

## [Securities Regulation Daily Wrap Up, SECURITIES OFFERINGS—Petition asks High Court to set standards for bespeaks caution doctrine, \(Apr. 21, 2023\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

When must a cautionary statement be made, and what must it say?

A petition for certiorari asks the Supreme Court to address two matters: what standards apply to the bespeaks caution doctrine, and the interpretation of "seller." The complaint challenged statements made in social media posts, and the Ninth Circuit held, essentially, that the cautionary language in the funds' offering documents was too attenuated and too broad for the bespeaks caution doctrine to apply. The panel also concluded that the petitioners were "sellers" even though, they argue, they did not directly and actively solicit the plaintiff's investment. The holding places the Ninth Circuit at odds with nearly every other court to consider these issues, the petition says, and the Court should review these important questions ([Cardone Capital, LLC v. Pino](#), April 14, 2023).

**Real estate investments.** The petition was brought by Cardone Capital, an investor in real estate through pooling money from many investors. At issue are two funds launched by Cardone in 2018 to acquire various real estate assets in income-producing multi-family residential properties. The offering circulars for the funds noted the risks of investing, including ten pages of warnings such as that the business may never be profitable or generate significant revenue, that the fund manager had complete discretion in making distributions, and that investors might lose their investments.

The respondent, Luis Pino invested in both funds in 2019. Near the start of the COVID-19 pandemic in April 2020, cash distributions were temporarily suspended. The distributions resumed in two months, and payments were made to make up for the suspension. There is no dispute that Pino's investments have performed as projected.

**The lawsuit.** Pino filed suit in September 2020, alleging violations of Section 12 of the Securities Act. The complaint identified three categories of misrepresentations, made mostly on social media: (1) the projected return rate of the funds; (2) the likelihood and amount of cash distributions; and (3) the acquisition and financing of properties by the funds. The challenged statements were made in social media posts, although Pino never claimed to have seen any of the posts. The district court dismissed the complaint with prejudice, concluding that the statements were protected by the bespeaks caution doctrine and that Cardone Capital was not a "seller" under Section 12(a)(2) because Pino did not allege that Cardone Capital passed title to Pino or directly solicited his investment.

**The Ninth Circuit.** In an unpublished opinion, the [Ninth Circuit](#) affirmed in part, reversed in part, and remanded. In particular, the panel held that the district court erred in holding that the bespeaks caution doctrine warranted dismissal of all the alleged misstatements. Here, the court assumed, without holding, that cautionary language does not necessarily need to appear in the same document as the alleged misstatement, but nevertheless found that the warnings in the offering circulars did not insulate statements made in social media posts; the cautionary language was general and too broad to immunize otherwise actionable misstatements, the court said, and the later misstatements were "too attenuated" from the release of the offering circulars.

In a second, [published](#) opinion, the panel concluded that Cardone Capital was a statutory seller. While Cardone Capital did not target Pino with direct solicitations, it was a significant participant in the selling transaction. The court agreed with an [Eleventh Circuit](#) decision holding that YouTube videos and other similar postings can

constitute solicitation under Section 12. "Pino fairly alleges that the nature of social media presents dangers that investors will be persuaded to purchase securities without full and fair information," the Ninth Circuit panel said.

**Bespeaks caution.** The petition argues that the Ninth Circuit has created a circuit split around the bespeaks caution doctrine. The petition points out that other circuits (the Second, Third, and Tenth) that have addressed the question have applied the bespeaks caution doctrine even when the forward-looking prediction and cautionary statements were made at different times. The petition noted in particular that language found by the Second Circuit to be sufficiently narrow and precise was identical in essence to the warnings in this case. If this case were heard by the Second Circuit, the petition says, it most likely would have found the language to bespeak caution.

In addition, the Ninth Circuit contravenes the policy rationale underlying the doctrine by elevating "off-the-cuff" remarks on social media over disclosures and cautions made in formal offering circulars. Statements must be analyzed in context, and the decision below gives short shrift to the context—and materiality—based considerations at the heart of the bespeaks caution doctrine, the petition says.

**Seller.** The petition's other argument is that the Ninth Circuit's holding also deepened a circuit split over who may be sued as a statutory seller under Section 12(a)(2). The Ninth and Eleventh (in the case noted above) Circuits have taken an expansive approach to the issue that conflicts with that taken by other circuits. The Eleventh Circuit rejected the requirement that a solicitation be "personal" or "individualized," and the Ninth went further by substituting for the statutory language an alternative theory of liability predicated on whether someone is a "significant participant." The Ninth Circuit did not even tether the social media engagement to the particular plaintiff or require a nexus between the two, the petition says, and this cannot be squared with the statutory language or the Supreme Court's and other appellate courts' case law. Other courts (the Second and Third, plus many district courts) have read Section 12 to require the active and direct solicitation of a plaintiff's investment.

The petition is [No. 22.1016](#).

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Companies: Cardone Capital, LLC; Cardone Equity Fund V., LLC; Cardone Equity Fund VI, LLC.

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