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Article 9

Status of the Duty to Update

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THE STATUS OF THE DUTY TO UPDATE

INTRODUCTION

There is currently a lack of consensus in the federal courts about whether, and to what extent, a company has a duty to update prior disclosure that was initially accurate, but subsequently became materially untrue, incomplete, or misleading due to subsequent events. Many courts and scholars recognize this duty to update; however, they disagree about the scope of the duty.

The duty to update is a judicially created duty. The duty serves the public policy goal of protecting investors from inadequate disclosure. The duty to update has evolved slowly, and its status as an independent duty has largely depended on judicial interpretation of its relation to another judge-created duty—the duty to correct. The scope of these two duties, as defined by the various circuits, the Securities and Exchange Commission ("SEC" or "Commission"), and scholars, has over time converged and diverged. Unfortunately, the courts, the SEC, commentators, and litigants have failed to consistently recognize the distinction between the duties to correct and update. For example, there are commentators who have, in effect, collapsed the two duties into one, under the rubric of the duty to correct.[1] This is achieved via a broad definition of the duty to correct which encroaches upon the niche reserved for the duty to update.

By contrast, the Seventh Circuit in 1995 decoupled the duties, and explained the distinction between the duties to correct and update.[2] According to the court, "a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not [true]" triggers a duty to correct.[3] On the

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[1] *See infra* Part III.C.

[2] *See* Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1331-32 (7th Cir. 1995). See Part IV.E for an extensive discussion of this case.

[3] *Stransky*, 51 F.3d at 1331.

other hand, "a forward-looking statement—a projection—that because of subsequent events becomes untrue" can activate a duty to update.[4] However, this attempt to set apart the two duties, in conjunction with other judicial and academic efforts to distinguish the duty to correct from the duty to update, has failed to introduce consistency to the case law. The distinction between the two duties is significant because an imposition of a duty to update is considerably more burdensome for companies than the imposition of only a duty to correct, for the duty to update increases the number of statements that companies must monitor to ensure that they remain accurate. A duty to update statements that have become materially inaccurate or misleading, as well as the concomitant liability for a failure to discharge this duty, can be very expensive, inconvenient, and time consuming for companies.

In enacting the Private Securities Litigation Reform Act of 1995[5] (the "PSLRA"), Congress declined the opportunity to clarify whether the duty to update exists and, if so, the precise scope of this duty. The PSLRA created a safe harbor for certain forward-looking statements. As discussed below in Part IV, Congress's silence suggests that courts may further narrow the already limited scope of the duty to update. Congress intended for the PSLRA's safe harbor to achieve the public policy goals of strengthening the securities markets and protecting investors by encouraging companies to make forward-looking statements. These statements should help investors make informed investment decisions. The imposition of a duty to update on companies is also intended to protect investors. It protects them from companies' materially inaccurate or misleading statements. The problem is that a duty to update appears to be irreconcilable with Congress's efforts to promote forward-looking statements because companies will not be as inclined to make these statements if they are required to update them should the statements become materially erroneous or misleading.

This Note will assess the current status of the duty to update. Part I of this Note identifies the statutory and case law origins of the duty to update, including the fundamental duty to disclose. The clear derivation of the duty to update provides further justification for concluding that the duty currently does and should exist. Part II separates the duty to update line of cases from that of the duty to correct. Part II notes that many courts and commentators have failed to properly distinguish the distinct roots of the two duties. In addition, it also shows that the SEC perpetuated the confusion that the case law engendered. Part III focuses on

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[4] *Id.* at 1332 (citations omitted). The *Stransky* court acknowledged that other jurisdictions and scholars have recognized such a duty to update; however, it refused to impose this duty on companies. *Id.*

[5] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

Backman v. Polaroid Corp.[6] ("*Polaroid II*"), in which the First Circuit explained the significant difference between the duties to correct and update, and clarified the scope of each duty. This Part also reviews and critiques the scholarly response to the decision. It concludes that the First Circuit reached the right decision on public policy grounds. Part IV assesses the current status of the duty to update in light of more recent case law, commentary, and the PSLRA. It compares the various post-*Polaroid II* cases in an attempt to determine whether the courts have reached a common understanding of the duty to update and its scope. This Part demonstrates that the status of the duty to update is rather uncertain—even within certain circuits. Part V suggests ten ways in which courts can restrict the application of the duty to update.[7] The Note concludes that the duty to update exists today—at least in certain circuits—however, the bewildering case law in the various circuit courts since *Polaroid II*, the uncertainty surrounding the PSLRA's treatment of the duty to update, and important public policy motivations strongly suggest that courts are likely to narrow the scope of the duty. This narrowing of the duty would represent a judicial preference for promoting disclosure and protecting investors by encouraging forward-looking statements rather than via a broad duty to update.

I. BACKGROUND

A. STATUTORY FRAMEWORK

Neither the Securities Act of 1933, as amended[8] ("Securities Act"), nor the Securities Exchange Act of 1934, as amended[9] ("Exchange Act") expressly codifies the duty to update. However, most commentators agree that, assuming the duty exists, it originates from a broad interpretation of section 10(b) of the Exchange Act and Rule 10b-5.[10] The recog-

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6 910 F.2d 10 (1st Cir. 1990) (en banc) [hereinafter *Polaroid II*].

7 This Note does not discuss how courts can limit, and have limited, plaintiffs' ability to bring, and prevail on, securities fraud claims in general. For a discussion of how federal case law and the PSLRA have brought about this result, see Douglas M. Branson, *Running the Gauntlet: A Description of the Arduous, and Now Often Fatal, Journey for Plaintiffs in Federal Securities Law Actions*, 65 U. CIN. L. REV. 3 (1996). A comprehensive analysis of the elements of a prima facie securities fraud claim and the pleading requirements for these claims is also beyond the scope of this Note.

8 15 U.S.C. §§ 77a-77aa (1994 & Supp. II 1996).

9 15 U.S.C. §§ 78a-78mm (1994 & Supp. II 1996).

10 *See, e.g.*, A. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10B-5 § 88.04[b], at 4-20 (rev. 2d ed. 1991); Dennis Block et al., *A Post-*Polaroid *Snapshot of the Duty to Correct Disclosure*, 1991 COLUM. BUS. L. REV. 139, 154; Milton H. Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1366 (1966) (suggesting that "[i]t would require no great extension of existing trends to read . . . [R]ule [10b-5] as providing a general sanction for an issuer's failure to disclose where previous disclosures have become materially misleading"); Robert H. Rosenblum, *An Issuer's Duty Under Rule 10b-5 to Correct and Update Materially Misleading Statements*, 40 CATH. U. L. REV. 289, 292-93, 302, 306-07 (1991); *cf.* Carl W.

nition of a duty to update comports with the public policy underlying the Exchange Act. The primary purpose of the Exchange Act is to "implement . . . a 'philosophy of full disclosure.'"[11] The Exchange Act mandates that public companies fulfill strict disclosure obligations via periodic and current reports and proxies.[12] Congress designed these disclosure requirements with an eye toward protecting investors.[13] Section 10(b), the antifraud provision of the Exchange Act, and Rule 10b-5 are intended to shield investors from fraud and misrepresentation. Section 10(b) provides: "It shall be unlawful for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of any [registered] security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe."[14] Section 10(b) provides the SEC with the authority to promulgate Rule 10b-5 which proscribes any individual from

> (a) . . . employ[ing] any device, scheme, or artifice to defraud, (b) . . . mak[ing] any untrue statement of a material fact or . . . omit[ting] to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) . . . engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with a purchase or sale of any security.[15]

Shortly after the SEC introduced Rule 10b-5, the courts have treated a violation of section 10(b) and the Rule as grounds for a private cause of action.[16] Consequently, an issuer is civilly liable under section 10(b) and Rule 10b-5(b) for making an inaccurate statement regarding a material fact.[17] This is a basis for the duty to correct.[18] However, the Rule does not literally address an issuer's obligation to amend, that is, update, prior

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Schneider, *Duty to Update: Does a Snapshot Disclosure Require the Commencement of a Motion Picture?*, INSIGHTS, Feb. 1989, at 3 (arguing that a recognition of a duty to update represents "a very strained reading of Rule 10b-5"). For the text of section 10(b) and Rule 10b-5, see *infra* text accompanying notes 14-15.

11 Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977); *see also* S. REP. No. 73-792, at 1-5 (1934) (emphasizing the importance of disclosure).

12 *See* 17 C.F.R. §§ 240.13a-1 (1997) (requiring issuers to file annual reports); 240.13a-13 (requiring issuers to file quarterly reports); 240.15d-11 (requiring issuers to file current reports); 240.14a-2 to 240.14a-15 (stating the proxy requirements).

13 *See* S. REP. No. 73-792, at 1-5 (1934).

14 15 U.S.C. § 78j(b).

15 17 C.F.R. § 240.10b-5. See *infra* Part I.C.1 for a definition and discussion of materiality.

16 *See* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

17 *See, e.g.*, Hirsch v. Du Pont, 553 F.2d 750, 761 (2d Cir. 1977).

18 *See infra* Part II.A.

disclosure that was initially true, but subsequently became false or misleading with the passage of time or as a result of ensuing circumstances. Scholars have found support for such a disclosure obligation in the second clause of Rule 10b-5(b)[19] which prohibits the "omi[ssion]" of a "material fact necessary" to ensure that a statement is not "misleading."[20] The language of the second clause of Rule 10b-5(b) does not alone impose on a company a duty to update a prior disclosure with material data,[21] but rather paves the road for the acknowledgement of the duty.

B. DUTY TO DISCLOSE

The courts have bridged the gap between Rule 10b-5(b) and a duty to update by developing the criteria that precipitate a duty to disclose.[22] The SEC and the Supreme Court articulated these criteria in dicta in a number of insider trading cases, and have invoked Rule 10b-5 to impose a duty to disclose on corporate insiders.[23] For example, the SEC held in *Cady, Roberts & Co.*[24] that corporate insiders have an "affirmative duty to disclose material information . . . which [is] known to them by virtue of their position but which [is] not known to persons with whom they deal and which, if known, would affect their investment judgment."[25] The SEC identified two bases which trigger the duty to disclose material inside information: (i) a relationship of trust that enabled the corporate insider to learn of inside information and (ii) the "unfairness" of permitting an insider, absent disclosure, to avail himself of the information through trading.[26] To the extent these circumstances existed, *Cady, Roberts* imposed on insiders a duty to disclose material information before they could engage in trading.[27]

The courts have identified other circumstances, in addition to the two-pronged standard discussed in *Cady, Roberts* and its progeny, which give rise to an issuer's duty to disclose. In *SEC v. Texas Gulf Sulphur Co.*,[28] another nondisclosure and insider trading case, the Second Circuit extended a company's duty to disclose to cover "sufficient information"

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19 *See, e.g.*, Rosenblum, *supra* note 10, at 292-93, 302, 306-07.

20 *See supra* text accompanying note 15.

21 *See* Chiarella v. United States, 445 U.S. 222, 226 (1980). The Supreme Court reviewed the legislative history and explained that neither Congress nor the SEC contemplated whether a "failure to provide information" represented a violation of section 10(b) or Rule 10b-5. *Id.*

22 *See* Rosenblum, *supra* note 10, at 292-313.

23 *See id.* at 293-306, 313.

24 40 S.E.C. 907 (1961).

25 *Id.* at 911.

26 *Id.* at 912 & n.15.

27 *Id.* at 912.

28 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied sub nom.* Coates v. SEC, 394 U.S. 976 (1969).

to prevent prior disclosure from becoming "false or misleading or . . . so incomplete as to mislead."[29] In other words, a company's initial "act of disclosure triggers the [Rule 10b-5] prohibition against materially misleading statements."[30]

Subsequent insider trading cases followed the *Cady, Roberts* analysis, which considered a duty to disclose a prerequisite to finding liability for a Rule 10b-5 violation, but came to some conclusions that neither the *Cady, Roberts* SEC nor the *Texas Gulf Sulphur Co.* court would probably have ever accepted. For example, in *Chiarella v. United States*,[31] the Supreme Court recognized in dicta that "silence in connection with the purchase or sale of securities may operate as a fraud actionable under §10(b) despite the absence of statutory language or legislative history specifically addressing the legality of nondisclosure."[32] However, "[w]hen an allegation of fraud is based on nondisclosure, there can be no fraud absent a duty to speak. . . . [A] duty to disclose under [section] 10(b) does not arise from the mere possession of nonpublic market information."[33] The Court applied the two-pronged test used in *Cady, Roberts*, but held that the petitioner did not have a duty to disclose material information because he lacked a fiduciary or equivalent relationship with the sellers from whom he purchased the securities.[34] The Court reiterated this analysis three years later in *Dirks v. SEC*,[35] holding a tippee not to be liable absent a breach of duty by his tipper.[36]

In 1987, the First Circuit in *Roeder v. Alpha Industries, Inc.*[37] expanded upon the *Cady, Roberts* two-pronged approach that the Supreme Court used in *Chiarella* and *Dirks,* and the "sufficient information" standard of *Texas Gulf Sulphur*.[38] The First Circuit explained that under Rule 10b-5, an issuer may have a duty to disclose material facts if any of the following three conditions were present: (i) "insider trading"; (ii) a "statute or regulation requiring disclosure"; or (iii) "inaccurate, incomplete or misleading prior disclosures."[39] This third criterion serves as a logical antecedent to a duty to update. *Roeder* expanded upon the notion developed in *Texas Gulf Sulphur* that when a public company com-

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29 *Id.* at 862.

30 Gordon Jones II, Comment, *In re* Time Warner Inc. Securities Litigation: *The Second Circuit Revisits Rule 10b-5–The Duties to Correct, Update, and Disclose Alternative Business Plans*, 28 GA. L. REV. 1019, 1027-28 (1994).

31 445 U.S. 222 (1980).

32 *Id.* at 230.

33 *Id.* at 235.

34 *Id.* at 232.

35 463 U.S. 646 (1983).

36 *Id.* at 667.

37 814 F.2d 22 (1st Cir. 1987).

38 *Id.* at 26.

39 *Id.* at 27 (citations omitted).

mences disclosure, it assumes a duty to disclose material information in the future that is necessary to re-establish the accuracy and completeness of the original disclosure.[40] The legislative history of section 10(b) provides further support for such a disclosure obligation.[41] In 1934, the Senate Report for the Exchange Act stated that "the omission of a material fact constitutes a misleading statement."[42] Cited in several duty to correct and update cases[43] because of its broad language,[44] *Roeder* provided the final groundwork for the recognition of such duties.

C. MATERIALITY

1. *The Standard*

In *Roeder*, the court explained that a company only has a duty to disclose additional information that is material.[45] The presence of one of the three criteria would not trigger a duty to disclose *nonmaterial* information.[46] However, if the additional information is material, yet the company is not under a duty of disclosure, the failure to disclose is also not actionable under Rule 10b-5.[47] The Second Circuit contributed to the duty to disclose line of cases by broadly defining materiality for the purposes of Rule 10b-5 in *Texas Gulf Sulphur*. According to the Second Circuit, "[t]he basic test of materiality . . . is whether a *reasonable* man would attach importance . . . in determining his choice of action in the transaction in question."[48] The Supreme Court elaborated on this materiality standard in *TSC Industries, Inc. v. Northway, Inc.*,[49] requiring "a substantial likelihood that the disclosure of the omitted fact would have

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[40] The language of *Roeder* is thus broad enough to provide support for both a duty to correct and a duty to update given that the third criterion does not specify whether the duty to disclose is triggered (i) because the original disclosure was "inaccurate, incomplete or misleading" at the time of dissemination or (ii) because the original disclosure *became* "inaccurate, incomplete or misleading."

[41] For a more expansive discussion of how the Exchange Act's legislative history and, in particular, that of section 10(b) is consistent with the duties to correct and update, see Rosenblum, *supra* note 10, at 308.

[42] S. REP. NO. 73-792, at 22 (1934).

[43] *See, e.g., Polaroid II*, 910 F.2d 10, 16-17 (1st Cir. 1990) (en banc). For a separation of the duty to correct and duty to update lines of cases, see *infra* Part II.

[44] *See supra* note 40 and accompanying text.

[45] Roeder v. Alpha Indus., Inc., 814 F.2d 22, 24-26 (1st Cir. 1987).

[46] *See supra* text accompanying note 39.

[47] *Roeder*, 814 F.2d at 26 (explaining that "[e]ven if information is material, there is no liability under Rule 10b-5 unless there was a duty to disclose it"); *see also infra* note 53 (reciting similar language from the Supreme Court's decision in *Basic Inc. v. Levinson*).

[48] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc) (emphasis added) (citing, inter alia, RESTATEMENT OF TORTS § 538(2)(a) (1934)), *cert. denied sub nom.* Coates v. SEC, 394 U.S. 976 (1969).

[49] 426 U.S. 438 (1976).

been viewed by the *reasonable* investor as having significantly altered the 'total mix' of information made available."[50]

The materiality requirement thus reduces the burden of disclosure on companies in two different ways. First, there is no duty to disclose additional information unless it would be probatively important to a "reasonable investor." Second, applying *Basic Inc. v. Levinson*,[51] there is no duty to disclose additional facts unless the original statement, which is allegedly false or misleading, remains material.[52] The Supreme Court explained that "in order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were *misleading* as to a *material* fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant."[53]

2. *The "Bespeaks Caution" Doctrine*

According to the judge-created "bespeaks caution" doctrine,[54] alleged materially inaccurate or misleading statements, as well as alleged material omissions, are not actionable in securities fraud cases if a company has provided adequate cautionary language.[55] In *In re Donald J.*

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[50] *Id.* at 449 (emphasis added). The Supreme Court in *Basic Inc. v. Levinson* maintained that determinations regarding materiality are fact-sensitive, and courts must make them on a case-by-case basis. Basic Inc. v. Levinson, 485 U.S. 224, 250 (1988).

[51] 485 U.S. 224 (1988).

[52] *See* Rosenblum, *supra* note 10, at 319-20.

[53] *Basic*, 485 U.S. at 238 (emphasis added). The Supreme Court explained in a now famous footnote: "Silence, absent a duty to disclose, is not misleading under Rule 10b-5." *Id.* at 239 n.17.

[54] As discussed below in Part IV.F.1, the PSLRA in 1995 basically codified the bespeaks caution doctrine.

[55] *See In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 371 (3d Cir. 1993), *cert. denied sub nom.* Gollomp v. Trump, 510 U.S. 1178 (1994). For a discussion of the bespeaks caution doctrine, see generally 3B HAROLD S. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 8.26 (1997); THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 13.5A (3d ed. 1996); Royce De R. Barondes, *The Bespeaks Caution Doctrine: Revisiting the Application of Federal Securities Law to Opinions and Estimates*, 19 J. CORP. L. 243 (1994); Klaus Eppler, *"Bespeaking Caution" in Disclosure Documents*, *in* 27TH ANNUAL INSTITUTE ON SECURITIES REGULATION 25 (PLI Corp. L. & Practice Course Handbook Series No. B-907, 1995); Donald C. Langevoort, *Disclosures that "Bespeak Caution,"* 49 BUS. LAW. 481 (1994); Jennifer O'Hare, *Good Faith and the Bespeaks Caution Doctrine: It's Not Just a State of Mind*, 58 U. PITT. L. REV. 619 (1997); Andrew M. Campbell, Annotation, *"Bespeaks Caution" Doctrine Under Federal Securities Laws*, 130 A.L.R. FED. 119 (1996); Edward Brodsky, *The 'Bespeaks Caution' Doctrine*, N.Y. L.J., Dec. 14, 1994, at 3; Joseph J. Fleischman & Shirley L. Berger, *'Bespeaks Caution' Doctrine Gains Favor*, NAT'L L.J., Feb. 7, 1994, at 19.

The district court in *Trump Casino* traced the history of the bespeaks caution doctrine. *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 793 F. Supp. 543, 549-50 (D.N.J. 1992), *aff'd*, 7 F.3d 357 (3d Cir. 1993), *cert. denied sub nom.* Gollomp v. Trump, 510 U.S. 1178 (1994).

Trump Casino Securities Litigation—Taj Mahal Litigation,[56] the Third Circuit explained that "cautionary language . . . negate[s] the materiality of an alleged misrepresentation or omission."[57] To the extent that "forecasts, opinions or projections are accompanied by meaningful cautionary statements, the[se] forward-looking statements will not form the basis for a securities fraud claim if [they] did not affect the 'total mix' of information the document provided investors."[58]

Therefore, to the extent a statement bespeaks caution, the "cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law."[59] However, the bespeaks caution doctrine is only available if the cautionary language is "sufficient" and "meaningful."[60] As the *Trump Casino* court clarified, "[of] course, a vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions . . . which the plaintiffs allege."[61] While the Third Circuit in *Trump Casino* held that the prospectus in question included sufficient cautionary language to warrant application of the bespeaks caution doctrine to dismiss the plaintiffs' claim regarding the Trump defendants' allegedly material misrepresentations and omissions,[62] other courts have been more reluctant to invoke the doctrine.[63] The inclusion of cautionary language will thus influence many courts' determinations on the materiality of prior

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56 7 F.3d 357 (3d Cir. 1993), *cert. denied sub nom.* Gollomp v. Trump, 510 U.S. 1178 (1994).

57 *Trump Casino*, 7 F.3d at 371.

58 *Id.*

59 *Id.* However, Professor Hazen has explained that while "[t]he [bespeaks caution] doctrine . . . necessarily relates to materiality in the sense that it address[es] the question of whether the misstatements are materially misleading when judged in light of the total mix of information available to the investor," it has also "frequently been referred to in the context of judging whether the plaintiff's reliance is reasonable." HAZEN, *supra* note 55, § 13.5A, at 798 (citations omitted); *see also In re* Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1414 (9th Cir. 1994), *cert. denied sub nom.* Miller v. Pezzani, 516 U.S. 868 (1995), *and cert. denied sub nom.* Deloitte & Touche v. Miller, 516 U.S. 909 (1995) (clarifying that "the [bespeaks caution] doctrine, when properly construed, merely represents the pragmatic application of two fundamental concepts in the law of securities fraud: materiality and reliance").

60 *Trump Casino*, 7 F.3d at 371.

61 *Id.* at 371-72.

62 *Id.* at 372, 377; *see also* Hillson Partners Ltd. Partnership v. Adage, Inc., 42 F.3d 204, 218 (4th Cir. 1994) (noting that "[i]t is well recognized that statements that include such cautionary language are usually 'not the stuff of which securities fraud claims are made'" (quoting Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 (1st Cir. 1991) (quoting Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986)))). For an analysis of *Hillson Partners*' assessment of the duty to update, see *infra* Part IV.D.

63 *See, e.g.*, Rubinstein v. Collins, 20 F.3d 160, 167-68 (5th Cir. 1994) (stating that "[u]nder [Fifth Circuit] precedent, cautionary language is not necessarily sufficient, in and of itself, to render predictive statements immaterial as a matter of law," and thus "is not per se

statements; however, this inclusion may not necessarily insulate companies from liability for securities fraud.

D. SYNTHESIS

In sum, one can see how Rule 10b-5, the duty to disclose, the materiality standard based on the reasonable investor and balanced by the bespeaks caution doctrine, and the public policy underlying section 10(b) might provide the foundation for a duty to update. Rule 10b-5 proscribes a company from failing to make further disclosure of material facts if such an omission would render the original statement misleading. The dicta in the insider trading cases outline a company's duty to disclose. *Texas Gulf Sulphur* and *Roeder* add the obligation to disclose material information when prior disclosure is untrue, incomplete, or misleading.[64] *Basic* requires that both the original statement and the additional information be material.[65] The standard of materiality established in *TSC Industries* and *Basic*, predicated on a reasonable investor,[66] as opposed to an unsophisticated investor, expands the scope of information, the omission of which Rule 10b-5 proscribes. Aggregating these elements, a duty to update appears to be within the purview of a company's affirmative duty to disclose. The imposition of a duty to update will reduce the likelihood that companies will omit material facts that may undermine the factual integrity of the original statement. Prevention of such omissions, which may mislead investors, comports with the fundamental public policy objective of section 10(b)—the protection of investors from misrepresentation and fraud.[67]

II. UNTANGLING THE DUTIES TO CORRECT AND UPDATE

In tracing the history of the duties to correct and to update, it is important to note that the courts, the SEC, scholars, and litigants have often used the verbs "correct" and "update," and therefore, the legal phrases "duty to correct" and "duty to update," interchangeably.[68] The problem is that the words "correct" and "update" have similar meanings in common parlance that can overlap.

When a company corrects a prior disclosure, it, by definition, updates the statement, for the act of adding information to make the original statement accurate represents an update with respect to the original

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dispositive"). For a discussion of this case's treatment of the duty to update, see *infra* Part IV.C.

64 *See supra* text accompanying notes 28-30, 37-40.

65 *See supra* notes 51-53 and accompanying text.

66 *See supra* text accompanying notes 49-50.

67 *See supra* Part I.A.

68 For examples of recent cases in which the plaintiffs still plead duty to correct and update claims improperly, see *infra* note 581.

disclosure. For example, consider a company that announces that earnings for the prior quarter grew by ten percent. If the company subsequently learns that earnings for the prior quarter only grew by six percent and it corrects the earlier statement, this correction necessarily constitutes an updating of the earlier statement because the company is using new information to make a prior statement accurate.

However, a company can update a prior disclosure without necessarily providing a correction. When a company merely supplements a prior statement that was correct when made with additional information relating to the prior statement that does not render the prior statement incorrect, it thereby updates the statement without correcting it. For example, consider a company that states on January 1 that it will issue a press release on January 15 that will announce earnings projections for the next quarter. The company then announces on January 8 that it is also going to announce in the press release a declaration of a dividend. This subsequent statement represents an update on the prior statement, but it is not a correction because the original statement was not incorrect. It was, at worst, incomplete.

On the other hand, a company can update a statement such that it also involves a correction. For instance, using the prior example, if a company announces on January 8 that it will not issue the press release until January 22—rather than on January 15—the company is both updating the earlier statement and correcting it, for it was inaccurate.

These similar, yet different, common meanings of "correct" and "update" have led courts, the SEC, scholars, and litigants to imprecisely use the legal phrases "duty to correct" and "duty to update," implying that the duties are the same. This imprecision has created substantial confusion. This Note maintains that although the common meanings of the words "correct" and "update" can overlap, the legal duties, as the *Polaroid II* court would ultimately recognize,[69] are not synonymous. Each duty has a distinct role, and this distinction has important ramifications for both companies and investors.[70]

Another reason why courts, scholars, and litigants confuse the duties to correct and update may be that the duties both originated out of the securities fraud framework discussed above in Part I. Therefore, a plaintiff bringing either a duty to correct or a duty to update claim in a private cause of action must prove the same initial elements to establish a Rule 10b-5 claim.[71] "[A] plaintiff must prove that the defendant: [(i)] made a misstatement or omission, [(ii)] of material fact, [(iii)] with scienter, [(iv)] in connection with the purchase or sale of securities, [(v)] upon

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69 *See infra* Part III.B.

70 *See infra* Part III.B.4, C.

71 *See supra* text accompanying notes 15-16.

which the plaintiff relied, and [(vi)] that reliance proximately caused the plaintiff's injury."[72] Similarly, because both duty to correct and duty to update claims are "'fraud' claim[s], [a] plaintiff must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)."[73] However, as Parts III and IV suggest below, a plaintiff bringing a duty to correct claim will need to prove, in addition to these Rule 10b-5 requirements, elements that differ from those necessary to establish a duty to update claim. This Part demonstrates that although the duties to correct and update grew out of the same securities fraud framework, the case history of the two duties branched off in different directions from their common trunk.

A. DUTY TO CORRECT

The duty to correct is an obligation that devolves upon a company to redress a statement that it thought was true when made, but subsequently learned was materially untrue, incomplete, or misleading.[74] In other words, the statement was, in reality, never correct. In contrast, a duty to update is an obligation that devolves upon a company to supplement a statement that has *become materially* untrue, incomplete, or misleading as a result of the passage of time or the unfolding of subsequent events.[75] Part I demonstrated that companies most certainly have a duty to correct inaccurate disclosure that, in actuality, was never true. The courts and authorities have not questioned the existence of this duty to correct.[76] The language of Rule 10b-5(b) expressly requires such a correction.[77] Similarly, following *SEC v. Texas Gulf Sulphur Co.* and *Roeder v. Alpha Industries, Inc.*, a correction of a material statement that was false when disseminated, clearly falls within a company's affirmative duty to disclose.[78]

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72 Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1331 (7th Cir. 1995) (citing *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1244 (3d Cir. 1989); Schlifke v. Seafirst Corp., 886 F.2d 935, 943 (7th Cir. 1989)).

73 *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1417 (3d Cir. 1997). See *infra* Part IV.J for a discussion of this case.

74 *See Stransky*, 51 F.3d at 1331 (citing *Polaroid II*, 910 F.2d 10, 16-17 (1st Cir. 1990) (en banc)); *Polaroid II*, 910 F.2d at 16-17; Rosenblum, *supra* note 10, at 289. This definition of the duty represents only the consensus among the circuits and scholars—not a unanimous definition. See *infra* Part III.C for a discussion of a flawed construction of the duty to correct. For a discussion of the duty to correct in its early stages, see F. Philip Manns, Jr., *Duty to Correct: A Suggested Framework*, 46 MD. L. REV. 1250 (1987).

75 *See infra* Part II.B.

76 *See Polaroid II*, 910 F.2d 10, 16-17 (1st Cir. 1990) (en banc) (opining that the duty to correct is an "[o]bvious" duty); Block, *supra* note 10; Rosenblum, *supra* note 10, at 301 & n.59, 302.

77 *See supra* text accompanying note 15.

78 *See supra* Part I.B-D.

It should thus come as no surprise that some authorities consider *Texas Gulf Sulphur* the catalyst of the duty to correct. These scholars cite the language in *Texas Gulf Sulphur* regarding a company's "duty to disclose 'sufficient information' so that the statement does not *become* 'false or misleading or . . . so incomplete as to mislead'" as support.[79] However, the Second Circuit concededly did not provide any guidance as to "the types of information necessary to avoid misleading public disclosures."[80]

The problem is that the language in *Texas Gulf Sulphur* is broad enough to function also as the source of the duty to update.[81] In fact, scholars' and courts' decision to cite the language quoted above from *Texas Gulf Sulphur*[82] in support of a duty to correct suggests that they have confused the meanings of the two duties, because a company can only *update*—not correct—a statement that has *become* "'false or misleading or . . . so incomplete as to mislead.'"[83] A company would have a duty to correct the statement if it discovered that it had never been true.[84] A literal reading of *Texas Gulf Sulphur*'s language supports the conclusion that the case was, in fact, the "genesis"[85] of the duty to update—not the duty to correct. Nevertheless, like *Roeder*, *Texas Gulf Sulphur*, with its broad requirement of disclosure of "sufficient information," ploughed the field for the duty to correct as well.

In citing two cases decided before *Polaroid II* that discuss the duty to correct (as defined above), Dennis Block and his coauthors provide much insight into the roots of the duty to correct line of cases.[86] In 1970, the Second Circuit decided *Butler Aviation International, Inc. v. Comprehensive Designers, Inc.*,[87] disapproving of the defendants' "failure to attempt to correct" a press release which it learned had always been inaccurate.[88] Although *Butler Aviation* did not expressly recognize the duty to correct, its emphasis on the original inaccuracy of the disclosure paved the road for the modern duty to correct.

Thirteen years later in *Rose v. Arkansas Valley Environment & Utility Authority*,[89] the district court essentially defined the duty to correct when it explained that "where the defendant, in good faith, has commu-

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79 *See, e.g.*, Jones, *supra* note 30, at 1028 (emphasis added) (omission in original). For a discussion of this language, see *supra* text accompanying notes 30-31.

80 Jones, *supra* note 30, at 1028.

81 See *infra* Part II.B for a discussion of the duty to update.

82 *See supra* text accompanying note 29.

83 *See supra* text accompanying note 29.

84 *See supra* text accompanying note 74.

85 Jones, *supra* note 30, at 1028.

86 Block et al., *supra* note 10, at 158 n.114.

87 425 F.2d 842 (2d Cir. 1970).

88 *Id.* at 843.

89 562 F. Supp. 1180 (W.D. Mo. 1983).

nicated or disseminated information which *later* becomes known to him to have been false or misleading when made . . ., [and] where the newly discovered information has a direct bearing upon the information previously given, the defendant has a 'duty' to communicate the new information."[90] The court continued, "performance of the duty requires a further affirmative act of the defendant, in correcting the information previously conveyed, and the duty itself actually arises, and can be breached, only at such later time following the original communication as the defendant learns of the newly discovered information."[91] "For convenience sake," the court "denominate[d] this sort of 'duty' as a 'duty to correct.'"[92] *Butler Aviation* and *Rose* represent early examples of cases belonging to the duty to correct line of cases.

The Eleventh Circuit's decision in 1986 in *Rudolph v. Arthur Andersen & Co.*[93] was consistent with *Butler Aviation* and *Rose*. The court explained that "[w]here a defendant's failure to speak would render the defendant's *own* prior speech misleading or deceptive, a duty to disclose arises."[94] Furthermore, the court indicated its approval of "[t]he rule that an accountant is under no duty to disclose ordinary business information, unless it shows a previous report to have been misleading or incorrect *when issued.*"[95] By contrast, the Eleventh Circuit discussed how other "courts have refused to hold accountants liable for not disclosing ordinary business information discovered after the completion of a report, where the information did not indicate that the report was inaccurate as of the date it was issued."[96] Therefore, although the court did not use duty to correct language, *Rudolph* clearly recognized that the extent to which the original disclosure was "misleading or incorrect" triggered a duty to correct the prior disclosure. Subsequent cases have cited *Rudolph* in support of a duty to correct.[97] Unfortunately, however, the case has also been improperly classified as a duty to update case.[98]

Butler Aviation, *Rose*, and *Rudolph* all focused on the status of the original statement at the time of disclosure. These cases represented the best articulations of the duty to correct prior to *Polaroid II*.[99]

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90 *Id.* at 1207.

91 *Id.* at 1208.

92 *Id.*

93 800 F.2d 1040 (11th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

94 *Id.* at 1043 (citing First Va. Bankshares v. Benson, 559 F.2d 1307, 1314 (5th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978)).

95 *Id.* at 1044 (emphasis added).

96 *Id.*

97 *See, e.g.*, *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1431 (3d Cir. 1997).

98 *See, e.g.*, Rubinstein v. Collins, 20 F.3d 160, 170 n.41 (5th Cir. 1994).

99 *See infra* Part III.B.

B. DUTY TO UPDATE

A company may also have a duty to update a forward-looking statement that was originally accurate, but became materially deficient or misleading over time or due to subsequent developments.[100] Some courts and commentators have declined to recognize that Rule 10b-5 implies such a duty.[101] As discussed earlier, the courts, the SEC, scholars, and litigants have indiscriminately employed the verbs "correct" and "update" as well as the legal phrases "duty to correct" and "duty to update," which has created much confusion. Among those that have acknowledged the duty, many have misidentified the case history of the duty to update as that of the duty to correct.[102]

The United States District Court for the Southern District of New York heard two of the earliest cases addressing the duty to update. First, in *SEC v. Shattuck Denn Mining Corp.*,[103] defendants announced in a press release that Shattuck had reached an agreement with an oil refining company to purchase it.[104] Soon after this announcement, the president of Shattuck recognized that "the acquisition which seemed so imminent on [the day Shattuck issued its press release] had become a mere possibility."[105] Shattuck's press release, apparently "[ ]true when made," thus "became false and misleading shortly thereafter."[106] The court held that the president of Shattuck violated the antifraud provisions under the federal securities laws when he "fail[ed] to correct the 'misleading impression left by statements already made' "[107] that were "truthful" at the time of issuance, but "became false and misleading shortly thereafter."[108] Therefore, despite the usage of the word "correct," the Southern District, in reality, recognized a duty to update.

Second, in the oft-cited case of *Ross v. A.H. Robins Co., Inc.*[109] the defendant company emphasized the safety, effectiveness, and appeal of its contraceptive product in its annual reports and in a prospectus be-

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100 *See Polaroid II*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc); HAZEN, *supra* note 55, §§ 13.5A, 13.10; Rosenblum, *supra* note 10, at 289.

101 *See, e.g.*, Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1332 (7th Cir. 1995); Block et al., *supra* note 10; Schneider, *supra* note 10; Carl W. Schneider, *Update on the Duty to Update: Did Polaroid Produce the Instant Movie After All?*, 23 REV. SEC. & COMMODITIES REG. 83 (1990).

102 *See, e.g.*, *infra* notes 121, 154, 165 and accompanying text.

103 297 F. Supp. 470 (S.D.N.Y. 1968).

104 *Id.* at 474.

105 *Id.* at 475.

106 *Id.*

107 *Id.* at 476 (quoting Cochran v. Channing Corp., 211 F. Supp. 239, 243 (S.D.N.Y. 1962)).

108 *Id* at 475.

109 465 F. Supp. 904 (S.D.N.Y. 1979), *rev'd on other grounds*, 607 F.2d 545 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980).

tween 1970 and 1972.[110] In reality, the device proved ineffective and allegedly harmful.[111] Consequently, unsatisfied consumers brought product liability class actions against the company.[112] In addition, in 1972, a report questioned the safety of the device.[113] The defendants neither "attempt[ed] to modify or correct" its prior statements nor disclosed the lawsuits until 1974.[114] Plaintiffs, who purchased stock in the company in 1973, brought suit under section 10(b) and Rule 10b-5, alleging reliance on the defendants' false and misleading statements in the annual reports and prospectus.[115]

In considering these facts, the Southern District of New York in *Ross* defined the scope of the duty to update and determined for how long it survives. The court asserted, "It is now clear that there is a duty to *correct* or *revise* a prior statement that was *accurate when made* but which has become misleading due to subsequent events."[116] It continued that "[t]his duty exists so long as the prior statements remain 'alive,'"[117] that is, "as long as traders in the market could reasonably rely on the statement."[118] Applying this doctrine to the facts, the court explained that "the defendants owed a duty to plaintiffs to *revise*" the earlier statements which "would appear to be of a nature that traders in the market might reasonably rely on them until publicly corrected."[119] According to the court, the defendants should have corrected the statements once they learned of the "subsequent events which rendered those statements misleading."[120]

After reviewing the relevant case law and commentary, it is apparent that the court's flexible usage of the words "correct" and "revise" in *Ross* has subsequently created much confusion. Many scholars have focused on the word "correct" and erroneously designated *Ross* as evidence of a judicial recognition of a broad duty to correct.[121] Such a duty would

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110 *Id.* at 906-07.

111 *See id.* at 906.

112 *See id.*

113 *See id.*

114 *Id.* at 906-07.

115 *See id.* at 907.

116 *Id.* at 908 (emphasis added).

117 *Id.* (citing A. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10B-5 § 88.04(B), at 4-14 (rev. ed. 1978)).

118 *Id.* (quoting 2 A. BROMBERG, SECURITIES LAW, FRAUD § 6.11(543) (1977)).

119 *Id.* (emphasis added).

120 *Id.*

121 *See, e.g.*, HAROLD S. BLOOMENTHAL, GOING PUBLIC AND THE PUBLIC CORPORATION § 12.20 (1992); Block et al., *supra* note 10, at 160-63; Daniel L. Goelzer, *Disclosure of Preliminary Merger Negotiations—Truth or Consequences*, 46 MD. L. REV. 974, 977 n.11 (1987). Robert Rosenblum properly distinguished the duty to update from the duty to correct. Rosenblum, *supra* note 10, at 290. However, despite his assertion that the court's language "literally recognizes a duty to update," he classified *Ross* as a duty to correct case because "the factual situation in *Ross* involved a duty to correct." *Id.* & n.10, 301 n.59.

be so sweeping in scope that it would swallow a duty to update.[122] These scholars contend that the defendants' disclosures in *Ross* were initially inaccurate, which would trigger a duty to correct.[123] In contrast, those that have treated *Ross* as a duty to update case appear to emphasize the state of the disclosure after the unfolding of subsequent events.[124] This analysis would lead them correctly to conclude that despite the usage of the word "correct," the court's literal language recognized a duty to update because it discussed the duty in the context of when an *initially accurate* disclosure *becomes* misleading in light of subsequent developments. Further evidence that *Ross* is a duty to update case lies in the word "revise." The disjunction suggests that "revise" must mean something other than correct because a broad construction of "correct" would envelop the meaning of "revise," thereby rendering it redundant.[125]

The second problem, in addition to the court's word choice, is that it applied duty to update language to a duty to correct fact pattern.[126] In *Ross*, the prior disclosure was inaccurate when made, which activates a duty to correct.[127] It is therefore understandable why a school of thought has classified *Ross* as a duty to correct case.[128] The more appropriate conclusion is that the court recognized a duty to update,[129] but misapplied it to a duty to correct fact pattern.

Confronted with the confusion that the case law introduced, the SEC attempted to clarify the duties to correct and update in a June 1979 release.[130] In this release, the Commission introduced a safe harbor rule that encourages issuers to make forward-looking statements in SEC filings.[131] The Commission sought to introduce a safe harbor rule that was consistent with its commitment to investor protection.[132] The Securities Act safe harbor for forward-looking statements in SEC filings is codified

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122 *See infra* Part III.C.

123 *See* John E. Hayes, III, Note, *Securities, Lies & Videotape:* Backman v. Polaroid *and the Duty to Update*, 39 U. KAN. L. REV. 951, 954 n.23 (1991).

124 *See id.* at 954 & n.23; Jones, *supra* note 30, at 1029 nn.67-68. For subsequent cases that have cited *Ross* in support of a duty to update, see *infra* note 129.

125 For a discussion of proper interpretation of disjunctions, see Bailey v. United States, 516 U.S. 137 (1995); Platt v. Union Pac. R.R. Co., 99 U.S. 48 (1878).

126 *See* Rosenblum, *supra* note 10, at 290 n.10.

127 *See supra* text accompanying note 74.

128 *See supra* note 121 and accompanying text.

129 Many subsequent cases have cited *Ross* in support of a duty to update. *See, e.g., Polaroid II*, 910 F.2d 10, 21 (1st Cir. 1990) (en banc) (Bownes, J., dissenting); *In re* Gulf Oil/ Cities Serv. Tender Offer Litig., 725 F. Supp. 712, 746 (S.D.N.Y. 1989); Kamerman v. Steinberg, 123 F.R.D. 66, 72 (S.D.N.Y. 1988); *In re* Warner Communications Sec. Litig., 618 F. Supp. 735, 752 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

130 Safe Harbor for Projections, Exchange Act Release No. 15,944, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,117, at 81,938 (June 25, 1979) [hereinafter 1979 Safe Harbor Release].

131 *Id.*

132 *Id.* at 81,939, 81,944.

in Rule 175;[133] while a nearly identical safe harbor is codified in Rule 3b-6 of the Exchange Act.[134] Rule 175 provides that an issuer's forward-looking statement that meets the requirements of Rule 175(b) "shall be deemed not to be a fraudulent statement . . . unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith."[135] Given that Congress intended for the safe harbor to encourage companies to make forward-looking statements, Rule 175 and Rule 3b-6 appear inconsistent with a duty to update. The safe harbor seems to suggest that duty to update liability under the antifraud provisions should not attach to statements in SEC filings other than statements "made or reaffirmed without a reasonable basis or . . . disclosed other than in good faith."[136]

In the 1979 release, the Commission summarized its view on the duties to update and correct. The Commission explained:

> 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. Moreover, the Commission believes that, depending on the circumstances, there is a *duty to correct* statements made in any filing, whether or not the filing is related to a specified transaction or event, if the statements either have become inaccurate by virtue of subsequent events, or are later discovered to have been false and misleading from the outset, and the issuer knows or should know that persons are continuing to rely on all or any material portion of the statements. This duty will vary according to the facts and circumstances of individual cases.[137]

This discussion of the duties to correct and update, which the SEC did not incorporate in the codified safe harbor, essentially restated the position of the Southern District of New York in *Ross*.[138] Unlike the court in

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133 17 C.F.R. § 230.175 (1997).

134 *Id.* § 240.3b-6.

135 *Id.* § 230.175(a); *see also id.* § 240.3b-6(b) (codifying the Exchange Act safe harbor).

136 *Id.* §§ 230.175(a), 240.3b-6(b).

137 1979 Safe Harbor Release, *supra* note 130, at 81,943 (emphasis added).

138 *See supra* text accompanying notes 116-120.

Ross, the Commission at least consistently used the term "correct" throughout the release, even though the SEC appeared to be announcing, inter alia, its recognition of a duty to update.

However, the SEC failed in its efforts to clarify because it substantively acknowledged both the duty to correct and the duty to update, yet effectively subsumed the latter under the former through its (i) failure to speak literally of a "duty to update" and (ii) emphasis on a broad duty to correct instead of an independent duty to update.[139] The SEC recognized in 1994 that critics have been complaining about the safe harbor for forward-looking statements because, among other reasons, "it has created confusion over whether and when there is a duty to correct or update projections once they are made."[140] This confusion has discouraged companies from making forward-looking statements[141]—the exact antithesis of what the SEC intended to achieve via the introduction of the safe harbor for forward-looking statements. The safe harbor that Congress subsequently created for forward-looking statements in the PSLRA in 1995 has similarly failed to provide clarification of the duty to update or to introduce uniformity to the case law in the federal circuits.[142]

The Third Circuit initially appeared to end the confusion in 1984 in *Greenfield v. Heublein, Inc.*[143] Heublein, a target of a tender offer, learned that a raider, via an asset sale, had access to capital that would enable it to increase its position in Heublein.[144] On the same day that Heublein became aware of this development, the price of the stock rose during a period of high volume trading.[145] Heublein publicized a statement that day that it was unaware of why trading in its stock increased.[146] Shareholders brought suit, alleging that Heublein violated section 10(b) and Rule 10b-5 when it (i) made this false and misleading statement and (ii) neglected to update the announcement thereafter.[147] Concluding that Heublein genuinely did not know the precise reasons for

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139 For a delineation of the safe harbor rule's shortcomings, see Stephen M. Muniz, Note, *The Private Securities Litigation Reform Act of 1995: Protecting Corporations from Investors, Protecting Investors from Corporations, and Promoting Market Efficiency*, 31 NEW. ENG. L. REV. 655, 678-89 (1997). For specific discussion of how the safe harbor failed to clarify the duties to correct and update, see *id.* at 687-89.

140 Safe Harbor for Forward-Looking Statements, Exchange Act Release No. 34,831, [1994-1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,436, at 85,778, 85,787 (Oct. 13, 1994) [hereinafter 1994 Safe Harbor Release]. In the Release, the Commission summarized criticisms of Rule 175. *Id.* at 85,786-88; *see also infra* text accompanying notes 346-48 (discussing three of these criticisms).

141 *See infra* text accompanying note 349.

142 *See infra* Part IV.F.2.

143 742 F.2d 751 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985).

144 *See id.* at 753-54.

145 *See id.* at 754.

146 *See id.*

147 *See id.* at 755.

the surge in trading,[148] the court ruled that Heublein did not make an untrue or misleading statement at the time of initial disclosure.[149] This ruling suggests that the court did not think Heublein had a duty to correct under the given facts. The court then stated in dicta that "if a corporation voluntarily makes a public statement that is correct when issued, it has a duty to *update* that statement if it becomes materially misleading in light of subsequent events."[150] This assertion, in conjunction with the court's apparent rejection of the applicability of the duty to correct, seemed to support a clear recognition of a duty to update. Courts and commentators have subsequently cited *Greenfield* as support for a duty to update.[151]

In spite of this seeming clarity, the Third Circuit in *Greenfield* once again enshrouded the duty to update in semantic confusion. The court did not impose a duty to update on Heublein because its statement "never became materially misleading on the basis of subsequent events."[152] However, the court explained that since the statement did not become "materially misleading[,] . . . no duty to *correct* ever arose."[153] As a result of this language, some scholars have argued that *Greenfield* is a duty to correct case.[154] Others have properly identified *Greenfield* as a duty to update case.[155] Therefore, although the Third Circuit acknowledged the existence of a duty to update, this pronouncement was diluted by the court's (i) decision not to impose the duty and (ii) unfortunate interjection of duty to correct language.

Five years later, the Third Circuit had an opportunity in *In re Phillips Petroleum Securities Litigation*[156] to clear up the confusion it created in *Greenfield* regarding the duty to update. Shareholder plaintiffs alleged that the defendants neglected to inform shareholders promptly that the defendant partnership had decided to change its publicized position on a tender offer for its shares of Phillips Petroleum.[157] The partnership had disclosed to the public on a number of occasions that it would not sell its

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148 Nevertheless, "Heublein executives . . . clearly knew of information that might have accounted for the increase in trading." *Id.* at 759.

149 *See id.*

150 *Id.* at 758 (emphasis added) (citing Sharp v. Coopers & Lybrand, 83 F.R.D. 343, 346-47 (E.D. Pa. 1979)).

151 *See, e.g., infra* note 155 and accompanying text.

152 *Greenfield*, 742 F.2d at 759-60. For a discussion of materiality, see *supra* Part I.C.

153 *Greenfield*, 742 F.2d at 759-60 (emphasis added).

154 *See, e.g.*, Block et al., *supra* note 10, at 163-65.

155 *See, e.g., In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1431 (3d Cir. 1997); *Polaroid II*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc); *In re* Gulf Oil/Cities Serv. Tender Offer Litig., 725 F. Supp. 712, 746, 749 (S.D.N.Y. 1989); Wallace v. Systems & Computer Tech. Corp., No. CIV.A. 95-CV-6303, 1997 WL 602808, at *13 (E.D. Pa. Sept. 23, 1997); Hayes, *supra* note 123, at 953; Jones, *supra* note 30, at 1029 n.68.

156 881 F.2d 1236 (3d Cir. 1989).

157 *See id.* at 1245.

shares of Phillips Petroleum back to Phillips unless the offer treated all shareholders equally.[158] In contrast, the partnership entered an agreement shortly thereafter with Phillips, the terms of which were not the same for all shareholders.[159] The plaintiffs thus alleged that the partnership's prior disclosures had become false and misleading, and thus violated section 10(b) and Rule 10b-5.[160] The court held that the partnership's announcement of its change of intent was sufficiently prompt.[161] However, the court in dicta explained that "[t]here can be no doubt that a duty exists to *correct* prior statements, if the prior statements were true when made but misleading if left unrevised."[162] As a result, "notice of a change of intent [needs to] be disseminated in a timely fashion."[163] Assuming that a statement that is "misleading if left unrevised" becomes misleading as a result of subsequent events or the passage of time, the Third Circuit, although it interestingly did not cite *Greenfield*, once again recognized a duty to update. However, the Third Circuit left the waters muddied when it again employed the term "correct."[164] Consequently, courts and commentators have classified the case, like *Greenfield*, as both a duty to correct and duty to update case.[165]

Kirby v. Cullinet Software, Inc.,[166] also decided in 1989, exemplified the obfuscation that *Greenfield* and *Phillips Petroleum* engendered regarding the duty to update. In *Kirby*, Cullinet Software issued several press releases which contained optimistic projections concerning growth and operating margins.[167] These projections proved illusory.[168] Shareholders brought an action against Cullinet for violating section 10(b) and Rule 10b-5.[169] The United States District Court for the District of Mas-

158 *See id.* at 1239-42, 1245.

159 *See id.* at 1239-41.

160 *See id.* at 1245.

161 *See id.* at 1246.

162 *Id.* at 1245 (emphasis added) (citing Thomas v. Duralite Co., Inc., 524 F.2d 577, 583-84 (3d Cir. 1975)).

163 *Id.*

164 *See supra* text accompanying note 162.

165 *Compare* Block et al., *supra* note 10, at 169 (citing case in support of duty to correct) *with* Weiner v. Quaker Oats Co., 129 F.3d 310, 316, 318 (3d Cir. 1997) (citing case in support of both the duty to correct and the duty to update), *and In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1431, 1433-34 (3d Cir. 1997) (citing case in support of duty to update), *and* Rubinstein v. Collins, 20 F.3d 160, 170 n.41 (5th Cir. 1994) (same), *and Polaroid II*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc) (same), *and* Rand v. M/A-Com, Inc., 824 F. Supp. 242, 257 (D. Mass. 1992) (same); *and* Wallace v. Systems & Computer Tech. Corp., No. CIV.A. 95-CV-6303, 1997 WL 602808, at *13 (E.D. Pa. Sept. 23, 1997) (same). See *infra* note 223 and accompanying text for a discussion of the First Circuit's treatment of *Phillips Petroleum* in *Polaroid II*. *Rand, Rubinstein, Burlington Coat Factory, Wallace*, and *Weiner* are discussed at length *infra* Part IV.A, C, J-K.

166 721 F. Supp. 1444, 1450 (D. Mass. 1989).

167 *Id.* at 1447.

168 *See id.*

169 *See id.* at 1445.

sachusetts quoted the aforementioned language from *Greenfield* that a company has a duty to update disclosure that has become "materially misleading" as a result of later events.[170] The court then, as in *Greenfield*, recited duty to correct language. It recognized that the defendant "had a duty to correct the projection, or in any event, had a duty not to make statements which while not literally false would convey the misleading impression that the recent promising prediction remained reliable."[171] Adding still more terminology, the court explained that the defendants "had a duty to disclose adverse developments or revise its recent prediction."[172] The First Circuit, which decided *Polaroid II* one year after *Kirby*,[173] thus clarified the duty to update at its peak of confusion.[174]

III. *BACKMAN V. POLAROID*

A. PANEL DECISION

1. *Facts and Procedural History*

Backman v. Polaroid Corp.[175] caused much controversy with its expansive interpretation of the duty to update. In November 1978, Polaroid distributed its third quarter report, which discussed the company's robust sales figures and production levels, balanced only by an acknowledgement that it was incurring considerable costs in connection with Polavision, a new instant movie camera.[176] However, the quarterly report, which displayed Polavision on its cover, neglected to mention that, in fact, sales of Polavision cameras were discouragingly low.[177] In fact, Polaroid took measures to discontinue production until sales increased, and secured assurance from its supplier that it would not disclose the stoppage of production.[178] Polaroid did not disclose the extent of Polavi-

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170 *Id.* at 1450; *see supra* text accompanying note 150.

171 *Kirby*, 721 F. Supp. at 1454.

172 *Id.* at 1454-55.

173 Despite the duty to correct language and the new terminology, subsequent cases and commentators have cited *Kirby* in support of a duty to update. *See, e.g.*, Rand v. MIA-Com, Inc., 824 F. Supp. 242, 257 (D. Mass. 1992); Rosenblum, *supra* note 10, at 302 n.61. *But see* Block et al., *supra* note 10, at 165 (citing case in support of the duty to correct). For a discussion of *Rand*, see *infra* text accompanying notes 269-72.

174 *See infra* Part III.B.

175 [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,899, at 94,937-3 (1st Cir.), *withdrawn and vacated, reh'g granted*, (1st Cir.), *rev'd*, 910 F.2d 10 (1st Cir. 1990) (en banc) [hereinafter *Polaroid I*]. *Polaroid I* is an unreported decision. The First Circuit in its subsequent *Polaroid II* opinion explained that the panel opinion in *Polaroid I* has no precedential value because the judgment was vacated. *Polaroid II*, 910 F.2d 10, 14 (1st Cir. 1990) (en banc).

176 *See Polaroid I*, at 94,938-39.

177 *See id.* at 94,939.

178 *See id.*

sion's underperformance in 1978 until a late February 1979 press release.[179] In the wake of this press release, the price of Polaroid's stock plummeted by just under twenty percent.[180]

The plaintiffs, shareholders of Polaroid who purchased stock or options in the six-week period before the February 1979 release, brought a class action securities fraud suit against the company, pleading a section 10(b) and Rule 10b-5 violation.[181] They argued that Polaroid made false and misleading statements regarding Polavision in its quarterly report.[182] Alternatively, plaintiffs alleged that the statements in the quarterly report became false and misleading six weeks before the disclosure in the press release.[183] In short, plaintiffs advanced both a duty to correct and a duty to update claim. A jury found Polaroid liable, and a different jury awarded damages.[184] The district court refused to grant Polaroid's motions for judgment n.o.v. or a new trial.[185] Polaroid subsequently appealed.[186]

2. *Majority Decision*

In a two-to-one decision, a First Circuit panel found that the trial judge had erred in instructing the jury and, therefore, remanded the case for a new trial.[187] The panel majority, however, proceeded to determine whether Polaroid had a duty to disclose information about Polavision. Accepting that Polaroid was unaware of precisely how low the sales figures were for Polavision at the time it issued the quarterly report and the broader ramifications thereof, the panel in *Polaroid I* found that the statements in the quarterly report were not misleading when made.[188] Hence, it did not consider applying a duty to correct.

The panel cited *Greenfield v. Heublein, Inc.* and *Roeder v. Alpha Industries, Inc.* in support of its position that knowledge of "material facts" necessary to "render prior statements not misleading" can trigger a duty to disclose.[189] Although Polaroid may have considered its statements accurate and complete when it issued the report, the panel decided

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179 *See id.*

180 *See id.*

181 *See id.*

182 *See id.* at 94,939-40; *Polaroid II*, 910 F.2d 10, 15 (1st Cir. 1990) (en banc).

183 *See Polaroid I*, at 94,940.

184 *See id.*

185 *See id.*

186 *See id.*

187 *See id.*; Polaroid II, 910 F.2d at 12.

188 *Polaroid I*, at 94,943-44; Thomas J. Dougherty, Backman v. Polaroid: *The First Circuit Declines to Expand the Duty of Disclosure*, 34 BOSTON B.J. 8, 8 (1990).

189 *Polaroid I*, at 94,944 (citing Greenfield v. Heublein, Inc., 742 F.2d 751, 758 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 27 (1st Cir. 1987); Starkman v. Marathon Oil Co., 772 F.2d 231, 238 (6th Cir. 1985)).

that the company's subsequent actions, for example, the temporary cessation of production and request that its supplier remain quiet, may have rendered its original disclosure misleading and incomplete.[190] The panel concluded that "there [was] sufficient evidence to support a jury's determination that the report's relatively brief mention of Polavision difficulties *became* misleading in light of the subsequent information acquired by Polaroid."[191] The majority thus was willing to impose a duty to update prior disclosure that was accurate at the time of dissemination, but became misleading as a result of later developments.[192]

3. *Dissent*

Judge Aldrich, the author of the subsequent majority opinion in *Polaroid II*,[193] dissented, insisting that the quarterly report was neither misleading nor did it become misleading.[194] Judge Aldrich contended that "[m]isleading must mean misleading in fact, or by implication, within the terms of the disclosure and not mere omission of other facts that might be considered material by the market."[195] The dissent contended that the quarterly report contained disclosure about the "negative earnings" of Polavision, which does not trigger a duty to disclose information regarding production.[196] The quarterly report remained "as accurate, and complete, in what it said, and implied, as it was in November."[197] The dissent appeared to argue that Polaroid's disclosure in the report was complete not only because it restricted its disclosure regarding Polavision as to earnings, but also because it addressed historical facts as opposed to making forward-looking statements. Judge Aldrich explained, "[h]ad there been a representation as to a better future, we would have a different case."[198] The dissent summarized the majority's holding as mandating that after a company has made disclosure, it has "a duty to announce [the] specifics" of an "undisclosed degree of negative earnings" as soon as it learns of them "even [if] between regular quarterly reports."[199] Judge Aldrich dissented because he could find no precedent that imposed such a demanding disclosure duty.[200]

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190 *Id.* at 94,943-44.

191 *Id.* at 94,944.

192 *See id.*

193 *See infra* Part III.B.

194 *Polaroid I*, at 94,957 (Aldrich, C.J., dissenting).

195 *Id.* (Aldrich, C.J., dissenting).

196 *Id.* (Aldrich, C.J., dissenting).

197 *Id.* (Aldrich, C.J., dissenting).

198 *Id.* (Aldrich, C.J., dissenting).

199 *Id.* (Aldrich, C.J., dissenting).

200 *See id.* at 94,955 (Aldrich, C.J., dissenting).

4. *Criticism of the Decision*

The legal community, which recognized the public policy implications of a broad duty to update historical statements of fact, widely criticized the *Polaroid I* decision.[201] Critics of *Polaroid I* saw the broad duty to update as a "disincentive" or "deterrent" for voluntary disclosure.[202] They agreed with Judge Aldrich that a duty to update covering historical facts creates an untenable situation for management.[203] As Judge Aldrich noted, management's hands are particularly tied in a scenario where management seeks to disclose that a product has been unsuccessful.[204] In order to avoid sending shareholders into a panic and condemning the product to certain failure, management may wish to discuss in general language the status of the product.[205] However, a "volunteered general statement will [not] be safe" because management "will be faced with a subsequent obligation to supply details."[206] On the other hand, if management does not disclose anything about the product, but instead focuses on more favorable matters, "the good news without the bad will be misleading for incompleteness."[207] Recognizing these and other problems with a sweeping duty to update, a host of *amici curiae* from within the legal community supported Polaroid's petition for a rehearing in the First Circuit.[208]

B. EN BANC REHEARING

1. *Holding*

In a six-to-one decision, the majority in *Polaroid II* explained the legal difference between the duties to correct and update and properly applied the law to the facts. Judge Aldrich's majority opinion criticized the panel opinion in *Polaroid I* as a "mixed marriage of a duty to update and outright rejection of *Roeder* [*v. Alpha Industries, Inc.*]"[209] The opin-

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201 *See, e.g.*, Edward Brodsky, *The Duty to Update Information*, N.Y. L.J., Mar. 7, 1990, at 3; Carl W. Schneider, *The Uncertain Duty to Update*—Polaroid II *Brings a Welcome Limitation*, INSIGHTS, Oct. 1990, at 2. In his dissent in *Polaroid II*, Judge Bownes, who wrote the majority opinion in *Polaroid I*, reflected that certain language in the panel opinion "could be interpreted as creating an overly broad duty on the part of corporations to update even accurate statements of past historical fact." *Polaroid II*, 910 F.2d 10, 21 (1st Cir. 1990) (en banc) (Bownes, J., dissenting).

202 *See, e.g.*, Schneider, *supra* note 201, at 2.

203 *Polaroid I*, at 94,955, 94,957 (Aldrich, C.J., dissenting).

204 *Id.* at 94,957 (Aldrich, C.J., dissenting).

205 *See id.* (Aldrich, C.J., dissenting).

206 *Id.* (Aldrich, C.J., dissenting).

207 *Id.* (Aldrich, C.J., dissenting).

208 The Business Law Section of the Boston Bar Association, the Associated Industries of Massachusetts, the New England Legal Foundation, the New England Corporate Counsel Association, and the American Corporate Counsel Association were among the *amici curiae*. *See* Dougherty, *supra* note 188, at 9.

209 *Polaroid II*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc).

ion followed the court's then recent decision in *Roeder,* in which the First Circuit identified three conditions the absence of which negated a duty to disclose.[210] The third, and most relevant of these conditions, was that there could not be "inaccurate, incomplete, or misleading prior disclosures."[211]

The majority in *Polaroid II,* like the panel in *Polaroid I,* did not find that Polaroid was speaking falsely or incompletely when it issued its quarterly report.[212] In fact, the disclosure was "precisely correct, initially."[213] In addition, "it remained precisely correct thereafter."[214] Reiterating the analysis from his dissent in *Polaroid I,* Judge Aldrich explained that *Roeder*'s requirement that disclosure "be 'complete and accurate' . . . 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 'so incomplete as to mislead.'"[215] The majority applied this standard to the facts, and held that Polaroid's failure to disclose details regarding the sales of Polavision was not misleading because these details were "outside the scope of the initial disclosure, in no way making it incorrect or misleading, originally, or later."[216] The First Circuit reversed the district court's denial of judgment n.o.v. for Polaroid and remanded the case for dismissal.[217] The court thus reached its decision without applying the duty to update.

2. *Dicta*

The dicta in *Polaroid II,* however, addressed the duties to correct and update. Because the quarterly report was not "inaccurate, incomplete, or misleading" when made,[218] the en banc court did not impose on Polaroid a duty to correct. Nevertheless, the court reaffirmed that a duty to correct certainly exists. According to the court, "[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."[219]

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210 *See supra* text accompanying note 39.

211 Roeder v. Alpha Indus., Inc., 814 F.2d 22, 27 (1st Cir. 1987).

212 *Polaroid II,* 910 F.2d at 16. The court explained that "if management knew at the time of the report that Polavision was a commercial failure, to say simply that its earnings were negative might well be found to be a material misrepresentation by half-truth and incompleteness." *Id.*

213 *Id.* at 17.

214 *Id.*

215 *Id.* at 16 (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968) (en banc), *cert. denied sub nom.* Coates v. SEC, 394 U.S. 976 (1969)).

216 *Id.* at 17.

217 *Id.* at 18.

218 *See supra* text accompanying note 211.

219 *Polaroid II,* 910 F.2d at 16-17.

The court contrasted this duty to correct with the duty to update. The *Polaroid II* opinion recognized that the duty to update was "a quite different duty"[220] from the duty to correct. In looking to the Third Circuit's opinion in *Greenfield v. Heublein, Inc.*, the en banc court described the duty to update as a "call[ ] for disclosure if a prior disclosure 'becomes materially misleading in light of subsequent events.'"[221] The court commented, "We may agree 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. If this is a clear meaning, and there is a change, correction, more exactly further disclosure, may be called for."[222] The court supported this statement with a "*Cf.*" citation to *In re Phillips Petroleum Securities Litigation*.[223]

3. *Analysis of Dicta*

This somewhat vague language in dicta has come to define the scope of the duty to update. The court's dicta enumerates seven criteria that together trigger a duty to update a disclosure. First, there must be so-called "special circumstances."[224] The court's failure to elaborate on, or provide examples of, what exactly are these "special circumstances" represents the largest gap in the *Polaroid II* opinion. This element requires clarification, for it may prove too discretionary.[225] Second, the original statement must have been "correct at the time."[226] This criterion preserves the already recognized distinction between the duty to correct material, initially erroneous, incomplete, or misleading statements from the duty to update statements that have become materially erroneous, incomplete, or misleading over time. Third, the original statement must

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220 *Id.* at 17.

221 *Id.* (quoting Greenfield v. Heublein, Inc. 742 F.2d 751, 758 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985)). For a discussion of the *Greenfield* case, see *supra* text accompanying notes 143-55.

222 *Polaroid II*, 910 F.2d at 17. See *infra* Part III.C for interpretation of the court's usage of the word "correct" in this context.

223 For a discussion of *Phillips Petroleum*, see *supra* text accompanying notes 156-65. Carl Schneider has argued that the *Phillips Petroleum* case, unlike *Polaroid II*, serves as an example where it would be appropriate to apply a duty to update because the original statements were forward-oriented, and likely to be interpreted by the public as expressing the partnership's intentions for the future. To the extent that the partnership decided to deviate from its announced intention, the public could reasonably expect the partnership to promptly disclose this development. Schneider, *supra* note 201, at 10. In addition to *Phillips Petroleum*, the court in *Polaroid II* also cited *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981), which discussed in dicta the duty to update, but did not contribute much to the already established case law. *Polaroid II*, 910 F.2d at 17.

224 *See supra* text accompanying note 222.

225 Since *Polaroid II*, the First Circuit has still not expounded upon what the "special circumstances" entail. *See, e.g.*, Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1219 (1st Cir. 1996); *see also infra* Part IV.G (discussing *Shaw*).

226 *See supra* text accompanying note 222.

be forward-looking.[227] Fourth, the statement must be one on which an investor could reasonably rely.[228] As with the first requirement, the en banc court did not elaborate on what type of statement upon which it would be reasonable for an investor to rely. Fifth, the forward-looking statement must have a "clear meaning."[229] The courts will have to apply a test, either subjective or objective, to determine whether a statement has the required clear meaning. Sixth, there must be a "change."[230] Seventh, the change must cause the prior statement to become materially misleading.[231]

The third requirement represents the most significant contribution of *Polaroid II*,[232] and serves as a critical distinction between the duty to correct, which applies to historical statements, and the duty to update, which pertains to forward-looking statements. The court's reference to a "forward intent and connotation" reveals that the court intended for a duty to update to apply only to forward-looking statements. This emphasis represents a dramatic departure from *Polaroid I,* which sought to impose on Polaroid a duty to update *historical* facts that had become misleading as a result of subsequent events.[233] The end of the en banc court opinion reveals that the court (i) recognized that the panel in *Polaroid I* ascribed an excessively broad scope to the duty to update and (ii) intended to restrict the scope of the duty to forward-looking statements: "We understand the amici apprehension because of the panel opinion's not only requiring update, but requiring it in terms of a new duty that

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227 *See supra* text accompanying note 222.

228 *See supra* text accompanying note 222. Although similar to the materiality element of a Rule 10b-5 claim, reliance is a separate element. *See* HAZEN, *supra* note 55, § 13.5B, at 806 (explaining that "[t]he reliance requirement is a corollary of materiality . . . [that] applies in securities fraud cases" (footnote omitted)).

229 *See supra* text accompanying note 222.

230 *See supra* text accompanying note 222.

231 This materiality requirement derives from the *Polaroid II* court's quoted language from *Greenfield* with which the court acknowledged that it "may agree." *See supra* text accompanying notes 221-22. In addition, the materiality criterion can be implied, given that it is a required element of a Rule 10b-5 claim. *See supra* text accompanying note 72. Subsequent cases that have cited *Polaroid II* have found that the *Polaroid II* dicta requires that the statement must become "materially misleading" to be actionable. *See, e.g.*, Rubinstein v. Collins, 20 F.3d 160, 170 n.41 (5th Cir. 1994); Colby v. Hologic, Inc., 817 F. Supp. 204, 213 (D. Mass. 1993). *But cf.* Hillson Partners Ltd. Partnership v. Adage, Inc., 42 F.3d 204, 219 n.13 (4th Cir. 1994) (noting that "[d]icta in some cases can be read to suggest a possible duty to update even immaterial statements in that those cases do not expressly limit the asserted duty to update to statements that are material" (citing *Polaroid II*, 910 F.2d 10, 16-17 (1st Cir. 1990) (en banc); *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1245 (3d Cir. 1989))).

232 *See* Hayes, *supra* note 123, at 955 (stating that the court in *Polaroid II* was the first to maintain that "a statement must be future-oriented in order to give rise to a duty to update").

233 It is interesting to note that the statement at issue in *Greenfield*, *see supra* text accompanying note 146, was probably historical in nature. Greenfield v. Heublein, Inc., 742 F.2d 751, 759-60 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985). Therefore, as in *Polaroid I*, the court in *Greenfield* was willing to apply a duty to update to an historical statement.

had never been undertaken. With those errors corrected, however, we see no reason to proceed further. Plaintiffs have no case."[234]

The dissent also lends support to the interpretation that *Polaroid II* narrowed the scope of the duty to update to forward-looking statements.[235] Judge Bownes interpreted the majority opinion to signify that "corporations have no duty to update statements of past historical fact that were accurate when made but that have simply become stale with the passage of time."[236]

4. *Public Policy Considerations*

Restricting application of the duty to update to forward-oriented statements was a prudent public policy decision. This restriction should benefit companies. The court recognized the concern of the *amici curiae* that the imposition of a duty to update statements of "historical fact . . . could inhibit disclosures all together."[237] Of perhaps greater concern, a duty to update historical statements would lead companies to incur substantial disclosure costs and expose companies to perpetual liability because "important subsequent events (following the filing of an accurate . . . quarter[ly] report) will always render the required quarterly snapshot out-of-date."[238] In fact, "a duty to update all historical information could be interpreted as a continuing duty to provide daily updates of financial statement balances."[239] Such a duty would necessitate sweeping changes to the periodic reporting rules and regulations that the Exchange Act prescribes.[240]

However, imposition of a broad duty to update forward-looking statements that become materially inaccurate or misleading could be very burdensome for companies, given that, under the duty to correct, they already must correct material historical statements that were initially er-

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234 *Polaroid II*, 910 F.2d at 18. The *amici* had been concerned about the implications for management and the private bar of imposing a duty to update historical facts. *See supra* note 208 and accompanying text; *infra* text accompanying note 237.

235 *See* Dougherty, *supra* note 188, at 11.

236 *Polaroid II*, 910 F.2d at 21 (Bownes, J., dissenting).

237 *Id.* at 17; *see also* Block et al., *supra* note 10, at 174-75 (warning that a broad duty to update "'provides a powerful deterrent to voluntary disclosure'"); Schneider, *supra* note 101, at 84-85 (same).

238 Hayes, *supra* note 123, at 963 (quoting Amici Curiae Brief in Support of Reversing the Judgment of the Trial Court of the Associated Industries of Massachusetts & the New England Legal Foundation at 2 (emphasis omitted), *Polaroid II*, 910 F.2d 10 (1st Cir. 1990) (en banc) (No. 89-1171)); *see also* Block et al., *supra* note 10, at 173-74 (discussing the considerable burdens and costs companies would incur if a duty to update covered historical statements); Dougherty, *supra* note 188, at 9 (explaining how the application of a duty to update to historical statements "opens the door to liability with no clear stopping point").

239 Hayes, *supra* note 123, at 963.

240 *See* Block et al., *supra* note 10, at 173.

roneous.[241] A desire to avoid the costs and burdens of updating prior disclosures, as well as liability for statements that become materially misleading, may deter companies from making forward-looking statements. The *Polaroid II* court tried to ensure that the duty to update would have a limited scope. For example, the "special circumstances," reliance, and materiality requirements should ensure that imposition of the duty to update would be relatively rare.[242] Moreover, courts can narrowly construe each of these elements, which would further limit liability.[243] In short, the *Polaroid II* court's refusal to recognize a duty to update historical statements benefits companies, but its dicta discussing the potential application of the duty to forward-looking statements may prove detrimental to companies, and thus lead to an unwillingness to make forward-looking statements.

The decision in *Polaroid II* should sufficiently protect investors, thereby rendering it consistent with the legislative intent underlying section 10(b).[244] Investors should benefit from the court's emphasis on the importance of truthful and complete disclosure by companies at the time of issuance. In the case of historical statements, it is fair to conclude that most investors recognize that these statements will not remain accurate indefinitely.[245] Therefore, the *Polaroid II* refusal to impose on companies a duty to update statements of historical fact should not harm the public. Moreover, the public does not need protection from historical statements (other than that which the duty to correct provides) because they cannot become false or misleading as a result of subsequent events; they only concern circumstances existing at the time when the company made the statements.[246]

In contrast, future-oriented statements, which investors and securities professionals desire in order to make informed investment decisions,[247] can become false and misleading. Investors expect companies to ensure that projections are current.[248] They thus may need the protection that *Polaroid II* provides in the form of a duty to update forward-looking statements that have become materially misleading. The First Circuit's efforts to limit the scope of the duty to update forward-looking

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241 *See infra* Part III.C.

242 *See supra* text accompanying notes 224, 228, 231.

243 *See infra* Part V.B.

244 *See supra* Part I.A.

245 *See* Hayes, *supra* note 123, at 962 (citing Supplemental Brief of Defendant-Appellant/Appellee Polaroid Corp. on Rehearing En Banc at 19, *Polaroid II*, 910 F.2d 10 (1st Cir. 1990) (en banc) (89-1171, 89-1172)).

246 *See* Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1332 n.3 (7th Cir. 1995).

247 *See infra* note 351 and accompanying text.

248 *See* Hayes, *supra* note 123, at 962 (citing Supplemental Brief, *supra* note 245, at 19); Brodsky, *supra* note 201, at 3.

statements by requiring the seven criteria[249] may admittedly deprive investors of some protection. However, this restriction on the scope of the duty is necessary because a broad duty to update will harm investors if it discourages companies from making forward-looking statements.

C. SIGNIFICANCE OF DISTINGUISHING THE DUTIES TO CORRECT AND UPDATE

As the foregoing discussion of public policy considerations suggests, the *Polaroid II* distinction between the duties to correct and update has important ramifications for companies, investors, and the securities markets as a whole. One should not view the case as merely a resolution of a legal semantics problem.

Most scholars properly interpreted *Polaroid II* as preserving the duty to correct statements that were initially false, incomplete, or misleading,[250] and narrowing the duty to update to apply to only forward-looking statements.[251] However, a minority school of thought has construed the *Polaroid II* dicta as recognizing a duty to *correct* forward-looking statements that were truthful when made, but became false or misleading due to subsequent events.[252] This interpretation subsumes a duty to update under a broadened duty to correct that already requires correction of initially erroneous, historical statements.

This construction represents a misreading of *Polaroid II* which recognized a duty to *update* forward-looking statements under "special circumstances" as "a quite different duty" from the duty to correct.[253] Furthermore, the *Polaroid II* court used language which clearly distinguished between the duties to correct and update. The court did not suggest a "correction" of forward-looking statements (on which investors could reasonably rely and that had become materially false or misleading as a result of later events), but "*more exactly*, further disclosure."[254] The phrase "more exactly" reveals that the court saw this duty as distinct from the duty to correct. The court presumably chose the word "correct" to set up the contrast with the concept of an "update." In addition, in the wake of *Polaroid II*, many courts have cited the decision as evidence of a judicial recognition of the duty to update.[255]

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249 *See supra* text accompanying notes 224-31.

250 *See, e.g.*, Block et al., *supra* note 10, at 172.

251 *See, e.g.*, Schneider, *supra* note 201, at 10.

252 *See, e.g.*, Block et al., *supra* note 10, at 158.

253 *Polaroid II*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc).

254 *Id.* (emphasis added).

255 *See, e.g.*, *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1431-32 (3d Cir. 1997) (citing *Polaroid II* in recognition of a duty to update without imposing it under the particular facts); Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1332 (7th Cir. 1995) (acknowledging *Polaroid II*'s recognition of a duty to update, but declining to recognize it in

An interpretation of *Polaroid II* that subsumes the duty to update under a broader duty to correct also understates the significance of the distinction between the two duties that *Polaroid II* emphasized. The duties trigger different disclosure obligations for companies, and therefore, influence the extent to which investors will receive accurate information to different degrees. In jurisdictions that recognize a duty to update, companies must be prepared to incur the costs and burdens of updating forward-looking statements that have become materially inaccurate or misleading, which are in addition to the costs and burdens of correcting initially inaccurate, historical statements that they must correct under the almost universally accepted duty to correct.[256] Recognition of a duty to update not only exposes companies to potential liability for a failure to discharge its duty, but also to frivolous lawsuits.[257] Defense of such lawsuits will be expensive.

Polaroid II's distinction between the duties also impacts investors. While a duty to update may prove burdensome for companies, it may protect investors.[258] In jurisdictions that recognize a duty to update, investors should receive more accurate information from companies. The duty to correct should prompt companies to make further disclosures that correct originally inaccurate, historical statements that affect investors' investment decisions. Recognition of a duty to update should additionally benefit investors, for it should increase the accuracy of material, forward-looking statements.

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the Seventh Circuit); Rubinstein v. Collins, 20 F.3d 160, 170 n.41 (5th Cir. 1994) (recognizing the duty in dicta); Rand v. M/A-Com, Inc., 824 F. Supp. 242, 257 (D. Mass. 1992) (citing *Polaroid II* and recognizing a duty to update); Evanowski v. Bankworcester Corp., 788 F. Supp. 611, 615 (D. Mass. 1991) (recognizing the duty to update; however, rejecting its application because the original disclosure, like that in *Polaroid*, "remained precisely correct thereafter" (quoting *Polaroid II*, 910 F.2d at 17)). However, as Edward Brodsky has pointed out, courts have also cited *Polaroid II* "in opposition to" a duty to update. Edward Brodsky, *The Duty to Update Forward-Looking Statements*, N.Y. L.J., Aug. 9, 1995, at 3. More precisely, these courts have cited *Polaroid II* and proceeded to decline to (i) recognize the duty in their jurisdiction, *see Stransky*, 51 F.3d at 1332, or (ii) impose the duty under the particular facts, *see Burlington Coat Factory*, 114 F.3d at 1431-32. Brodsky cites, among other cases, *Colby v. Hologic, Inc.*, 817 F. Supp. 204 (D. Mass. 1993). Brodsky, *supra*, at 3 n.17. In *Colby*, the court cited *Polaroid II* in support of "a duty to disclose . . . only to correct or update what would otherwise be a materially misleading prior statement," but declined to impose such a duty in light of the company's merely "'vague'" statement and "cautionary" projection. *Colby*, 817 F. Supp. at 213. Therefore, the court in *Colby* still appears to recognize the duty to update. It is interesting to note that the United States District Court for the District of Massachusetts is located within the First Circuit, which rendered the en banc decision in *Polaroid II*. Therefore, a comparison of *Evanowski*, decided in 1991, and *Rand*, decided one year later, with the 1993 *Colby* decision, reveals that even in the First Circuit, courts have been reluctant to impose the duty to update as defined in the *Polaroid II* dicta. *See infra* Part IV.A; *see also* Part IV.G (discussing duty to update cases that the First Circuit decided in 1996).

256 *See supra* note 76 and accompanying text.

257 *See infra* note 309 and accompanying text.

258 *See supra* Part III.B.4.

However, investors only benefit if companies make forward-looking statements. Imposition of a duty to correct will not discourage companies from making forward-looking statements, for, as the First Circuit in *Polaroid II* explained,[259] the duty only applies to historical statements. On the other hand, imposition of a duty to update, especially a broad duty, may dissuade companies from making forward-looking disclosures.[260] It is therefore easy to see how *Polaroid II*'s distinction between the duties to correct and update has important consequences for both companies and investors. The courts deciding cases after *Polaroid II* would have to decide the best way to protect investors from materially misleading, forward-looking statements without discouraging companies from making future-oriented statements.

IV. THE UNCERTAIN AFTERMATH OF *POLAROID II*

Although the legal community considered *Polaroid II* a significant case, the court's opinion did not bring the much needed uniformity to the case law either within or outside the First Circuit. In fact, as the cases discussed below reveal,[261] there are courts that remain confused about the difference between the duties to correct and update. Similarly, certain courts have recognized the duty to update, while others have rejected the duty. This Part analyzes numerous post-*Polaroid II* cases addressing the duty to update. Throughout this analysis, this Part attempts to identify similarities and differences between these cases in order to better assess the current status of the duty to update. It also evaluates the status of the duty in light of the PSLRA.

A. *EVANOWSKI V. BANKWORCESTER CORP.*,[262] *RAND V. M/A-COM, INC.*,[263] AND *COLBY V. HOLOGIC, INC.*[264]

In *Evanowski*, the United States District Court for the District of Massachusetts unsurprisingly followed the First Circuit's recent *Polaroid II* opinion. The court refused to impose on the defendants a duty to update statements regarding the status of merger negotiations, which the plaintiff alleged were false and misleading.[265] Finding that the state-

259 *See supra* Part III.B.4.

260 *See supra* Part III.B.4; *infra* text accompanying note 349.

261 The cases discussed herein do not represent all of the cases since *Polaroid II* that have addressed the duty to update. This Part tries to focus on the cases that courts have cited most frequently, or are the most likely to become the law in a given circuit. However, it also examines certain cases that have far less precedential value when they either belong to a potentially important line of cases or remind the reader that courts continue to misunderstand the difference between the duties to correct and update.

262 788 F. Supp. 611 (D. Mass. 1991).

263 824 F. Supp. 242 (D. Mass. 1992).

264 817 F. Supp. 204 (D. Mass. 1993).

265 *Evanowski*, 788 F. Supp. at 614-15.

ments were "'precisely accurate,'" the court, continuing to follow the reasoning of *Polaroid II*, held that "none of the . . . statements or omissions were so incomplete as to mislead at the time they were made. The mere failure to disclose additional related information that may have been 'interesting, marketwise,' does not result in 10b-5 liability."[266] The court did not impose a duty to update because, as in *Polaroid II*, the initial disclosure did not become inaccurate or misleading as a result of subsequent developments. In short, they "remained precisely correct thereafter."[267] Quoting *Polaroid II,* the court explained that, "[a]ssuming the challenged statements or omissions should even be characterized as forward looking," the defendants were not under a duty to update disclosure regarding "matters outside the scope of the initial disclosure."[268]

In 1992, the United States District Court for the District of Massachusetts in *Rand* cited *Polaroid II* in support of a duty to update.[269] The *Rand* court explained that "[a] prediction, although true when made, may nevertheless become misleading due to subsequent events."[270] The court properly distinguished the duty to correct from the duty to update, explaining that even though the defendant company's original "statement was not, as a matter of law, untrue or misleading at the time it was made, there [was] a genuine issue of material fact as to whether the statement became misleading in light of [a subsequent e]stimate."[271] The court thus held that "there was a genuine issue of material fact concerning whether M/A-Com had a duty to update the [original] statement at the time [a subsequent e]stimate was distributed to senior management."[272]

In the following year, the United States District Court for the District of Massachusetts declined in *Colby* to impose the *Polaroid II* duty to update on a company that had made a "vague" statement and a "cautionary" projection.[273] The court cited the "general rule" of *Polaroid II* in support of "a duty to disclose . . . only to correct or update what would otherwise be a materially misleading prior statement."[274] The court compared the nature of the company's statement and prediction with that of Polaroid's quarterly report, and held that "[t]he facts of [*Polaroid II*], no less than its general rule, mandate a rejection of Colby's non-disclosure

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266 *Id.* (quoting *Polaroid II*, 910 F.2d 10, 16-18 (1st Cir. 1990) (en banc).

267 *Id.* at 615 (quoting *Polaroid II*, 910 F.2d at 17).

268 *Id.* (quoting *Polaroid II*, 910 F.2d at 17).

269 Rand v. M/A Com, Inc., 824 F. Supp. 242, 257 (D. Mass. 1992).

270 *Id.* (citing *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1245 (3d Cir. 1989); Kirby v. Cullinet Software, Inc., 721 F. Supp. 1444, 1450 (D. Mass. 1989)).

271 *Id.*

272 *Id.*

273 Colby v. Hologic, Inc., 817 F. Supp. 204, 213 (D. Mass. 1993).

274 *Id.* This assessment of the dicta in *Polaroid II* is somewhat ambiguous because it does not distinguish the duty to correct an initially misleading statement from the duty to update a statement that became misleading due to subsequent events. *See supra* note 40.

claim."[275] The court's comparison revealed that "Hologic's prior . . . statement [was] as vague as Polaroid's . . . advertisement, but Hologic's . . . balancing prediction . . . [was] more cautionary than the overall tenor of Polaroid's challenged quarterly report."[276] The court emphasized that in *Polaroid II*, Polaroid was aware that Polavision was losing money when it published its quarterly report, which failed to disclose this fact.[277] On the other hand, in *Colby*, the plaintiff failed to offer evidence that orders for Hologic's products had decreased as of the time when a company executive declined to provide projections of earnings.[278] As a result, the court concluded that "[i]f Polaroid owed no duty of further disclosure because 'what was revealed [was] not so incomplete as to mislead,' . . . then no such duty can be imputed to Hologic."[279] In short, the court appeared to recognize a duty to update in circumstances that were not present in the case. As discussed below, the First Circuit revisited the duty to update in 1996 in three cases; however, in contrast to the three district court cases discussed in this Section, it failed to cite *Polaroid II*.[280]

B. *IN RE TIME WARNER INC. SECURITIES LITIGATION*[281]

The plaintiffs alleged in this Second Circuit case that Time Warner made misleading statements that (i) misrepresented the company's progress toward entering certain strategic partnerships and (ii) omitted disclosure that the company was alternatively contemplating an equity offering.[282] The statements addressing the strategic partnerships did not trigger a duty to correct because the court found "no suggestion that the factual assertions contained in any of the[ ] statements were false when the statements were made."[283]

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275 *Colby*, 817 F. Supp. at 213.

276 *Id.*; *see supra* Part III.A (discussing facts in *Polaroid* litigation). The *Colby* court did not mention the bespeaks caution doctrine, *see supra* Part I.C.2, with respect to the cautionary prediction; however, the doctrine would provide further support for the court's decision not to impose on Hologic a duty to update this prediction. *See infra* Part IV.D (discussing how the Fourth Circuit in *Hillson Partners Ltd. Partnership. v. Adage, Inc.* found that the alleged materially misleading statements contained cautionary language, and refused to impose a duty to update on the defendants). *But see infra* Part IV.C (discussing how the Fifth Circuit in *Rubinstein v. Collins* recognized the duty to update despite the defendants' inclusion of cautionary language).

277 *See Colby*, 817 F. Supp. at 213; *supra* Part III.A.

278 *See Colby*, 817 F. Supp. at 213.

279 *Id.* (second alteration in original) (quoting *Polaroid II*, 910 F.2d 10, 13, 16 (1st Cir. 1990) (en banc)).

280 *See infra* Part IV.G.

281 9 F.3d 259 (2d Cir. 1993), *cert. denied sub nom.* Ross v. ZVI Trading Corp. Employees' Money Purchase Pension Plan, 511 U.S. 1017 (1994).

282 *See id.* at 262.

283 *Id.* at 266.

The majority opinion began with a bitter complaint that section 10(b) and Rule 10b-5 were unsatisfactory, providing insufficient guidance in securities fraud cases.[284] The Second Circuit recognized that "a duty to update opinions and projections may arise if the original opinions or projections have become misleading as the result of intervening events."[285] However, the court did not impose this duty to update the statements regarding the strategic partnerships, for they "lack[ed] the sort of definite positive projections that might require later correction," and therefore, "did not become materially misleading when the talks did not proceed well."[286] Despite this usage of the word "correction," the court was addressing the question of whether Time Warner had a duty to update its prior statements. The indefiniteness of the statements may speak to the absence of three of the elements that the *Polaroid II* dicta required for a duty to update: the statements appeared to (i) not be statements on which reasonable investors could "be expected to rely"; (ii) lack a sufficiently "clear meaning"; and (iii) be immaterial given their indefiniteness, which would prevent them from becoming "materially misleading."[287] In addition, the statements were not future-oriented. As a result, the Second Circuit's refusal to impose on Time Warner a duty to update appears consistent with *Polaroid II*.

On the other hand, the court found that Time Warner might be under a duty to disclose that it had been considering a stock offering.[288] This "secret information render[ed]" its original disclosure, which only discussed the strategic alliances option, "materially misleading."[289] The court supported a finding of this duty because the statements were forward-oriented, and of such a nature that "reasonable investors" might interpret them to indicate that Time Warner planned to pursue only the strategic partnerships.[290] The court did narrow its holding to the facts of the case: "[W]e 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 the goal when those approaches are under active and serious consideration."[291]

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284 *See id.* at 263-64.

285 *Id.* at 267.

286 *Id.*

287 *See supra* text accompanying notes 228-29, 231.

288 *See Time Warner*, 9 F.3d at 267-68.

289 *Id.* at 268.

290 *Id.*

291 *Id.*

C. *RUBINSTEIN V. COLLINS*[292]

The Fifth Circuit cited *Polaroid II* in *Rubinstein* in support of its recognition of the duty to update.[293] The holding of the *Rubinstein* case, which rejected a per se application of the bespeaks caution doctrine despite the defendants' usage of cautionary language,[294] did not turn on the duty to update. However, the court addressed the duty in a footnote.[295] While the court only dedicated two sentences of the opinion to discussing the duty, it is worth mentioning because *Rubinstein* demonstrates that even after *Polaroid II*, there are still courts that do not properly distinguish the duty to correct from the duty to update. The plaintiffs "alleged that . . . [certain] optimistic projections became materially misleading when subsequent testing and production undermined the basis of those projections."[296] The court responded to this allegation: "We note that, at least facially, it appears that defendants have a duty under Rule 10b-5 to *correct* statements if those statements have become materially misleading in light of subsequent events."[297]

Therefore, the Fifth Circuit recognized the substance of the duty to update, as defined in *Polaroid II*, but, like many courts both before and after *Polaroid II*, it misidentified the duty as the duty to correct. It is interesting to note that while the court in *Colby v. Hologic, Inc.* refused to impose a duty to update on Hologic, in part, because of the cautionary nature of the company's prediction,[298] the *Rubinstein* court recognized the duty to update even though the defendants used cautionary language.[299]

D. *HILLSON PARTNERS LTD. PARTNERSHIP V. ADAGE, INC.*[300]

While federal district courts in Massachusetts[301] and the Second[302] and Fifth Circuits[303] thus have recognized a duty to update similar to that which the First Circuit described in *Polaroid II*, the Fourth Circuit reached a different conclusion in 1994 in *Hillson Partners* regarding the duty to update predictions. In this litigation, the plaintiffs alleged that Adage had duties to update or correct predictions, contained in quarterly

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292 20 F.3d 160 (5th Cir. 1994).

293 *Id.* at 170 n.41.

294 *Id.* at 166-68; *see supra* note 63 and accompanying text.

295 *See Rubinstein*, 20 F.3d at 170 n.41.

296 *Id.*

297 *Id.* (emphasis added) (citing, inter alia, *Polaroid II*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc); *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1245 (3d Cir. 1989)).

298 *See supra* notes 275-76 and accompanying text.

299 *Rubinstein*, 20 F.3d at 170 n.41.

300 42 F.3d 204 (4th Cir. 1994).

301 *See supra* Part IV.A.

302 *See supra* Part IV.B.

303 *See supra* Part IV.C.

reports and press releases, that had become erroneous.[304] The court held that "[a]ssuming that there can ever be a 'duty to update,' there was no such duty here."[305]

The court made a public policy argument: "To require Adage continually to correct and modify its projections would inevitably discourage the types of disclosure the securities laws seek to encourage . . . . '[Such] a duty to disclose [projections] would have required virtually constant statements by [the issuer] in order not to mislead investors.'"[306] The court concluded that a duty to update projections was "'impractical, if not unreasonable.'"[307] Quoting from its 1993 decision in *Raab v. General Physics Corp.*,[308] the court continued its public policy analysis: "[I]mposing liability on companies for predictions of future growth, which are often and inevitably wrong, would lead to further proliferation of lawsuits and would be contrary to the 'goal of full disclosure underlying the securities laws.'"[309]

Following the Second Circuit's decision in *In re Time Warner Inc. Securities Litigation*,[310] the court explained that "[t]here is no duty to update [predictions that it deemed to be immaterial and not "pled with sufficient particularity to allege a claim of fraud"] . . . on the basis of subsequent events."[311] The Fourth Circuit, however, applied the holding of *Time Warner* to a different fact pattern. In *Hillson Partners*, the optimistic predictions were of a more specific nature than Time Warner's disclosures regarding the progress of its negotiations toward entering

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304 *Hillson Partners*, 42 F.3d at 219.

305 *Id.*

306 *Id.* (citation omitted) (last alteration in original) (quoting Walker v. Action Indus., 802 F.2d 703, 710 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987)).

307 *Id.* (quoting *Walker*, 802 F.2d at 710).

308 4 F.3d 286 (4th Cir. 1993).

309 *Hillson Partners*, 42 F.3d at 220 (footnote omitted) (quoting *Raab*, 4 F.3d at 290). The *Hillson Partners* court quoted other policy-oriented language earlier in its opinion from *Raab* that provides further support for the argument that the duty to update should not apply to "predictions of future growth":

> Predictions of future growth . . . will almost always prove to be wrong in hindsight. If a company predicts twenty-five percent growth, that is simply the company's best guess as to how the future will play out. As a statistical matter, twenty percent and thirty percent growth are both nearly as likely as twenty-five. If growth proves less than predicted, buyers will sue; if growth proves greater, sellers will sue. Imposing liability would put companies in a whipsaw, with a lawsuit almost a certainty. Such liability would deter companies from discussing their prospects, and the securities markets would be deprived of the information those predictions offer. We believe that this is contrary to the goal of full disclosure underlying the securities laws . . . .

Id. at 214 (quoting *Raab*, 4 F.3d at 290).

310 *See supra* text accompanying note 286.

311 *Hillson Partners*, 42 F.3d at 219 (citing *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993), *cert. denied sub nom.* Ross v. Zvi Trading Corp. Employees' Money Purchase Pension Plan, 511 U.S. 1017 (1994)).

strategic alliances.[312] On the other hand, the Fourth Circuit's finding in *Hillson Partners* that the alleged materially misleading statements included cautionary language, and its endorsement of the bespeaks caution doctrine,[313] may distinguish them from Time Warner's statement. This finding, among other reasons, led the *Hillson Partners* court to conclude that the statements were not "material under the federal securities laws,"[314] and therefore, contributed to its rationale for refusing to impose on the defendants a duty to update. The Fourth Circuit, like the district court in *Colby v. Hologic, Inc.*,[315] and unlike the Fifth Circuit in *Rubinstein*,[316] thus was unwilling to impose a duty to update on a company that made predictions couched in cautionary language.

To the extent that the holding in *Hillson Partners* is interpreted to mean only that a company does not have a duty to update immaterial projections which plaintiffs have pled with inadequate particularity, it is not inconsistent with the prior duty to update case law—including *Polaroid II*. However, the court's application of the *Time Warner* court's holding to different facts, and its expressed skepticism regarding whether "there can ever be a 'duty to update,'"[317] suggest that the case may instead represent a rejection of the *Polaroid II* dicta regarding the duty to update. Later cases have cited *Hillson Partners* in support of a rejection of the duty to update forward-looking statements.[318]

E. *STRANSKY V. CUMMINS ENGINE CO., INC.*[319]

The Seventh Circuit in 1995 followed the Fourth Circuit's lead in departing from *Polaroid II*. The court acknowledged that the duties to correct and update represented "avenues . . . kicked around by courts, litigants and academics alike" to establish "a false or misleading statement" for the purposes of Rule 10b-5.[320] The court also characterized the legal distinction between the two duties as in a "confused state of the law."[321] As a result of this confusion, the *Stransky* court noted that "[l]itigants [including Stransky] often fail to distinguish between these theories . . . and to delineate their exact parameters."[322] Therefore, confu-

312 *See supra* text accompanying notes 282-86.

313 *Hillson Partners*, 42 F.3d at 218-19; *see supra* note 62 and accompanying text.

314 *Hillson Partners*, 42 F.3d at 219.

315 *See supra* text accompanying notes 273-75; *supra* note 276 and accompanying text.

316 *See supra* text accompanying note 299.

317 *Hillson Partners*, 42 F.3d at 219.

318 *See, e.g.*, PPM Am., Inc. v. Marriott Corp., 875 F. Supp. 289, 300-01 (D. Md. 1995).

319 51 F.3d 1329 (7th Cir. 1995).

320 *Id.* at 1331.

321 *Id.* at 1336.

322 *Id.* at 1331.

sion still existed five years after *Polaroid II*'s apparent clarification of the distinction between the duties to correct and update.[323]

Reciting the distinction made in *Polaroid II*, the court explained that 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."[324] In contrast, the duty to update applies to "a forward-looking statement—a projection—that because of subsequent events becomes untrue."[325] While the court recognized the duty to correct, it explained that "[t]his court has never embraced [a duty to update] . . . and we decline to do so now."[326]

The Seventh Circuit rejected the duty to update because it concluded that Rule 10b-5 "implicitly precludes basing liability on circumstances that arise after the speaker makes the statement."[327] Adding that "[t]he securities laws typically do not act as a Monday Morning Quarterback," the court argued that they "'approach matters from an *ex ante* perspective: just as a statement true when made does not become fraudulent because things unexpectedly go wrong, so a statement materially false when made does not become acceptable because it happens to come true.'"[328] These concerns "g[a]ve [the court] serious pause in imposing a duty to update."[329]

In *Stransky*, the plaintiff sued defendants for committing fraud when they issued various press releases that were allegedly false or misleading.[330] These press releases contained both historical statements and projections.[331] According to the court, "a projection can lead to liability under Rule 10b-5 only if it was not made in good faith or was made

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323 In *In re Burlington Coat Factory Securities Litigation*, decided in June 1997, the plaintiffs similarly did not understand the difference between the duties to correct and update. The Third Circuit noted that "[a]lthough plaintiffs characterize their claim as a 'duty to correct' claim, they appear to be asserting both a duty to correct and a duty to update." *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1430 (3d Cir. 1997). The court later in the opinion explained that the "plaintiffs' [duty to correct] claim is better characterized as a duty to update claim." *Id.* (internal quotation marks omitted).

324 *Stransky*, 51 F.3d at 1331-32 (citing *Polaroid II*, 910 F.2d 10, 16-17 (1st Cir. 1990) (en banc)).

325 *Id.* at 1332 (citing *Polaroid II*, 910 F.2d at 17; Rosenblum, *supra* note 10). The court explained that "[n]o duty to update an historical statement can logically exist. By definition an historical statement is addressing only matters at the time of the statement. Thus, that circumstances subsequently change cannot render an historical statement false or misleading." *Id.* at 1332 n.3.

326 *Id.* at 1332.

327 *Id.*

328 *Id.* (quoting Pommer v. Medtest Corp., 961 F.2d 620, 623 (7th Cir. 1992)).

329 *Id.*

330 *Id.* at 1331.

331 *See id.*

without a reasonable basis."[332] The court held that defendants may have been under a duty to correct the historical statements, to the extent that they subsequently learned that their initial statements were inaccurate.[333] As for the projections, the Seventh Circuit held that the plaintiff could plead on remand that they "were unreasonable when made or were not made in good faith."[334]

Despite the fact that the court refused to recognize the duty to update projections, the court curiously noted that "a company can limit its liability by 'updating' a prediction that was unreasonable when made or made in bad faith."[335] In addition, the court did qualify its holding by explaining that its position on the duty to update was restricted to certain forward-looking statements, in particular, projections and predictions.[336] The Seventh Circuit "express[ed] no opinion on whether the outcome would be the same if a plaintiff contested statements of intent to take a certain action."[337]

While the Second Circuit in *In re Time Warner Inc. Securities Litigation*,[338] and the Fourth Circuit in *Hillson Partners*[339] refused to impose on companies a duty to update indefinite, vague projections, the *Stransky* court held that companies were not under a duty to update predictions or projections—apparently irrespective of whether they were indefinite or vague. Therefore, *Stransky* should probably be viewed as a rejection of the duty to update projections, especially when compared to the decisions cited above that limited rejection of the duty to indefinite or vague predictions.

However, the qualification regarding the "outcome . . . if a plaintiff contested statements of intent to take a certain action"[340] may suggest that *Stransky* instead represents a severe narrowing of the duty to update,

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332 *Id.* at 1333; *see also infra* text accompanying notes 336-37 (discussing that the court's holding regarding the duty to update only applied to projections). The *Stransky* court's language resembled that of the safe harbor which provides that "an [issuer's forward-looking] statement within the coverage of [Rules 175(b) or 3b-6(b)] . . . shall be deemed not to be a fraudulent statement . . . unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith." 17 C.F.R. §§ 230.175(a), 240.3b-6(a) (1997); *see supra* text accompanying notes 131-36.

333 *Stransky*, 51 F.3d at 1336.

334 *Id.*

335 *Id.* at 1333 n.9. This concession that "'updating'" a prior prediction, originally "unreasonable . . . or made in bad faith," can limit a company's liability seems to undermine the court's earlier distinction between the duties to correct and update. Of course, the status of disclosure "when made" is only a concern under a duty to correct. *See supra* text accompanying notes 324-25.

336 *See Stransky*, 51 F.3d at 1332-33.

337 *Id.* at 1332 n.4.

338 *See supra* Part IV.B.

339 *See supra* Part IV.D.

340 *Stransky*, 51 F.3d at 1332 n.4.

as previously conceived. Under this interpretation of the *Stransky* dicta, a company would not be required to update projections, but it could have a duty to update a material statement in which it expressed its intent to take a particular action, if that statement became materially inaccurate or misleading. Courts deciding duty to update cases in the Seventh Circuit after *Stransky* have not cited the case to support this potential recognition of a duty to update statements expressing intent to take a particular action.[341] Instead, they have cited *Stransky* in support of decisions that do not recognize the duty to update.[342]

F. THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995[343]

The post-*Polaroid II* decisions discussed thus far reveal that there is inconsistency among the circuits regarding the duty to update. However, Congress had an opportunity in December 1995 to clarify the duty in the PSLRA. A codification of the duty to update or, alternatively, a statutory rejection of the duty would obviously bind courts. In fact, the duty to disclose line of cases expressly recognized this outcome. For example, the second criterion in *Roeder v. Alpha Industries, Inc.* that can give rise to a duty to disclose material facts was a "statute or regulation requiring disclosure."[344] Therefore, a recognition in the PSLRA of a duty to update would trigger an affirmative duty to disclose additional material information that renders prior disclosure materially inaccurate or misleading. Regrettably, Congress did not offer any such clarification.

The safe harbor for forward-looking statements codified in Rule 175 of the Securities Act and Rule 3b-6 of the Exchange Act did not bring about a substantial increase in the disclosure of forward-looking state-

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341 In fact, in *Fry v. UAL Corp.*, the United States District Court for the Northern District of Illinois argued that "the reasoning underlying the [*Stransky*] court's refusal to embrace a duty to update with respect to projections and predictions applies equally to statements of intent." Fry v. UAL Corp., 895 F. Supp. 1018, 1052 (N.D. Ill. 1995), *aff'd*, 84 F.3d 936 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (7th Cir.), *cert. denied*, 117 S. Ct. 447 (1996). The court "conclud[ed] that the rule announced in *Stransky* should govern the case. That is, that a statement of intent—like a projection or prediction—will result in liability only if the plaintiff can establish that it was not made in good faith or upon a reasonable basis." *Id.* at 1053.

342 *See, e.g.*, Eisenstadt v. Centel Corp., 113 F.3d 738, 746 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (7th Cir. 1997) (rejecting the duty to update predictions); Grassi v. Information Resources, Inc., 63 F.3d 596, 599 (7th Cir. 1995) (rejecting the duty to update projections solely because subsequent events have rendered them inaccurate); *Fry*, 895 F. Supp. at 1052-53 (rejecting the duty to update projections as well as statements of intent). *Cf. In re* HealthCare Compare Corp. Sec. Litig., 75 F.3d 276, 282 (7th Cir. 1996) ("declin[ing] to hold that *Stransky* adopted a bright-line rule that no duty to [update] exists in any case"). See *infra* Part IV.H for a discussion of *HealthCare Compare* and *infra* Part IV.I which analyzes *Eisenstadt*.

343 Pub. L. No. 104-67, 199 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

344 *See supra* text accompanying note 39.

ments.[345] Three specific complaints about the safe harbor that explain this outcome are particularly relevant to a discussion of the duty to update. First, the safe harbor insufficiently protects companies because it applies only to disclosures in SEC filings.[346] Second, the safe harbor inadequately insulates companies from the "mass shareholder litigation" to which companies are exposed when they make forward-looking statements.[347] Third, given its silence regarding the duties to correct and update, the safe harbor "has created confusion over whether and when there is a duty to correct or update projections once they are made."[348] This failure to definitively establish the law regarding a duty to update has prompted lawyers to advise their clients to refrain from making forward-looking statements in order to avoid the potential "assum[ption]" of the duty to update and the concomitant exposure to potential liability.[349]

This practice conflicts with the SEC's policy goal of promoting voluntary disclosure of forward-looking statements.[350] The SEC has noted the significance of forward-looking statements:

> Investors typically consider management's forward-looking information important and useful in evaluating a company's economic prospects and consequently in making their investment decisions. Analysts and other market participants report that they view consideration of management's own performance projections, *i.e.*, earnings and revenues, to be critical to their own forecasts of a company's future performance. As such, forward-looking information is often considered a critical component of investment recommendations made by broker-dealers, investment advisors and other securities professionals.[351]

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345 *See* 1994 Safe Harbor Release, *supra* note 140, at 85,786. For a discussion of the safe harbor, see *supra* notes 131-36 and accompanying text.

346 *See* 1994 Safe Harbor Release, *supra* note 140, at 85,786.

347 *Id.* at 85,786-87.

348 *Id.* at 85,787.

349 Harvey L. Pitt & Karl A. Groskaufmanis, *Selective Disclosure Can Be Perilous*, NAT'L L.J., Apr. 18, 1994, at B4. For an explanation of how an imposition of a duty to update predictions can place companies in an impossible position that will almost certainly lead to litigation, see *supra* note 309 and accompanying text.

350 1994 Safe Harbor Release, *supra* note 140, at 85,786-87.

351 *Id.* at 85,779 (footnote omitted); *see also* Statement by the Commission on Disclosure of Projections of Future Economic Performance, Securities Act Release No. 5362, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,211, at 82,665, 82,667 (Feb. 2, 1973) ("[P]rojections are currently widespread in the securities markets and are relied upon in the investment process. Persons invest with the future in mind and the market value of a security reflects the judgments of investors about the future economic performance of the issuer. Thus projections are sought by all investors, whether institutional or individual.").

In light of the significance of forward-looking statements, Congress and the SEC obviously intended for the PSLRA to improve upon the existing safe harbor rule.

1. *Safe Harbor for Forward-Looking Statements*

Section 102 of the PSLRA introduced section 27A of the Securities Act[352] and section 21E of the Exchange Act.[353] These sections create a safe harbor for forward-looking statements[354] that is in addition to the Rule 175 and Rule 3b-6 safe harbor.[355] The safe harbor applies to written and oral[356] forward-looking statements[357] that a reporting issuer, a person or "outside reviewer" acting on the issuer's behalf, or an underwriter has made.[358] There are two prongs via which an issuer can find shelter in the safe harbor "in any private action . . . that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading."[359] The first prong consists of two avenues: "the forward-looking statement is (i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or (ii) immaterial."[360] The second prong protects issuers if "the plaintiff fails to

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352 15 U.S.C. § 77z-2 (Supp. I 1995).

353 *Id.* § 78u-5.

354 *See id.* §§ 77z-2(c), 78u-5(c).

355 *See supra* text accompanying notes 131-36.

356 For the provisions that govern the eligibility of oral forward-looking statements for the safe harbor, see 15 U.S.C. §§ 77z-2(c)(2), 78u-5(c)(2).

357 The PSLRA's definition of forward-looking statement applies to more statements than the Rule 175 and Rule 3b-6 safe harbor, which only protects statements contained in SEC filings. See *supra* text accompanying notes 131-36 for a discussion of the Rule 175 and Rule 3b-6 safe harbor. For the PSLRA's definition of forward-looking statements, see 15 U.S.C. §§ 77z-2(i), 78u-5(i).

Certain forward-looking statements are not eligible for the PSLRA safe harbor. *See id.* §§ 77z-2(b), 78u-5(b). The most important of these exceptions are forward-looking statements contained in financial statements that are prepared in accordance with generally accepted accounting principles and forward-looking statements relating to rollup and going private transactions, tender offers, and initial public offerings. *See id.*

358 *Id.* §§ 77z-2(a), 78u-5(a).

359 *Id.* §§ 77z-2(c)(1), 78u-5(c)(1).

360 *Id.* §§ 77z-2(c)(1)(A), 78u-5(c)(1)(A). The Conference Committee Report for the PSLRA elaborated on the requirement of "meaningful cautionary language":

> The cautionary statements must convey substantive information about factors that realistically could cause results to differ materially from those projected in the forward-looking statement. . . .
>
> . . . "Important" factors means the stated factors identified in the cautionary statement must be relevant to the projection and must be of a nature that the factor or factors could actually affect whether the forward-looking statement is realized. . . .
>
> . . . [T]he cautionary statements [must] identify important factors that could cause results to differ materially—but not all factors. Failure to include the particu-

prove that the forward-looking statement . . . was made with actual knowledge . . . that the statement was false or misleading."[361]

Both avenues of the first prong of eligibility for the safe harbor appear to codify judicially recognized doctrines. The first avenue appears to codify the bespeaks caution doctrine that many courts have invoked to dismiss securities fraud cases on the ground that the sufficient cautionary language in the forward-looking statements in question rendered them immaterial or unreasonable bases upon which investors could rely.[362] The second avenue is consistent with courts' efforts to dismiss securities fraud claims based on immaterial statements.[363] The second prong protects issuers in securities fraud cases because it requires plaintiffs to prove that the defendant "made [the statement] with actual knowledge . . . that the statement was false or misleading," which is in addition to the Rule 10b-5 requirement that a plaintiff must prove that the defendant acted with scienter.[364]

2. *Implications for the Duty to Update*

The PSLRA safe harbor thus provides that to the extent a reporting issuer includes adequate cautionary language in a forward-looking statement that meets the safe harbor's requirements, or if such a statement is deemed immaterial, the safe harbor protects issuers from liability in a private securities fraud action. This protection from liability in the form of a safe harbor may suggest that the PSLRA insulates issuers from lia-

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lar factor that ultimately causes the forward-looking statement not to come true will not mean that the statement is not protected by the safe harbor. . . .

. . . .

. . . A cautionary statement that misstates historical facts is not covered by the [s]afe harbor.

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

361 15 U.S.C. §§ 77z-2(c)(1)(B), 78u-5(c)(1)(B).

362 For a discussion of the bespeaks caution doctrine, see *supra* Part I.C.2. In the wake of the PSLRA, many commentators have written about the safe harbor, the extent to which it codifies the judge-created bespeaks caution doctrine, and its effect on the doctrine. *See, e.g.*, Gerald S. Backman et al., *Forward-Looking Statements and Cautionary Language After the 1995 Reform Act: An Empirical Study, in* SAILING IN "SAFE HARBORS": DRAFTING FORWARD-LOOKING DISCLOSURES 153 (PLI Corp. L. & Practice Course Handbook Series No. B-1020, 1997); John F. Olson & David C. Mahaffey, *The Private Securities Litigation Reform Act of 1995 and the "Bespeaks Caution" Doctrine, in* 1 SWEEPING REFORM: LITIGATING AND BESPEAKING CAUTION UNDER THE NEW SECURITIES LAW 529 (PLI Corp. L. & Practice Course Handbook Series No. B-923, 1996); Phillip D. Parker, *The New Safe Harbor for Forward-Looking Statements, in id.* at 269; Julia B. Strickland & Mary D. Manesis, *Litigating a Safe Harbor: The Private Securities Litigation Reform Act of 1995 and the Bespeaks Caution Doctrine, in* SWEEPING REFORM 147 (PLI Corp. L. & Practice Course Handbook Series No. B-1996S, 1996); Erin M. Hardtke, Comment, *What's Wrong with the Safe Harbor for Forward-Looking Statements? A Call to the Securities and Exchange Commission to Reconsider Codification of the Bespeaks Caution Doctrine*, 81 MARQ. L. REV. 133 (1997).

363 *See, e.g.*, *supra* text accompanying notes 286, 311.

364 15 U.S.C. §§ 77z-2(c)(1)(B), 78u-5(c)(1)(B); *see supra* text accompanying note 72.

bility arising from a failure to discharge a duty to update forward-looking statements that meet the requirements of the safe harbor.[365] However, one can make an equally strong argument that the safe harbor does not reject the judge-created duty to update. In other words, this interpretation maintains that the safe harbor protects issuers from liability—unless they have breached a duty to update a forward-looking statement in a jurisdiction that recognizes this duty.

Congress's few words regarding the duty to update did not resolve this problem. The safe harbor that the PSLRA introduced includes a provision that states: "Nothing in this section shall impose upon any person a duty to update a forward-looking statement."[366] A strict interpretation of this language indicates that Congress did not reject the duty to update that certain jurisdictions have already recognized. Congress may have only declined to codify a duty to update, and thus rejected only an "impos[ition]" of a *statutory* duty to update. However, members of Congress, who opposed the PSLRA, have contended that this language reverses the judicial recognition of the duty to update.[367] Commentators have not reached a consensus regarding how the PSLRA has affected the duty to update.[368]

Certainly if Congress intended to eliminate the duty, the courts should not continue to impose it on issuers. However, even if Congress solely decided not to discuss the duty, the underlying policy objectives of the PSLRA suggest that the courts may, in response, reduce the scope of

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365 The second prong of eligibility for the safe harbor, *see supra* text accompanying note 361, does not concern the duty to update. If a plaintiff proves that the defendant made the statement "with actual knowledge . . . that the statement was false or misleading," this determination would be irrelevant in a duty to update claim because the duty only attaches to forward-looking statements that become materially false or misleading. To the extent that the defendant knew that the statement was false or misleading when it made the statement, the statement cannot become false or misleading, for it always had been false or misleading.

366 15 U.S.C. §§ 77z-2(d), 78u-5(d).

367 *See* Martha L. Cochran & Catherine Collins McCoy, *The Safe Harbor for Forward-Looking Statements*, INSIGHTS, Feb. 1996, at 14, 17.

368 *See, e.g.*, John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975, 992 (1996) (Congress's "statement borders on the tautological. Safe harbors do not by definition impose duties or create liabilities; rather, they are exceptions from rules that do."); Marc I. Steinberg, *Symposium: Securities Law After the Private Securities Litigation Reform Act—Unfinished Business*, 50 SMU L. REV. 9, 16 (1996) (observing that "[i]t is unclear whether this language [regarding the duty to update] is meant to eliminate the 'duty to update' any forward-looking statement or merely to clarify that no implied 'duty to update' may be gleaned from this section"); John C. Coffee, Jr., *Safe Harbor for Forward-Looking Statements*, N.Y. L.J., Nov. 30, 1995, at 5 (To the extent the relevant jurisdiction recognizes a duty to update, the language in the PSLRA "would seem to leave that duty unchanged and intact. Had Congress wanted to say that the maker of a forward-looking statement is under no duty to update, notwithstanding any contrary interpretation, it could have easily so provided. Instead, it appears to have compromised ambiguously.").

the duty to update.[369] Encouraging companies to publicize projections supports the underlying policy goal of the Exchange Act,[370] because these statements help investors make more informed decisions.[371] The purpose of the duty to update is to protect investors from a company's materially inaccurate or misleading statements.[372] However, a broad duty to update will discourage companies from making forward-looking statements, for it burdens companies with the obligation of further disclosure and also exposes them to liability for statements that were accurate when made.[373] In sum, a broad duty to update appears to be irreconcilable with the public policy underlying Congress's adoption of the safe harbor for forward-looking statements.

Congress's vague language in the PSLRA regarding the duty to update has been uninfluential in two important ways. First, it has made those issuers (and their lawyers), who were already averse to forward-oriented statements in light of the uncertainty of the judicially recognized duty to update, reluctant to make such voluntary disclosures.[374] Second, it has thus far not influenced the existing duty to update case law.[375] Therefore, despite anticipation that Congress would clarify the status of the duty to update, the judge-created duty to update remains, for now, in the hands of judges.

G. *SHAW V. DIGITAL EQUIPMENT CORP.*,[376] *GLASSMAN V. COMPUTERVISION CORP.*,[377] AND *GROSS V. SUMMA FOUR, INC.*[378]

In 1996, the First Circuit revisited the duty to update controversy in *Shaw*, *Glassman*, and *Gross*.[379] As in *Rubinstein v. Collins*,[380] the court in *Shaw* addressed the duty to update in a footnote.[381] The court, appearing to follow the First Circuit's dicta in *Polaroid II*, explained that the duty to update did not apply to the defendants' statement announcing an expected increase in "'service revenues'" because it was "a statement of

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369 *See infra* Part V.

370 *See supra* Part I.A.

371 *See supra* note 351 and accompanying text.

372 *See supra* text accompanying note 67.

373 *See supra* Part III.B.4; *supra* text accompanying note 349.

374 *See infra* text accompanying note 549.

375 *See infra* Part V.A.

376 82 F.3d 1194 (1st Cir. 1996).

377 90 F.3d 617 (1st Cir. 1996).

378 93 F.3d 987 (1st Cir. 1996).

379 For a discussion of the First Circuit's decision in 1990 in *Polaroid II*, see *supra* Part III.B. Between 1991 and 1993, federal district courts in Massachusetts decided three duty to update cases discussed *supra* Part IV.A.

380 *See supra* text accompanying note 295.

381 *Shaw*, 82 F.3d at 1219 n.33.

historical fact not alleged to be false."[382] Interestingly, the court did not cite *Polaroid II* for this proposition. Rather, it cited *Serabian v. Amoskeag Bank Shares, Inc.*[383] as support.[384] With respect to other forward-looking statements that Digital Equipment made, the court maintained that their "cautiously optimistic" nature "would not be actionable in the first instance."[385] These statements "express[ed], at most, 'only the hope of any company' for a positive future, and [like the statements in *In re Time Warner Inc. Securities Litigation* regarding the strategic partnerships,] 'lack[ed] the sort of definite positive projections that might require later correction.'"[386] Because the indefiniteness of the statements rendered them presumably unreasonable bases for reliance, potentially devoid of a clear meaning, and immaterial, the decision may be consistent with *Polaroid II*.[387]

The court held that "[w]hatever the circumstances in which a company might be subject to a duty to 'update' information previously disclosed, we do not think that the . . . statements identified by plaintiffs are of the kind that could trigger any such duty."[388] Once again, the court did not cite *Polaroid II* to support its discussion of the "the circumstances in which a company might be subject to a duty to 'update' information previously disclosed."[389] In fact, the tone of the language suggests a retrenchment from *Polaroid II* because it does not articulate that there are, in fact, any circumstances that trigger a duty to update. The court's holding reveals that six years after *Polaroid II*, the First Circuit was no closer to defining the requisite "special circumstances" dis-

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382 *Id.* (citing Serabian v. Amoskeag Bank Shares, Inc. 24 F.3d 357, 361 (1st Cir. 1994)). For a discussion of how a duty to update cannot apply to historical statements, much less to historical statements which plaintiffs do not allege are false, see *supra* text accompanying notes 222, 232-34; *supra* note 325 and accompanying text.

383 24 F.3d 357 (1st Cir. 1994).

384 *See Shaw*, 82 F.3d at 1219 n.33.

385 *Id.* (citing San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., Inc., 75 F.3d 801, 811 (2d Cir. 1996)). The First Circuit discussed the bespeaks caution doctrine earlier in the opinion with respect to a statement that Digital Equipment made concerning the "'adequacy'" of its restructuring reserve. *Id.* at 1211-14. The *Shaw* court reversed the district court's decision to invoke the bespeaks caution doctrine, finding that "[t]he cautionary statements . . . did not provide an unambiguous warning." *Id.* at 1214. Because the First Circuit was unable to "conclude, as a matter of law and on [the particular] pleadings, that the actionability of the 'reserve adequacy' statement [was] precluded by a context that bespeaks caution," it "h[e]ld that the district court erred in concluding that the plaintiffs' allegations . . . fail[ed] to state a claim under [s]ections 11 and 12[a](2)." *Id.*

386 *Id.* at 1219 n.33 (quoting *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993), *cert. denied sub nom.* Ross v. Zvi Trading Corp. Employees' Money Purchase Pension Plan, 511 U.S. 1017 (1994)). *See supra* text accompanying note 286 (discussing the statements in *Time Warner*).

387 *See supra* text accompanying notes 228-29, 231.

388 *Shaw*, 82 F.3d at 1219 n.33.

389 *Id.*

cussed in the *Polaroid II* dicta.[390] Of the post-*Polaroid II* cases discussed thus far, the *Shaw* decision is probably most similar to the Fourth Circuit's decision in *Hillson Partners Ltd. Partnership v. Adage, Inc.*[391]

In *Glassman*, the First Circuit followed its recent decision in *Shaw*.[392] The court focused on the nature of the statements that Computervision made. It explained that the company's "statements did not rise to the level of optimism or certainty that would make them materially misleading in the absence of disclosure of initial development problems the product was facing."[393] In short, "Computervision's mild statements of hope, couched in strongly cautionary language, cannot be said to have become materially misleading."[394] *Glassman* combines *Time Warner*'s, *Hillson Partners'* and *Shaw*'s refusal to find materiality in vague projections[395] with *Colby v. Hologic, Inc.*'s and *Hillson Partners*' reluctance to find materiality in projections that contain cautionary language.[396] Given the immateriality of its statements, Computervision was under no duty to update.

Similarly, in *Gross*, the First Circuit maintained that a duty to update would not devolve upon Summa Four because of the nature of its public statement. The court noted that even if Summa Four's statement that it "had received 'significant orders' carries a positive implication about . . . future success . . ., and so might, arguably, be the basis for a duty to update claim, we think this statement falls in the category of vague and loosely optimistic statements that this court has held nonactionable as a matter of law."[397] As a result, the statement could not "be the basis for a duty to update claim."[398] Like *Shaw*, neither *Glassman* nor *Gross* cited *Polaroid II*. These failures to cite *Polaroid II* are interesting because in *Colby*, the United States District Court for the District of Massachusetts in 1993 was confronted with a similarly "vague" state-

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390 *See supra* text accompanying note 224.

391 *See supra* text accompanying notes 305 (quoting the *Hillson Partners* court's skepticism regarding the existence of the duty to update), 311 (reciting the same language from *Time Warner*, explaining that vague projections do not require subsequent correction, and, therefore, do not become materially misleading).

392 Glassman v. Computervision Corp., 90 F.3d 617, 636 (1st Cir. 1996).

393 *Id.* (citing *Shaw*, 82 F.3d at 1219 n.33; San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., Inc., 75 F.3d 801, 811 (2d Cir. 1996); *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993), *cert. denied sub nom.* Ross v. Zvi Trading Corp. Employees' Money Purchase Pension Plan, 511 U.S. 1017 (1994)).

394 *Id.*

395 *See supra* text accompanying notes 287, 311, 385-86.

396 *See supra* notes 275-76 and accompanying text; *supra* text accompanying note 314.

397 Gross v. Summa Four, Inc., 93 F.3d 987, 995 (1st Cir. 1996) (citing *Glassman*, 90 F.3d at 635-36; *Shaw*, 82 F.3d at 1217-19).

398 *Id.*

ment.[399] Yet that court contrasted the facts before it with those in *Polaroid II*, and stated the "general rule" of *Polaroid II*.[400] The First Circuit's failure to discuss, or even cite, the *Polaroid II* dicta, coupled with the tone of *Shaw* and *Gross*,[401] suggest that the First Circuit itself is uncertain about what circumstances, if any, will trigger a duty to update.

The three 1996 cases that this Section discussed—*Shaw*, *Glassman*, and *Gross*—are at least consistent with each other. The First Circuit in all three cases declined to impose the duty to update on defendants that made predictions that were vague or accompanied by cautionary language because these characteristics rendered the statements immaterial for purposes of the securities laws. Nevertheless, the status of *Polaroid II*—even within the First Circuit—remains unclear.

H. *IN RE HEALTHCARE COMPARE CORP. SECURITIES LITIGATION*[402]

Much like the First Circuit's decisions in *Shaw*, *Glassman*, and *Gross* cast some doubt on the relevance of *Polaroid II*, the Seventh Circuit's 1996 decision in *HealthCare Compare* initially raised questions about the precedential value of its decision in *Stransky v. Cummins Engine Co., Inc.* Prior to *HealthCare Compare*, the Seventh Circuit's rejection of the duty to update projections appeared clear following *Stransky*.[403] In *Grassi v. Information Resources, Inc.*,[404] the Seventh Circuit reiterated its holding in *Stransky* that "'a company has no duty to update forward-looking statements merely because changing circumstances have proven them wrong.'"[405] Similarly, in *Fry v. UAL Corp.*,[406] the United States District Court for the Northern District of Illinois, citing *Stransky*, recognized that "the Seventh Circuit recently refused to adopt the position that forward-looking statements give rise to a duty to update when subsequent events make them no longer true."[407]

However, the court in *HealthCare Compare* appears to have misunderstood both the distinction between the duties to correct and update that *Stransky* emphasized and the *Stransky* court's holding with respect to the duty to update. A summary of the facts in this case is worthwhile, for it demonstrates the court's confusion regarding the duties to correct

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399 *See supra* text accompanying notes 273, 276.

400 *See supra* text accompanying notes 274-79.

401 *See supra* text accompanying notes 388, 397.

402 75 F.3d 276 (7th Cir. 1996).

403 *See supra* Part IV.E (discussing *Stransky*).

404 63 F.3d 596 (7th Cir. 1995).

405 *Id.* at 599 (quoting Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1333 n.9 (7th Cir. 1995)).

406 895 F. Supp. 1018, 1052 (N.D. Ill. 1995), *aff'd*, 84 F.3d 936 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (7th Cir.), *cert. denied*, 117 S. Ct. 447 (1996).

407 *Id.* at 1052.

and update. In this case, HealthCare made forward-looking statements on February 2 and 9, 1993, expressing the company's comfort with analysts' earnings estimates.[408] The chief financial officer of HealthCare subsequently included sales and revenue estimates in an internal memorandum dated February 24.[409] On March 30, HealthCare announced in a press release that it was " 'uncomfortable' " with some of the revenue and earnings estimates that had been within the range of estimates with which it had expressed comfort in February.[410] The plaintiffs alleged that HealthCare knew before it issued its March 30 press release that the analysts' earnings estimates with which it had expressed comfort in February were unrealistically high.[411] According to the plaintiffs, the February 24 internal memorandum, which "reported a revised revenue forecast," evidenced that HealthCare possessed knowledge that it would not meet the analysts' earnings predictions.[412] The plaintiffs brought a securities fraud action against HealthCare, alleging that they suffered from fraud when HealthCare's common stock price fell by more than thirty percent after it issued its press release on March 30.[413]

The plaintiffs attempted to show that HealthCare's February statements "lacked a reasonable basis."[414] The court concluded that the plaintiffs failed to plead with sufficient specificity, and therefore, dismissed this claim.[415] However, the Seventh Circuit recognized another avenue by which plaintiffs could state a securities fraud claim. According to the *HealthCare Compare* court, the plaintiffs could show "that a duty arose prior to the March 30 press release to correct the early February comfort statements—a duty the neglect of which amounts to fraud."[416] The plaintiffs claimed that HealthCare was under a duty to correct its February statements after the "generat[ion of] the February 24 memorandum."[417] In short, the "plaintiffs claim that the company's failure to correct [the statements before the March 30 press release was] actionable as securities fraud."[418]

There are two problems with the court's statement of the law. First, the court clearly misunderstood or ignored the *Stransky* explanation of the difference between the duties to correct and update. In *Stransky*, the Seventh Circuit emphasized that the duty to correct applies to historical

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408 *See HealthCare Compare*, 75 F.3d at 278.
409 *See id.*
410 *See id.*
411 *See id.* at 279.
412 *Id.*
413 *See id.* at 278-79.
414 *Id.* at 281.
415 *See id.* at 280.
416 *Id.* at 281.
417 *Id.* at 282.
418 *Id.*

statements that were initially inaccurate; whereas, the duty to update, which it did not recognize, attaches to forward-looking statements that become inaccurate.[419] One can consider HealthCare's February statements to be projections, for they have the same effect on shareholders, other investors, and securities professionals.[420] These statements were future-oriented in that they expressed comfort with analysts' projections. In fact, the court expressly identified the statements as "forward-looking."[421] Furthermore, the plaintiffs alleged in their duty to correct claim that the duty arose after the preparation of the internal memorandum.[422] This allegation suggests the plaintiffs were arguing in their duty to correct claim that the February statements became untrue.[423] As discussed earlier, the court concluded that the plaintiffs failed to prove that the "February comfort statements lacked a reasonable basis."[424] Therefore, taken together, the February statements were forward-looking statements that became inaccurate.[425] Under *Stransky* (and *Polaroid II*), the duty to update—not the duty to correct—applies to such statements.[426] The Seventh Circuit in *HealthCare Compare* thus, like the Fifth Circuit in *Rubinstein v. Collins*,[427] confused the two duties.

The second problem with the court's statement of the law is that it is inconsistent with the holding of *Stransky*. The previous paragraph discussed how, under *Stransky*, the duty to correct cannot apply to the February statements in *HealthCare Compare*. With respect to the duty to update, the *Stransky* court refused to recognize a duty to update predictions.[428] As suggested above, the statements in *HealthCare Compare* can be considered projections that became inaccurate.[429] Thus, *Stransky* is in point.[430] Therefore, even if, for the purposes of clarity, we recharacterize the plaintiffs' claim in *HealthCare Compare* as a duty to update claim, the plaintiffs still cannot state a claim under *Stransky* because the court in that case did not recognize a duty to update projec-

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419 *See supra* text accompanying notes 324-25.

420 For a discussion of the significance of projections, see *supra* note 351 and accompanying text.

421 *HealthCare Compare*, 75 F.3d at 278.

422 *See supra* text accompanying note 417.

423 *But cf. HealthCare Compare*, 75 F.3d at 282 (noting that the "plaintiffs allege that the circumstances which made the comfort statements false . . . arose prior to the statements—even if only realized by HealthCare on February 24"). For a discussion of how the court tried to distinguish *HealthCare Compare* from *Stransky* on this ground, see *infra* note 434.

424 *See supra* text accompanying notes 414-15.

425 The court strangely did not reach this conclusion. *See supra* note 423; *infra* note 434.

426 *See supra* text accompanying notes 324-25.

427 *See supra* Part IV.C.

428 *See supra* text accompanying notes 327-29, 336.

429 *See supra* text accompanying notes 420-25.

430 *But see infra* note 434 (explaining that the *HealthCare Compare* court contended that "[r]eliance on *Stransky* is somewhat misplaced").

tions. The *Stransky* court held that "a projection can lead to liability under Rule 10b-5 only if it was not made in good faith or was made without a reasonable basis."[431] Therefore, *Stransky* dictates that the plaintiffs' "lack of a reasonable basis claim"[432] should have been the only ground on which they could base a securities fraud claim. The *HealthCare Compare* court's statement of the law thus was entirely irreconcilable with *Stransky*.

The *HealthCare Compare* court's attempt to explain the *Stransky* decision only further obfuscated its analysis. The court stated that in *Stransky*, the Seventh Circuit "specifically declined to adopt a bright-line rule that a duty to correct exists when a company makes a forward-looking statement that becomes untrue because of subsequent events."[433] The *HealthCare Compare* court explained that in *Stransky*, "we declined to find a duty to correct based on the rationale that 'just as a statement true when made does not become fraudulent because things unexpectedly go wrong, so a statement materially false when made does not become acceptable because it happens to come true.'"[434] This interpretation of *Stransky* is flawed. Once again, the *Stransky* court refused to adopt "a bright-line rule," as the *HealthCare Compare* court described it, regarding the *duty to update* projections that become inaccurate in light of subsequent events—not with respect to the duty to correct.[435] Immediately after quoting the *Pommer v. Medtest Corp.*[436] language—which the *HealthCare Compare* court cited as the "rationale" in *Stransky* for refusing to "find a *duty to correct*"[437]—the *Stransky* court, by contrast, explained that "[t]hese considerations give us serious pause in imposing a *duty to update*."[438]

The court concluded its discussion of *Stransky* with the following statement: "[W]e decline to hold that *Stransky* adopted a bright-line rule that no duty to correct exists in any case."[439] A proper understanding of

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431 Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1333 (7th Cir. 1995).

432 *HealthCare Compare*, 75 F.3d at 281.

433 *Id.* at 282.

434 *Id.* (quoting *Stransky* 51 F.3d at 1332 (quoting Pommer v. Medtest Corp., 961 F.2d 620, 623 (7th Cir. 1992))). Stating that "[r]eliance on *Stransky* is somewhat misplaced," the court ineffectively tried to use this language from *Pommer* to distinguish the facts in *HealthCare Compare* from those in *Stransky*. *Id.* The court argued that *HealthCare Compare* "is not a case where things unexpectedly went wrong; rather, plaintiffs allege that the circumstances which made the comfort statements false . . . arose prior to the statements—even if only realized by HealthCare on February 24." *Id.* For a response to this attempt to distinguish the cases, see *supra* text accompanying notes 420-25, 428-30.

435 *See supra* text accompanying notes 326, 336-37.

436 961 F.2d 620 (7th Cir. 1992).

437 *HealthCare Compare*, 75 F.3d at 282 (emphasis added); *see also supra* text accompanying note 434 (quoting the same language from *Pommer*).

438 *Stransky*, 51 F.3d at 1332 (emphasis added).

439 *HealthCare Compare*, 75 F.3d at 282.

the *Stransky* decision should lead one to realize that this statement does not advance the law in any way for two reasons. First, the Seventh Circuit in *Stransky* refused to recognize a duty to update. The *Stransky* court recognized the duty to correct initially inaccurate, historical statements.[440] Second, even if the aforementioned statement read "duty to update" instead of "duty to correct," it would still not advance the law beyond *Stransky*. The *Stransky* court expressly stated that the decision did not represent a per se rejection of the duty to update in all cases. The *Stransky* court rejected only the duty to update projections.[441] For example, it did not rule out the possibility that a company may have a duty to update "statements of intent to take a particular action."[442] As the foregoing discussion should reveal, the court in *HealthCare Compare* obviously misunderstood the *Stransky* decision.

After "declin[ing] to hold that *Stransky* adopted a bright-line rule that no duty to correct exists in any case," the *HealthCare Compare* court applied its unique understanding of the law to the facts.[443] The court explained: "Rather, we are persuaded that 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."[444] "[O]therwise," the court continued, "it was not unreasonable for HealthCare to wait until March 30 to make a public announcement."[445] The court explained that in prior cases, the Seventh Circuit had held that companies were not required to disclose all projections—especially tentative forecasts.[446] Therefore, the *HealthCare Compare* court recognized, and was perhaps willing to impose, a duty to update (which it misidentified as a duty to correct) on HealthCare, to the extent that the plaintiffs proved that HealthCare definitively knew at least as of the time it prepared the internal memorandum that it would not meet the analysts' estimates. However, the court held that the "[p]laintiffs have not met their burden to show that the internal memorandum did not merely contain tentative projections subject to revision."[447]

The *HealthCare Compare* court, which misconstrued *Stransky*, thus recognized the substance of the duty to update, but misidentified it as the duty to correct, much like the Fifth Circuit did in *Rubinstein*,[448] and then declined to impose it under the facts that the plaintiffs alleged. While the

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440 *See supra* text accompanying notes 326, 333.
441 *See supra* text accompanying note 336.
442 *Stransky*, 51 F.3d at 1332 n.4.
443 *HealthCare Compare*, 75 F.3d at 282.
444 *Id.*
445 *Id.*
446 *See id.* at 283.
447 *Id.*
448 *See supra* Part IV.C.

Seventh Circuit and courts within the Seventh Circuit have cited *Stransky* in numerous decisions,[449] they have not cited the two-to-one *HealthCare Compare* decision in support of either a duty to correct or a duty to update. As a result, *HealthCare Compare*'s misunderstanding of *Stransky* should probably be viewed as anomalous in light of the Seventh Circuit's decisions preceding and, as the next Section demonstrates, following the case.

I. *EISENSTADT V. CENTEL CORP.*[450]

In *Eisenstadt*, the Seventh Circuit buttressed its decision in *Stransky*. Although the court addressed the duty to update only in dicta,[451] the case is important for two reasons. First, it represents the boldest judicial rejection of a duty to update. Second, *Eisenstadt* was the first major case discussing the duty to update to cite the PSLRA in support of its decision.[452] Centel announced on January 23, 1992 its plan to hold an auction at which bidders could bid to purchase the entire company or a smaller part of the company.[453] On March 5, GTE stated that it would not bid for Centel at the auction.[454] Three weeks later, Pacific Telesis, a Baby Bell company that had expressed interest in bidding for a certain "major asset" of Centel, announced that it would not participate in the auction.[455] Other large potential bidders similarly reported that they would not partake in the auction.[456] Despite these indications that the auction might prove unsuccessful, Centel declared to the public that "'the bidding process continues to go very well' and 'very smoothly.'"[457] On April 13, Centel stated that a proposed auction to sell the company had generated considerable interest; however, the auction, which took place on April 16, was a failure—only seven companies bid for Centel and none of the bids were to purchase the entire company.[458]

Stockholders brought a section 10(b) and Rule 10b-5 claim against Centel for allegedly fraudulent representations regarding its auction.[459] The Seventh Circuit held that Centel's representations were not actiona-

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449 See *supra* note 342 and accompanying text; *supra* text accompanying notes 403-07; *infra* note 466 and accompanying text.

450 113 F.3d 738 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (7th Cir. 1997).

451 *See id.* at 746.

452 *Id.* at 744, 746.

453 *See id.*

454 *See id.* at 741.

455 *Id.*

456 *See id.*

457 *Id.*

458 *See id.* at 741-42.

459 *See id.* at 740.

ble under Rule 10b-5; they were, at worst, "[m]ere sales puffery."[460] The court maintained that the statements were not "so discordant with reality that they would induce a reasonable investor to buy the stock at a higher price than it was worth ex ante."[461] Assessing the materiality of the statements, the *Eisenstadt* court explained that "[i]t would be unreasonable for investors to attach significance to general expressions of satisfaction with the progress of the seller's efforts to sell."[462] These statements were thus immaterial. On the other hand, the court clarified that Centel's representation that the auction was "going smoothly would have been materially deceptive," if, for example, Centel neglected to disclose "a disaster," such as if lienors refused to consent to a sale of Centel's encumbered assets.[463]

The Seventh Circuit's focus on the immateriality of Centel's statements to dismiss the plaintiffs' claim is consistent with how courts have disposed of many of the securities antifraud claims discussed in the preceding Sections.[464] *Eisenstadt* is different from most of these cases because, as the court emphatically noted, Centel did not make any predictions.[465]

Nonetheless, the court proceeded to explain that "[e]ven if it had made a public prediction . . ., it would have had no legal duty, in this circuit anyway and perhaps in no circuit after the [PSLRA], to make a public revision of the prediction when it became clear" that the prediction had become inaccurate.[466] In spite of the court's usage of the phrase "duty to correct,"[467] it is clear that the Seventh Circuit in *Eisenstadt* was reaffirming its decision in *Stransky* to reject the duty to update projections.[468] As discussed above, the PSLRA certainly does not expressly reject the duty to update.[469] In fact, one could just as easily argue that the explicit language of the PSLRA preserves the judge-created duty to update in jurisdictions, other than the Seventh Circuit, that have recognized the duty. The Seventh Circuit's suggestion that the PSLRA has

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460 *Id.* at 746 (citing, inter alia, Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1217-18 (1st Cir. 1996)).

461 *Id.*

462 *Id.* at 745.

463 *Id.*

464 *See, e.g., supra* text accompanying notes 286 (discussing *In re Time Warner Inc. Securities Litigation*), 311 (discussing *Hillson Partners Ltd. Partnership v. Adage, Inc.*).

465 *Eisenstadt*, 113 F.3d at 746.

466 *Id.* (citing Grassi v. Information Resources, Inc., 63 F.3d 596, 599 (7th Cir. 1995); Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1331-32 (7th Cir. 1995)); *see also id.* at 744 (noting that "it is true . . . that in this circuit, and maybe now in all circuits (as a result of [the PSLRA]), there is no duty to correct a prediction falsified by subsequent events").

467 *Id.* at 744; *see supra* note 466.

468 *See infra* text accompanying note 466 (citing *Stransky* in support of its repudiation of the duty to update); *see also supra* Part IV.E (discussing *Stransky*).

469 *See supra* Part IV.F.2.

abolished the duty to update is an excessively broad interpretation of the express language in the statute. One could also argue that the legislative intent underlying the PSLRA runs contrary to a duty to update.[470] However, the court in *Eisenstadt* did not address legislative intent; it simply concluded that the PSLRA may have signalled the death of the duty to update.

The court's dicta in *Eisenstadt* did not elaborate on the *Stransky* court's qualification regarding the undetermined status of the duty to update forward-looking statements that were neither predictions nor projections, such as "statements of intent to take a certain action."[471] Although the tone of the court's opinion suggests that the Seventh Circuit has completely rejected the duty to update,[472] this issue of law that *Stransky* raised remains unresolved at the circuit court level.[473]

J. *IN RE BURLINGTON COAT FACTORY SECURITIES LITIGATION*[474]

As the discussion of the cases above suggests, the duty to update and, in particular, the *Polaroid II* dicta appeared to be waning since the en banc decision and, especially, after the PSLRA. However, the Third Circuit's June 1997 decision in *Burlington Coat Factory* revitalized the significance of the *Polaroid II* dicta. The court devoted considerable energy to distinguishing the duty to correct from the duty to update and to analyzing both duties.

1. *Duty to Correct Claim*

In *Burlington Coat Factory*, the plaintiffs brought "a 'duty to correct' claim" against Burlington Coat Factory for failing to correct an earnings projection that had become inaccurate.[475] The court recognized that the plaintiffs were, in reality, "asserting both a duty to correct and a duty to update" claim.[476] The court quoted the *Stransky v. Cummins Engine Co., Inc.* construction of the duty to correct,[477] and cited *Polaroid II*

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470 *See supra* text accompanying note 367.

471 *See supra* text accompanying notes 336-37.

472 *See supra* note 466 and accompanying text.

473 However, in *Fry v. UAL Corp.*, the United States District Court for the Northern District of Illinois concluded that a company should not be subject to a duty to update a statement of intent. Fry v. UAL Corp., 895 F. Supp. 1018, 1053 (N.D. Ill. 1995), *aff'd*, 84 F.3d 936 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (7th Cir.), *cert. denied*, 117 S. Ct. 447 (1996). Rather, "a statement of intent—like a projection or prediction—will result in liability only if the plaintiff can establish that it was not made in good faith or upon a reasonable basis." *Id.*

474 114 F.3d 1410 (3d Cir. 1997).

475 *Id.* at 1430.

476 *Id.*

477 *See supra* text accompanying note 324.

as additional support for a recognition of the duty to update.[478] As discussed above, *Stransky* explained that the duty to correct applies only to historical statements; whereas, the duty to update applies to future-oriented statements.[479] However, the Third Circuit suggested in dictum that the *Stransky* conception of the duty was somewhat incomplete because the duty "can also apply to a certain set of forward-looking statements."[480] The court then presented a fact pattern which it thought supported this conclusion.[481] The upshot of the court's reasoning is that when a public company makes a forecast, "there is an implicit representation . . . that errors [regarding the original data that were reasonably made, and discovered as a result of subsequent events] will be corrected," assuming "the correction . . . was material to the forecast that was disclosed earlier."[482] The court emphasized that this situation triggers a duty to correct because "the error, albeit an honest one, was one that had to do with information *available at the time the forecast was made* and that the error in the information was subsequently discovered."[483]

Despite this lengthy discussion of the duty to correct in dictum, the court dismissed the duty to correct claim because the plaintiffs did not allege with specificity how the forecast was erroneous when made.[484] Additionally, the plaintiffs neglected to "identif[y] the specific times at which these errors were discovered, so as to allow correction and trigger defendants' alleged duty."[485] Moreover, the court correctly decided that the "claim [was] better characterized as a 'duty to update' claim."[486]

The court's expansion of the duty to correct to include "a certain set of forward-looking statements"[487] constitutes a departure from the prior case law, which has maintained that the duty only applies to historical statements.[488] The duty to correct, as theretofore conceived, is not triggered when a company subsequently discovers that a *forecast* was originally inaccurate.[489] The Third Circuit attempted to address this problem of explaining how the duty to correct could apply to certain forward-looking statements by focusing in dictum on whether "information avail-

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478 *Burlington Coat Factory*, 114 F.3d at 1430-31.

479 *See supra* notes 324-25 and accompanying text.

480 *Burlington Coat Factory*, 114 F.3d at 1431.

481 *See id.*

482 *Id.*

483 *Id.*

484 *See id.*

485 *Id.*

486 *Id.*

487 *Burlington Coat Factory*, 114 F.3d at 1431.

488 *See supra* text accompanying note 324.

489 The duty to update, which applies to forecasts that have become materially inaccurate or misleading, would similarly not apply to an initially inaccurate forecast.

able at the time the [original statement] was made" would have rendered the statement erroneous.[490] Prior to *Burlington Coat Factory*, most courts were not concerned with whether a company could or should have known that a disclosure was erroneous in light of information available when it made the statement.[491] Rather, they have recognized a company's duty to correct a statement when that statement itself was materially inaccurate or misleading when made.[492]

But for an occasional misidentification of a duty to update case as a duty to correct case or vice versa, the recent duty to correct case law had been fairly consistent since *Polaroid II*. In light of the dictum in *Burlington Coat Factory*, the precise status of the duty to correct is now somewhat unclear—at least in the Third Circuit.

2. *Duty to Update Claim*

Citing *Greenfield v. Heublein, Inc.* and *Polaroid II*, the Third Circuit explained the duty to update, which it understood was more relevant to the case than the duty to correct.[493] According to the *Burlington Coat Factory* court, "[t]he duty to update . . . concerns statements that, although reasonable at the time made, become misleading when viewed in the context of subsequent events."[494] The court reiterated *Polaroid II*'s "special circumstances" requirement,[495] and acknowledged that "although we have generally recognized that a duty to update might exist

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490 *Burlington Coat Factory*, 114 F.3d at 1431.

491 This analysis that the Third Circuit explored in dictum most resembles the Seventh Circuit's approach in *Stransky* and the language of the safe harbor that the SEC adopted in Rules 175 and 3b-6. As discussed above in Part IV.E, the *Stransky* court held that "a projection can lead to liability under Rule 10b-5 only if it was not made in good faith or was made without a reasonable basis." Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1333 (7th Cir. 1995). In a footnote, the *Stransky* court noted that in an earlier case, the Seventh Circuit "[i]n dicta . . . stated that predictions that don't pan out can lead to Rule 10b-5 liability only if the prediction was *unreasonable in light of information available at the time the statement was made*." *Id.* at 1333 n.8 (emphasis added) (citing Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1132 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994)). Therefore, the court in *Stransky* suggested that information available when a company has made a statement may affect a determination of whether the projection was "not made in good faith or was made without a reasonable basis," and therefore, whether a company is subject to Rule 10b-5 liability. *Id.* at 1333.

Similarly, the safe harbor for forward-looking statements in Rules 175 and 3b-6 contains language that is analogous to the *Burlington Coat Factory*'s dictum. It provides that "an [issuer's forward-looking] statement within the coverage of [Rules 175(b) or 3b-6(b)] . . . shall be deemed not to be a fraudulent statement . . . unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith." 17 C.F.R. §§ 230.175(a), 240.2b-6(a) (1997); *see supra* text accompanying notes 131-35.

492 *See supra* Part II.A; *supra* text accompanying notes 219, 324.

493 *Burlington Coat Factory*, 114 F.3d at 1431.

494 *Id.* (citing Greenfield v. Heublein, Inc., 742 F.2d 751, 758 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985); *Polaroid II*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc)).

495 *Id.* at 1431-32; *see supra* text accompanying note 224.

under certain circumstances, we have not clarified when such circumstances might exist."[496] *Burlington Coat Factory* presented a new issue for the Third Circuit, which had not previously considered whether a duty to update attaches to "ordinary, run-of-the-mill forecasts."[497]

The plaintiffs claimed that Burlington Coat Factory breached its duty to update when the company failed to disclose information it had acquired after making an earnings projection.[498] According to the plaintiffs, such information materially changed the projection.[499] The court focused on the nature of the federal securities laws to determine whether a solitary earnings forecast triggered a duty to update that forecast on an ongoing basis in light of subsequently acquired, material information that would materially affect the original forecast.[500] The basis for this duty, according to the court, must "be that the projection contained an implicit factual representation that remained 'alive' in the minds of investors as a continuing representation."[501]

Emphasizing two "well settled . . . principle[s]" under the federal securities laws, the court held that a regular earnings projection lacks "an implicit representation on the part of the company that it will update the investing public with all material information that relates to the forecast."[502] First, the court reiterated that a company is not required to disclose material information absent a duty to disclose.[503] Second, the court stated that a company's accurate statement of prior success does not necessarily imply a continuation of success.[504] In addition, the Third Circuit, conspicuously omitting discussion of the PSLRA, explained that the imposition of a duty to update standard earnings forecasts would conflict with the SEC's current efforts to facilitate forward-looking voluntary disclosure from companies.[505] To the extent that a duty to update projections discourages companies from making earnings projections, investors would suffer, for "it is these specific earnings projections that are the

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496 *Burlington Coat Factory*, 114 F.3d at 1431-32 (citing *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1245 (3d Cir. 1989); *Polaroid II*, 910 F.2d at 17)). The court returned to a discussion of the "special circumstances" later in the opinion. *See infra* text accompanying notes 520-22.

497 *Burlington Coat Factory*, 114 F.3d at 1432.

498 *See id.*

499 *See id.*

500 *See id.* at 1432-33.

501 *Id.* at 1432.

502 *Id.* at 1432-33.

503 *See id.* at 1432 (citing *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993), *cert. denied sub nom.* Ross v. ZVI Trading Corp. Employees' Money Purchase Pension Plan, 511 U.S. 1017 (1994)).

504 *See id.* (citing, inter alia, Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1202 (1st Cir. 1996); Raab v. General Physics Corp., 4 F.3d 286, 289 (4th Cir. 1993)).

505 *Id.* at 1432-33 (citing Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1333 (7th Cir. 1995); *Raab*, 4 F.3d at 290).

most useful to investors in deciding whether to invest in a firm's securities."[506] Imposing burdensome disclosure obligations on companies appeared particularly inappropriate to the *Burlington Coat Factory* court given that the plaintiffs' claim, as recast by the court, meant that "the disclosure of a single specific forecast produced a continuous duty to update the public with either forecasts or hard information that would in anyway change a reasonable investor's perception of the originally forecasted range."[507] In light of the foregoing policy arguments, the court "decline[d] to hold that the disclosure of a single, ordinary earnings forecast can produce such an expansive set of disclosure obligations."[508] The court held that "the voluntary disclosure of an ordinary earnings forecast d[id] not trigger any duty to update."[509]

The Third Circuit's holding that companies are not under a duty to update "an ordinary earnings forecast" reaches the same result as the Seventh Circuit's decision in *Stransky,* which rejected the application of a duty to update projections.[510] The court in *Burlington Coat Factory* used language to describe forecasts that was nearly identical to that which the Seventh Circuit used in *Stransky* regarding projections: "We conclude that ordinary, run-of-the-mill forecasts contain no more than the implicit representation that the forecasts were made reasonably and in good faith."[511] Much like the *Stransky* holding was limited to projections,[512] the duty to update holding in *Burlington Coat Factory* only applied to standard forecasts.

The court in *Burlington Coat Factory* emphasized the importance of understanding that its holding was limited. It distinguished the facts in the case from those in *Greenfield* and *In re Phillips Petroleum Securities Litigation.*[513] In both of these cases, the Third Circuit "recognized that a duty to update might exist."[514] According to the *Burlington Coat Factory* court, *Greenfield* and *Phillips Petroleum* both addressed statements made in the context of "*takeover* attempts," therefore, "the initial disclosures that were argued to have triggered the duty to update involved in-

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506 *Id.* at 1433.

507 *Id.* at 1432.

508 *Id.*

509 *Id.* at 1433.

510 *See supra* text accompanying notes 326, 336.

511 *Burlington Coat Factory,* 114 F.3d at 1433 (citing Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1333 (7th Cir. 1995)). In *Stransky,* the court explained that "a projection can lead to liability under Rule 10b-5 only if it was not made in good faith or was made without a reasonable basis." *Stransky,* 51 F.3d at 1333.

512 *See supra* text accompanying notes 336-37.

513 *See Burlington Coat Factory,* 114 F.3d at 1433-34; *see supra* text accompanying notes 143-46 (discussing *Greenfield*), 156-59 (discussing *Phillips Petroleum*).

514 *Burlington Coat Factory,* 114 F.3d at 1433; *see supra* text accompanying notes 150 (discussing *Greenfield*), 162-63 (discussing *Phillips Petroleum*).

formation about events that could *fundamentally change* the natures of the companies involved."[515] On the other hand, the statement at issue in *Burlington Coat Factory* was only an earnings forecast.[516] The court explained that "finding a duty to update a disclosure of a takeover threat is a far cry from finding a duty to update a[ ] simple earnings forecast, which, if anything, contains a clear implication that circumstances underlying it are likely to change."[517]

To the extent that there is such a "clear implication that circumstances underlying [a forecast] are likely to change,"[518] the statement is likely to be immaterial, and not one on which an investor could be expected to reasonably rely. *Polaroid II*'s dicta stated that in "special circumstances," a company may have a duty to update a statement that, among other things, is reasonable for the parties to rely upon, and that becomes materially misleading.[519] Therefore, given that the *Burlington Coat Factory* court implicitly considered this reliance element, presumably concluded that the statement was immaterial, and that it distinguished the facts of the case from those in *Greenfield* and *Phillips Petroleum* to suggest that the required "special circumstances" were lacking, the holding in *Burlington Coat Factory* regarding the duty to update forecasts appears not to disrupt the existing duty to update case law that *Greenfield*, *Phillips Petroleum*, and *Polaroid II* established.

In fact, the court's consideration of the duty to update concluded with some guidance in dicta regarding what *Polaroid II*'s "special circumstances" requirement for a duty to update might entail.[520] This discussion goes far beyond *Stransky* because it appears to provide support for a duty to update. The court opined that "[w]here the initial disclosure relates to the 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 . . . of any radical change in the company's plans."[521] "[N]ews that [a] merger is no longer likely to take place" is an example of such a fundamental change.[522] In a footnote, the Third Circuit elaborated on its position:

> We emphasize that we are *not* saying that once a fundamental change is announced the company faces a duty

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515 *Burlington Coat Factory*, 114 F.3d at 1433 (citing Greenfield v. Heublein, Inc., 742 F.2d 751, 758-59 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985); *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1239, 1245 (3d Cir. 1989)).

516 *Id.*

517 *Id.* at 1434.

518 *Id.*

519 *See supra* text accompanying note 222.

520 *Burlington Coat Factory*, 114 F.3d at 1433-34.

521 *Id.* (citing *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1246 (3d Cir. 1989)).

522 *Id.* at 1434 (citing *Phillips Petroleum*, 881 F.2d at 1246).

> continuously to update the public with all material information relating to that change. Instead, we think 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. *But cf. Eisenstadt v. Centel Corp.*, 113 F.3d 738, 745 (7th Cir. 1997) (suggesting that even such a narrow duty might not exist).[523]

On the one hand, this language further clarifies when a company may have a duty to update prior disclosure. It appears to build on the qualifying language in *Stransky* which explained that the 7th Circuit "express[ed] no opinion on whether the outcome would be the same if a plaintiff contested statements of intent to take a certain action."[524] However, on the other hand, the court's suggestion that there may not exist a duty to update at all, together with its citation of *Eisenstadt*, is troubling because it undercuts much of the court's prior discussion concerning the duty. As discussed above, much of the court's treatment of the duty to update suggests that the Third Circuit recognized the duty; it merely declined to impose on Burlington Coat Factory a duty to update a standard earnings forecast.[525] This footnote leaves many questions unanswered, including whether there even exists a duty to update. Unfortunately, this footnote represented the end of the Third Circuit's theretofore cogent discussion of the duty.

Subsequent decisions within or by the Third Circuit have not clarified the dicta in *Burlington Coat Factory*.[526] A Pennsylvania district court case, *Wallace v. Systems & Computer Technology Corp.*,[527] addressed the duty to update in September 1997.[528] The court followed the Third Circuit's dicta in *Burlington Coat Factory* that the duty to update may exist "[u]nder certain circumstances."[529] The court discussed the holding of *Burlington Coat Factory*:

> [A]n ordinary, run-of-the mill earnings projection contains no more than the implicit representation that the forecasts were made reasonably and in good faith and

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523 *Id.* at 1434 n.20 (second emphasis added).

524 Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1332 n.4 (7th Cir. 1995); *see also supra* notes 340-42 and accompanying text (discussing this language).

525 *See supra* text accompanying note 509.

526 *See infra* text accompanying notes 527-31; *infra* Part IV.K.

527 No. CIV.A. 95-CV-6303, 1997 WL 602808 (E.D. Pa. Sept. 23, 1997).

528 *Id.* at *13, *18 n.43.

529 *Id.* at *13 (citing Greenfield v. Heublein, Inc., 742 F.2d 751, 758 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985); *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1245 (3d Cir. 1989)).

> disclosure of a specific earnings forecast does not contain the implication that the forecast will continue to hold good even as circumstances change. They do not contain an implicit representation that the company will update the investing public with all material information that relates to the forecast.[530]

Following this reasoning, the court held in *Wallace* that the defendant company "had no duty to update [an] earnings projection in light of events that occurred or became known to [the company] subsequent to the making of that projection."[531] In recognizing that a company may have a duty to update "[u]nder certain circumstances" while following only the narrow holding of *Burlington Coat Factory*, as opposed to the dicta, the *Wallace* court properly interpreted the Third Circuit's opinion. Despite *Wallace*, the Third Circuit's decision in *Weiner v. Quaker Oats Co.*, discussed below, reveals that the dicta in *Burlington Coat Factory* will undoubtedly, with respect to both the duties to correct and update, usher in further confusion to an area of law that desperately requires clarification.

K. *WEINER V. QUAKER OATS CO.*[532]

In contrast to *Wallace*, the Third Circuit decided this duty to update case in November 1997 without citing its June 1997 decision in *Burlington Coat Factory* as support.[533] The plaintiffs alleged that Quaker made statements prior to a merger that materially "omitted mention of a planned increase in the total debt-to-total capitalization ratio guideline."[534] Prior to applying the law to the facts of the case, the court set forth the law in the Third Circuit regarding nondisclosure claims under section 10(b) and Rule 10b-5.[535] The court cited *In re Phillips Petroleum Securities Litigation*, and maintained that "[i]n general, [s]ection 10(b) and Rule 10b-5 do not impose a duty on defendants to correct prior

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530 *Id.* at *18 n.43 (citing *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1431 (3d Cir. 1997)).

531 *Id.*

532 129 F.3d 310 (3d Cir. 1997).

533 Although the *Weiner* court did not mention *Burlington Coat Factory* to support its holding regarding the duty to update claim relating to Quaker's statements about its "total debt-to-total capitalization guideline ratio," *id.* at 315-18, it cited the case in its analysis of the plaintiffs' claim regarding alleged, materially misleading earnings growth projections. The court cited *Burlington Coat Factory* in its discussion of materiality, *id.* at 320, and in its explanation of the requirement that a statement must "remain 'alive'" to be actionable in a securities fraud claim, *id.* at 321. The court dismissed the claim regarding the projections because a subsequent disclosure "cured" the projection of its "misleading effect," thus rendering it immaterial. *Id.*

534 *See id.* at 316.

535 *See id.* at 315-16.

statements—particularly statements of intent—so long as those statements were true when made."[536] Standing alone, it is unclear whether the court was merely explaining in this sentence the narrow province reserved for the duty to correct, or if it was rejecting—or at least limiting—the duty to update, but couching it in duty to correct language.

However, the Third Circuit's subsequent analysis of the law reveals that the court was neither concerned with the duty to correct nor sought to reject the duty to update. Rather, despite its use of duty to correct language, the court recognized the duty to update and, in effect, distinguished it from the "duty to correct prior statements . . . [that] were true when made."[537] Quoting the duty to correct language in *Phillips Petroleum* that actually represented a recognition of a duty to update,[538] the court noted that "'[t]here can be no doubt that a duty exists to correct prior statements, if the prior statements were true when made but misleading if left unrevised.'"[539] The court devoted considerable attention to explaining the requirement that the statement must be material.[540] After finding that the statements were material, the court held that "a reasonable factfinder could determine that Quaker's statements . . . would have been material to a reasonable investor, and hence that Quaker had a duty to update such statements when they became unreliable."[541] Unlike the prior cases, some of which only went so far as to recognize a duty to update, and often only in dicta, the *Weiner* court held that a reasonable factfinder could find that Quaker had a duty to update its prior statements.

Because the claim in *Weiner* regarding Quaker's failure to disclose its intention to increase the total debt-to-total capitalization ratio guideline—unlike the claim in *Wallace*[542]—did not involve a projection, *Burlington Coat Factory* may not have been in point. Perhaps the Third Circuit has adopted a case-by-case approach whereby it focuses primarily on the nature of the original statement. For example, it justified in *Burlington Coat Factory* its recognition of the duty to update in *Greenfield* and *Phillips Petroleum* on the ground that the statements that the defendants made in those cases were in connection with "takeover attempts," thereby "involv[ing] information about events that could funda-

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536 *Id.* at 316 (citing *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1245 (3d Cir. 1989)). The court did not revisit its dicta in *Burlington Coat Factory* regarding how the duty to correct might attach to forward-looking statements. *See supra* notes 480-92 and accompanying text.

537 *Weiner*, 129 F.3d at 316.

538 *See supra* text accompanying note 162.

539 *Weiner*, 129 F.3d at 316 (alteration in original) (quoting *Phillips Petroleum*, 881 F.2d at 1245).

540 *See id.* at 316-18.

541 *Id.* at 318.

542 *See supra* text accompanying note 531.

mentally change the natures of the companies involved."[543] In *Burlington Coat Factory* and *Wallace*, the courts rejected imposition of a duty to update standard earnings projections.[544] In *Weiner*, Quaker's material omission was in the context of a merger,[545] that is, like the circumstances surrounding the statements in *Greenfield* and *Phillips Petroleum*, in the context of "events that could fundamentally change the natures of the companies involved."[546] The Third Circuit presumably viewed the types of statements in *Greenfield*, *Phillips Petroleum*, and *Weiner*, in contrast to those in *Burlington Coat Factory* and *Wallace*, as material statements on which a reasonable investor might rely.

Nevertheless, the *Weiner* court's omission of any discussion of the dicta regarding either the duty to correct or the duty to update in *Burlington Coat Factory*, which it decided only five months before *Weiner*, is surprising. This omission raises questions about the precedential value of *Burlington Coat Factory*—even within the Third Circuit—and, in particular, about the precise status of the duty to update. *Weiner* would have been an ideal case for the Supreme Court to hear, and to decide whether the duty to update exists and, if so, to establish the scope of the duty. In light of the circuit split and the uncertainty surrounding the language in the PSLRA, the legal issue is certainly ripe.

V. RESTRICTING THE SCOPE OF THE DUTY TO UPDATE

A. JUSTIFICATION

The cases decided after *Polaroid II* clearly suggest that there is no uniform understanding of the duty to update. The PSLRA similarly did not introduce consistency. *Shaw v. Digital Equipment Corp.*, *Glassman v. Computervision Corp.*, *Gross v. Summa Four, Inc.*, *In re HealthCare Compare Corp. Securities Litigation*, *Eisenstadt v. Centel Corp.*, *In re Burlington Coat Factory Securities Litigation*, *Wallace v. Systems & Computer Technology Corp.*, and *Weiner v. Quaker Oats Co.* were all decided after the enactment of the PSLRA. With the notable exception of *Eisenstadt*,[547] these other cases understandably have neither cited the PSLRA as support for, nor against, a recognition of a duty to update. In *Burlington Coat Factory*, the Third Circuit extensively discussed how a duty to update could undermine the Commission's policy goal of encouraging forward-looking statements, yet the case conspicuously neglected to mention the PSLRA in its discussion of the duty to update.[548] Recent

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

544 *See supra* text accompanying notes 509, 531.

545 *See supra* text accompanying note 534.

546 *Burlington Coat Factory*, 114 F.3d at 1433.

547 *See supra* note 466 and accompanying text.

548 *Burlington Coat Factory*, 114 F.3d at 1432-33.

commentary has proposed that until the sections of the PSLRA addressing the duty to update are "further clarified through judicial interpretation, it may be prudent to assume that some duty to update projections has been assumed once they are made . . . and to factor this into the equation when deciding whether to make public projections."[549] However, the PSLRA and post-*Polaroid II* case law shed more light on the status of the duty to update than these authorities suggest.

The present legislative intent of, and SEC commitment to, promoting the public policy goals of promoting efficient markets and protecting investors through the encouragement of forward-looking statements[550] will probably trump the notion of protection via a broad duty to update. This result is especially probable given that lawyers are apparently advising their clients not to make forward-looking statements in light of potential liability arising from a duty to update.[551] However, because the duty to update does provide the public with some protection against fraud, courts may continue to recognize the duty barring legislative decree or binding precedent. Furthermore, the Rule 175 and Rule 3b-6 safe harbor for forward-looking statements, which the SEC adopted in 1979, has not stopped courts from recognizing the duty to update. Nevertheless, the policy considerations regarding the facilitation of forward-looking statements, in conjunction with courts' current reluctance to impose—or, in some jurisdictions, refusal to recognize—the duty, suggest that courts are likely to narrow the scope of the duty to update.

This narrowing of the duty to update will probably discourage some hopeful plaintiffs from bringing duty to update claims against companies. This should, to an extent, reduce the number of frivolous Rule 10b-5 lawsuits. However, a substantial reduction in the number of duty to update claims will only occur if Congress clarifies the duty to update or the Supreme Court hears a duty to update case and introduces uniformity to the case law.

B. METHODS

The post-*Polaroid II* case law has suggested ten ways in which courts can reduce the reach of the duty to update.[552] If courts follow

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549 Cochran & McCoy, *supra* note 367, at 17.

550 *See supra* notes 350-51 and accompanying text (discussing the significance of forward-looking statements).

551 *See supra* text accompanying notes 349, 549.

552 As mentioned earlier, a discussion of the elements that plaintiffs must prove to state a claim for a securities fraud case under Rule 10b-5, and of the pleading requirements under the federal securities laws and the Federal Rules of Civil Procedure, is beyond the scope of this Note. In light of the Note's relative silence on these issues, it is important to point out here that courts can also limit the scope of the duty to update by narrowly construing all of the elements of a Rule 10b-5 claim; for example, by narrowly construing scienter or causation, and

Polaroid II, the dicta prescribes seven criteria for the activation of a company's duty to update: A company may be under a duty to update (i) in "special circumstances" (ii) a statement that was an initially correct, (iii) forward-looking disclosure (iv) with a "clear meaning" (v) on which an investor could reasonably rely (vi) when there is a "change" (vii) that causes the original statement to become materially misleading.[553] The first way in which courts can limit the scope of the duty to update is to require all seven of these criteria, and to narrowly construe each of them. For example, there will be cases where the original statement can be viewed as either an historical or a forward-looking statement. A narrow interpretation of forward-looking statements will enable courts to dismiss many duty to update claims. Second, courts may follow the example that the Second Circuit set in *In re Time Warner Inc. Securities Litigation* and restrict holdings to the particular facts of each case.[554] A court could recognize or impose a duty to update on a company, and limit this holding to the unique facts of that case.

Third, following *Polaroid II* and *Evanowski v. Bankworcester Corp.*, courts can strictly interpret what information is within the scope of the original disclosure.[555] This would immunize companies from duty to update claims predicated on subsequent events that concern matters even remotely outside this scope. A narrow interpretation of the scope of the original statement will also enable courts to find that there has not been "a change," which the *Polaroid II* dicta requires,[556] that has rendered the original statement materially misleading. If the scope of the original disclosure is construed particularly narrowly, subsequent events may not affect the narrowly defined original statement, or if they do, they may only have a peripheral impact which would be insufficient to render the statement itself materially misleading.

Courts may not require all seven of the *Polaroid II* elements. These courts can narrow the scope of the duty to update by imposing restrictions on the original disclosure. For example, nearly all courts will refuse to impose on companies a duty to update immaterial statements.[557] The fourth method of limiting the duty to update is to rely on *TSC Industries, Inc. v. Northway, Inc.*, *Basic Inc. v. Levinson*, *Weiner v. Quaker Oats Co.*, and similar cases to emphasize that the original disclosure, and

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by ensuring that plaintiffs plead each element with sufficient specificity. Part V.B of this Note focuses on avenues available to courts to narrow the scope of the duty to update in and of itself—not means by which courts can limit liability under Rule 10b-5 in general.

553 *See supra* text accompanying notes 224-31.

554 *See supra* text accompanying note 291.

555 *See supra* text accompanying notes 212-13; *infra* text accompanying notes 266-68.

556 *See supra* text accompanying note 230.

557 *Cf. supra* note 231 (quoting dicta in *Hillson Partners Ltd. Partnership* that other cases can be interpreted to impose on companies a duty to update immaterial statements).

the additional information which renders the original disclosure inaccurate or misleading, must both be material.[558] A refusal to expand upon these cases' materiality standard, and a requirement that both the initial statement and the subsequent information must be material, will eliminate many duty to update claims. Courts, for example, can apply the bespeaks caution doctrine to dismiss claims based on forward-looking statements that are accompanied by "meaningful" and "sufficient" cautionary language on the ground that the statements are immaterial.[559]

Fifth, courts can rely on *Time Warner*, *Hillson Partners Ltd. Partnership v. Adage, Inc.*, *Shaw v. Digital Equipment Corp.*, *Glassman v. Computervision Corp.*, and *Gross v. Summa Four, Inc.* to reserve application of the duty to update for only "the sort of definite positive projections that might later require later correction."[560] This approach, which focuses on the materiality of the original statement, will filter out many claims. For example, this requirement would insulate companies that make general statements of opinion from potential duty to update liability. As the Fourth Circuit has explained, "'soft,' 'puffing' statements . . . generally lack materiality because the market price of a share is not inflated by vague statements predicting growth."[561] Similarly, in *Eisenstadt v. Centel Corp.*, the Seventh Circuit opined that "[i]t would be unreasonable for investors to attach significance to general expressions of satisfaction with the progess of [a] seller's efforts to sell."[562]

Sixth, in contrast to the previous strategy, courts can narrow the scope of the duty by restricting a recognition of a duty to update to forward-looking statements other than predictions and projections. For example, as the Seventh Circuit's dicta in *Stransky v. Cummins Engine Co., Inc.* hinted, courts could reserve the duty to update for situations where a company makes material public "statements of [an] intent to take a certain action"[563] that become materially inaccurate, misleading, or incomplete in light of subsequent developments. Similarly, courts could follow the dicta in *In re Burlington Coat Factory Securities Litigation*, imposing the duty only in situations "[w]here the initial disclosure relates to the

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558 *See supra* Parts I.C.1, IV.K.

559 *See supra* Part I.C.2; *supra* note 276; *supra* text accompanying notes 313-14, 396. The first prong of the PSLRA safe harbor may also insulate companies from liability for failing to update statements that either include cautionary language or are immaterial, which have become materially inaccurate or misleading. *See supra* note 360 and accompanying text; *infra* text accompanying note 578.

560 Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1219 n.33 (1st Cir. 1996) (quoting *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993), *cert. denied sub nom.* Ross v. Zvi Trading Corp. Employees' Money Purchase Pension Plan, 511 U.S. 1017 (1994)).

561 Raab v. General Physics Corp., 4 F.3d 286, 289 (4th Cir. 1993).

562 Eisenstadt v. Centel Corp., 113 F.3d 738, 745 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (7th Cir. 1997).

563 Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1332 n.4 (7th Cir. 1995).

announcement of a fundamental change in the course the company is likely to take."[564] In particular, courts could follow the Third Circuit's distinction in *Burlington Coat Factory* of the facts in that case with those in *Greenfield v. Heublein, Inc.* and in *In re Phillips Petroleum Securities Litigation*, and require that the statements or omissions must "involve[ ] information about events that could fundamentally change the natures of the companies involved," such as in the context of a takeover.[565] The recent holding in *Weiner*, in which the Third Circuit found that Quaker may have had a duty to update statements made before a merger, may provide further support for this restriction of the duty.[566]

The seventh method, like the prior three, focuses on the original statement. Courts can narrowly construe the types of statements on which a reasonable investor could rely. If a reasonable investor cannot be expected to rely on a particular statement, the statement is not actionable in a securities fraud claim,[567] and thus cannot trigger a duty to update. The Third Circuit in *Burlington Coat Factory* explained, for example, that a "simple earnings forecast . . ., if anything, contains a clear implication that circumstances underlying it are likely to change."[568] A vague or indefinite projection may not only be immaterial, it may also be a statement on which an investor could not reasonably rely. Likewise, the bespeaks caution doctrine, in addition to speaking to the materiality of the statement, can also render reliance on a particular statement unreasonable.[569] Therefore, if companies include meaningful and sufficient cautionary language in their forward-looking statements, courts may be able to dismiss duty to update claims on the ground that the plaintiffs' reliance on these statements was unreasonable. Carl Schneider has argued that "[t]o the extent reasonable investors should perceive that the information initially disclosed is subject to change, the fact that a change has occurred should not, in and of itself, trigger an independent Rule 10b-5 disclosure obligation under the duty to update rubric."[570] Similarly, courts probably will refuse to impose on companies a duty to update statements that a third party unaffiliated with the company made, for, in most instances, it would be unreasonable for investors to rely on these statements as if the company had made them.[571]

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564 *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1433-34 (3d Cir. 1997).

565 *Id.* at 1433 (citing Greenfield v. Heublein, Inc., 742 F.2d 751, 758-59 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985); *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1239, 1245 (3d Cir. 1989)).

566 *See supra* text accompanying notes 545-46.

567 *See supra* text accompanying note 72.

568 *Burlington Coat Factory*, 114 F.3d at 1434.

569 *See supra* note 59.

570 Schneider, *supra* note 10, at 10.

571 *See* Raab v. General Physics Corp., 4 F.3d 286, 288-89 (4th Cir. 1993) (explaining that "[t]he securities laws require [a company] to speak truthfully to investors; they do not

The eighth method is for courts to limit the circumstances surrounding and the time frame within which plaintiffs can bring a claim alleging a duty to update. For instance, certain future-oriented statements will over time become "stale and immaterial."[572] Since *Ross v. A.H. Robins Co., Inc.*, the courts have not further refined the "alive" standard, which prescribed that the duty to update lasts only as long as a reasonable investor can rely on the original disclosure.[573] For example, the First Circuit in *Polaroid II* raised this issue of how long a company would be "under a duty of disclosure," but declined to address it.[574] Similarly, "[c]ommentators [still] question[ ] how long a forward-looking statement will be considered current and how far in the future, if at all, an issuer must continue to update [it]."[575] If, for example, a substantial amount of time has elapsed or information has already been publicized that casts doubt on the original disclosure, courts can dismiss duty to update claims.[576]

There are other ways of narrowing the ambit of the duty to update. Following the examples of *Hillson Partners* and *Burlington Coat Factory*, the ninth approach is to decline to impose the duty to update in certain instances for public policy reasons.[577] Courts can argue that the imposition of a duty to update in a particular case would discourage other companies from making forward-looking statements that provide inves-

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require the company to police statements made by third parties for inaccuracies, even if the third party attributes the statement[s to the company]").

572 2 BROMBERG, *supra* note 118, § 6.11(543).

573 *See supra* text accompanying notes 117-18.

574 *Polaroid II*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc). The Third Circuit in *Burlington Coat Factory* addressed the concept of a "representation . . . remain[ing] 'alive,'" *see supra* text accompanying note 501, but it failed to advance the law beyond *Ross* in this area. In *Weiner*, the Third Circuit reiterated the requirement that "for the statement to have . . . a deleterious effect, it [must] . . . remain 'alive' in the market, unmodified." Weiner v. Quaker Oats Co., 129 F.3d 310, 321 (3d Cir. 1997). The court decided that Quaker's disclosure in its annual report, available as of September 23, 1994, "cured" its August 4, 1994 projection of its "misleading effect." *Id.* As a result, the court held that "no reasonable finder of fact could conclude that the projection influenced prudent investors." *Id.*

575 1994 Safe Harbor Release, *supra* note 140, at 85,787.

576 *See, e.g., Weiner*, 129 F.3d at 321 (concluding that disclosure in Quaker's September 23, 1994 annual report "cured" an August 4, 1994 statement of its "misleading effect"); Hillson Partners Ltd. Partnership v. Adage, Inc., 42 F.3d 204, 212 (4th Cir. 1994) (explaining that "'[t]he securities laws require disclosure of information that is not otherwise in the public domain,' not information that has already been publicly—indeed, officially—disclosed by the company" (citing Sailors v. Northern States Power Co., 4 F.3d 610, 613 (8th Cir. 1993) (quoting Acme Propane, Inc. v. Tenexco, Inc., 844 F.2d 1317, 1323 (7th Cir. 1988)))); *Raab*, 4 F.3d at 289 (clarifying that a "'failure to disclose material information may be excused where that information has been made credibly available to the market by other sources'" (quoting *In re* Apple Computer Sec. Litig., 886 F.2d 1109, 1115 (9th Cir. 1989), *cert. denied*, 496 U.S. 943 (1990))).

577 *See supra* Part III.B.4; *supra* notes 306-09 and accompanying text; *supra* text accompanying notes 505-08.

tors with valuable information and strengthen the securities markets. Similarly, courts can warn that the imposition of a duty to update in a particular case would flood the courts with securities fraud lawsuits.

The tenth method, which is related to the previous approach, is to maintain that Congress's adoption of a safe habor for forward-looking statements in the PSLRA indicates its opposition to the duty to update. The Seventh Circuit in *Eisenstadt*, for example, suggested that the PSLRA supported a rejection of the duty to update.[578] However, as Part IV.F explained above, this approach is problematic because the vague language of the PSLRA does not clearly reject the duty to update.

Courts, of course, could employ any combination of these approaches to narrow the reach of the duty to update. For now, courts, in most cases, will follow precedent in their jurisdictions. In one respect, the various circuits have treated duty to update cases similarly. They have been reluctant to impose a broad duty to update on companies. This reluctance suggests that most courts will avail themselves of the aforementioned ten ways to reduce the scope of the duty to update.

CONCLUSION

As a result of intercircuit inconsistency and the SEC's and Congress's failure to provide clarification, the precise contours of the duty to update remain uncertain. The bewildering case law is in dire need of clarification and consistency, which will come only from further legislative action or a Supreme Court decision that directly addresses whether and when a company has a duty to update a prior disclosure that was originally accurate, but became materially inaccurate, misleading, or incomplete due to the passage of time or subsequent events.[579] In the interim, companies remain uncertain of their duties with respect to updating prior disclosures,[580] and will remain reluctant to make forward-looking statements. Similarly, shareholders and their lawyers are uncertain whether companies have breached a duty to correct, a duty to update, or whether a duty to update exists at all, and therefore, do not know how to plead.[581]

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578 *See supra* note 466 and accompanying text.

579 The Supreme Court has never heard a duty to correct or a duty to update case. *See* Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1331 n.1 (7th Cir. 1995). The Seventh Circuit in *Stransky* noted that "the Court affirmatively declined to discuss the question of liability for projections in *Basic Inc. v. Levinson*." *Id.*

580 *See* 1994 Safe Harbor Release, *supra* note 140, at 85,787.

581 *See, e.g., In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1430 (3d Cir. 1997) (explaining that "although plaintiffs characterize their claim as a 'duty to correct' claim, they appear to be asserting both a duty to correct and a duty to update"); *Stransky*, 51 F.3d at 1331, 1336 (complaining that "[l]itigants often fail to distinguish between [the duties to correct and update] (as did Stransky in this case) and to delineate their exact parameters," which the court deemed somewhat understandable in light "of the confused state of the law in the area").

A limited duty to update should and does currently exist—except in the jurisdictions that have declined to recognize the duty. Although its statutory and case law origins are the same as those of the duty to correct, the duty to update differs from the duty to correct. A company has a duty to correct material, initially inaccurate historical statements.[582] By contrast, the vast majority of cases and scholarly works have concluded that the duty to update only applies to material, initially accurate forward-looking statements that have become materially inaccurate or misleading. While the courts have almost universally accepted the duty to correct, several post-*Polaroid II* cases have refused to recognize the duty to update, and most are averse to imposing it on companies. The distinction between the two duties is significant because the imposition of a duty to update, when added to the almost universally recognized duty to correct, could be very burdensome and costly for companies. In addition, it is likely to discourage companies from making projections, which would deprive investors and securities professionals of valuable information.

In light of the circuit split on the duty to update and the legislative intent underlying the PSLRA, which is to protect investors by encouraging forward-looking statements, courts are likely to limit the scope of the duty to update. This limiting of the scope of the duty to update would reflect a preference for achieving the public policy goal of protecting investors by promoting forward-looking statements rather than via the imposition on companies of a broad duty to update. Part V identified ten ways that courts may continue to recognize the duty, yet greatly restrict its imposition. Many of these foreseeable restrictions on the scope of the duty to update speak to the "special circumstances" requirement of *Polaroid II*, which the First Circuit neglected to clarify in *Polaroid II* or thereafter.[583] The Third Circuit in *Burlington Coat Factory* recently suggested in dicta that these special circumstances may exist "[w]here the initial disclosure relates to the announcement of a fundamental change in the course the company is likely to take."[584] Although the Third Circuit in *Weiner* did not expressly identify the merger context that surrounded the statement at issue in the case as constituting the required special circumstances, its holding that a reasonable trier of fact could find that the defendant had a duty to update certain statements suggests that the court found that the necessary special circumstances were present. This spe-

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582 *Cf. Burlington Coat Factory*, 114 F.3d at 1431 (suggesting in dicta that the duty to correct "can also apply to a certain narrow set of forward-looking statements"). For a discussion of how the court in *Burlington Coat Factory* departed from the prior duty to correct case law, see *supra* Part IV.J.1.

583 *See supra* notes 224-25 and accompanying text; *supra* text accompanying notes 388-90.

584 *Burlington Coat Factory*, 114 F.3d at 1433-34.

cial circumstances requirement gives courts wide discretion in determining when to impose a duty to update. In the absence of further legislation or binding precedent from the Supreme Court, courts will likely dismiss many duty to update claims on the ground that the requisite special circumstances are lacking.

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