inc.*, 31 F.4th 898, 905 (4th Cir. 2022) that risk factors were not misleading even where a company "certainly could have provided more information to the public" because "federal securities laws did not require it to do so."

The 1st, 2nd, 3rd, 5th, and 10th Circuits have held that a risk disclosure is not rendered materially misleading unless the company knows with "near certainty" that the materialized risk will have an imminent, material adverse effect. For example, in *Williams v. Globus Med., Inc.*, the 3rd Circuit determined that the purpose of a risk factor is to warn investors about potential consequences of certain risks, and the relevant question is whether the *harm* from a risk has actually impacted the company at the time the challenged disclosure was made. 869 F.3d 235, 242 (3d Cir. 2017).

There, Globus warned investors that "sales could be adversely affected" if any independent contractors "were to cease to do business" with the company. *Id.* Globus shareholders alleged that this risk disclosure was false or misleading because, as of the date of its publication, the company had already terminated a contract with a key distributor. *Id.* at 241.

But the 3rd Circuit held that plaintiffs failed to allege that the risk factor was misleading because "[t]he risk actually warned of [wa]s the risk of adverse effects on sales — not simply the loss of independent distributors generally" and plaintiffs had failed to plead that "sales were adversely affected at the time the risk disclosures were made." *Id.* at 242.

Similarly, in *Smith v. Gap, Inc.*, the 2nd Circuit recently underscored this position by rejecting a court-made "rule that a risk disclosure is actionable whenever a company fails to disclose that the risk already materialized in some way." 177 F.4th 405, at 410 (2d Cir. 2026).

The panel emphasized that risk factors are not actionable unless "[u]nder the totality of the circumstances" a failure to disclose a materialized risk "rendered the seemingly hypothetical disclosures misleading." *Id.* at 411.

Only the 9th Circuit has allowed a company's mere failure to include past or present materialization of the risk to support a securities fraud claim. *Facebook* explicitly stated that the 9th Circuit "does not require harm to have materialized for a statement to be materially misleading," and the majority reasoned that where a company presents "the prospect of a breach as purely hypothetical when it ha[s] already occurred, such a statement c[an] be misleading even if the magnitude of the ensuing harm [i]s still unknown." 87 F.4th at 949-50.

In other words, it is "the fact of the breach itself, rather than the anticipation of reputational or financial harm, that cause[s] anticipatory statements to be materially misleading." *Id.* at 950.

The Supreme Court granted *certiorari* in *Facebook* to address this very split but then subsequently dismissed the appeal in 2024 as improvidently granted. *See Facebook, Inc. v. Amalgamated Bank*, 604 U.S. 4 (2024). Since then, the circuit-split has deepened along with the need for clarification and uniformity.

Implications

This circuit split presents important questions about risk factors themselves. Is the purpose of a risk factor to keep investors informed about every variable a company believes it may encounter or has encountered? Or are risk factors designed to warn investors about the harms certain risks may ultimately cause as a function of the company's unique risk-profile and industry?

Whether liability arises when a risk becomes known, when the company ultimately experiences some adverse effect, or not at all, companies must continue to think carefully when drafting risk factors, mindful that there are different standards in different jurisdictions about the scope and extent of the Safe Harbor's protections for forward-looking statements.

Virginia Milstead is a regular contributing columnist on securities law and litigation for Reuters Legal News and Westlaw Today.

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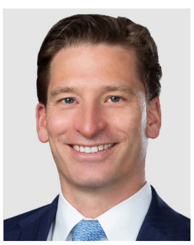

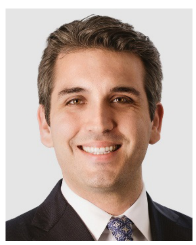

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