ASHER TO *ASHER* AND DUST TO DUST:

THE DEMISE OF THE PSLRA SAFE HARBOR?

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The safe harbor provision[1] of the Private Securities Litigation Reform Act ("PSLRA")[2] insulates issuers from liability for making forward-looking statements that, *inter alia*, "are accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement."[3] Lawmakers inserted the safe harbor provision into the PSLRA when the statute was enacted in 1995 to enable corporations to successfully move to dismiss "meritless" and "abusive" securities claims prior to expensive and protracted discovery.[4] Since the enactment of the PSLRA, several circuit courts and dozens of district courts have granted these motions.[5]

Judge Frank Easterbrook's decision in *Asher v. Baxter International Inc.*[6] regarding the PSLRA safe harbor has sparked a firestorm of controversy and ignited a raging debate in the federal securities bar. The *Asher* decision calls into question whether the safe harbor provision of the Private Securities Litigation Reform Act will continue to protect companies from costly and lengthy discovery in federal securities litigation. Proponents of the *Asher* opinion contend that the Seventh Circuit properly held that in certain situations, like the one *sub judice*, discovery is necessary to determine whether courts should invoke the safe harbor provision to dismiss a federal securities claim. Opponents argue that the *Asher* opinion is a radical shift in safe harbor jurisprudence wherein the court

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1. The PSLRA added substantially identical safe harbor language to Section 27A of the Securities Act, 15 U.S.C. § 77z-2 (2005), and Section 21E of the Securities Exchange Act, 15 U.S.C. § 78u-5 (2005).

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

3. 15 U.S.C. § 78u-5 (c)(1)(A)(i).

4. *See infra* notes 36-37 and accompanying text.

5. *See infra* notes 80-92 and accompanying text.

6. 377 F.3d 727 (7th Cir. 2004).

ruled that it is virtually impossible to dismiss a federal securities action prior to discovery. They further argue that *Asher*, if followed, may significantly lengthen the duration of otherwise meritless securities actions and severely curtail the willingness of corporations to issue forward-looking disclosures. The *Asher* defendants' petition for a writ of certiorari was joined by several organizations who filed *amicus curiae* briefs arguing that the Supreme Court should hear the case and reverse it.[7] Some seem ready to give the safe harbor provision its last rites when they argue that the *Asher* decision, if left standing, signals the demise of the PSLRA safe harbor provision.

In *Asher*, the Seventh Circuit rejected defendants' attempt to rely on the protection of the PSLRA's safe harbor provision on a motion to dismiss prior to discovery. Judge Easterbrook held that dismissal was inappropriate absent discovery regarding whether the defendants' cautionary statements identified the principal risks faced by the company at the time the forward-looking statements were made. As he stated, "the problem is that there is no reason (on this record) to conclude that Baxter mentioned those sources of variance that (at the time of the projection) were the principal or important risks. . . . This raises the possibility—no greater confidence is possible before discovery—that Baxter omitted important variables from the cautionary language and so made projections more certain than its internal estimates at the time warranted."[8] Accordingly, he reversed the district court's dismissal of the complaint, and remanded the case to the district court so that discovery could commence in the action.[9]

It is beyond cavil that the Seventh Circuit's decision in *Asher* diverges from the other recent circuit court cases, such as *Baron v. Smith*[10] and *Rombach v. Chang*,[11] which dismissed federal securities claims prior to discovery. Many commentators have argued, like the *Asher* defendants and the *amici curiae*, that Asher has created a *bona fide* circuit split worthy of Supreme Court review.[12] Moreover, *Asher* seems to run

7. *See infra* notes 104-34 and accompanying text.
8. *See Asher*, 377 F.3d at 734.
9. *Id.*
10. 380 F.3d 49 (1st Cir. 2004).
11. 355 F.3d 164 (2d Cir. 2004).
12. *See infra* notes 154-161 and accompanying text.

counter to the historical trend—established first by Securities and Exchange Commission (SEC) in the late 1970s, continued by the federal judiciary in the 1980s and early 1990s, and, finally, solidified by Congress when it passed the PSLRA safe harbor in 1995—of promoting meaningful forward-looking disclosures by corporations for the benefit of the investing public while providing protection for those companies against lengthy and expensive discovery in otherwise meritless lawsuits. On the other hand, the current post-Enron and post-Sarbanes legal environment is ripe for decisions, like *Asher*, that erode the PSLRA's procedural and substantive safeguards for corporate defendants.

On March 21, 2005, the Supreme Court denied the *Asher* defendants petition for a writ of certiorari. This article examines the PSLRA's safe harbor provision and the *Asher* decision's place in safe harbor jurisprudence. Part I of the article explores the pre-PSLRA protections for companies' forward-looking statements and projections. Part II of the article examines the PSLRA's safe harbor provision, as well as the cases and issues that established the contours of pre-*Asher* safe harbor jurisprudence. Part III of the article examines the *Asher* decision itself. Part IV of the article analyzes the *Asher* decision and critically reflects on the securities bar's reaction to it. Finally, the article concludes that although the *Asher* opinion may signal a reversal in the trend of circuit court opinions that strengthen the protections offered by safe harbor, the damage to the safe harbor provision is not fatal.

I.
PRE-PSLRA PROTECTION FOR FORWARD-LOOKING STATEMENTS

Regulatory Protection: The SEC Adopts a Limited Safeguard

From its inception until the 1970s, the Securities and Exchange Commission prohibited forward-looking projections and statements by companies in their disclosure documents and releases.[13] The Commission worried that unsophisticated investors would fail to recognize the inherent unreliability of

13. Safe Harbor for Forward-Looking Statements, Exchange Act Release No. 33-7101, 1994 WL 562021, at *2 (Oct. 13, 1994) [*hereinafter* "Safe Harbor Release"].

such information when making investment decisions.[14] In the early 1970's, however, the Commission began to recognize a growing disparity between the information available to investment professionals and that available to the general public.[15] By virtue of their close contact with corporate executives and careful study of corporate prospects, investment professionals were often privy to information that was obscured from the average investor.[16] To address the growing concern among individual investors that they were at a substantial informational disadvantage, the SEC reexamined its traditional prohibition of forward-looking statements.[17] Finally, in 1979, the SEC restructured its rules and adopted sections 230.175 and 240.3b-6 of chapter 17 of the Code of Federal Regulations, which are meant to encourage voluntary, forward-looking corporate disclosures.[18] The rules provide:

> [Forward-looking statements which are] made by or on behalf of an issuer or by an outside reviewer retained by the issuer or by an outside reviewer retained by the issuer 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.[19]

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14. *Id.*

15. Statement By The Commission On Disclosure Of Projections Of Future Economic Performance, Exchange Act Release No. 9984 [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,211, at 82,666 (Feb. 2, 1973) ("[P]rojections are sought by all investors, whether institutional or individual. The Commission is concerned, however, that all investors do not have equal access to this material information.") [*hereinafter* "Projections"]. *See also* Suzanne J. Romajas, Note, *The Duty to Disclose Forward-Looking Information: A Look At the Future*, 61 FORDHAM L. REV. S245, S249-S252 (1993).

16. *See Projections, supra* note 15.

17. *Id. See also* Romajas, *supra* note 15, at S249, citing Disclosures to Investors—A Reappraisal of Administrative Policies Under the '33 and '34 Acts [1962-1972 Special Studies Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 74,601 at 65,242 (May 9, 1961).

18. Safe Harbor Rule For Projections, Exchange Act Release No. 15,944 [1979 Transfer Binder] (June 25, 1979) ("The rule is being adopted in order to further the Commission's goal of encouraging disclosure of projections and forward looking information both in Commission filings and in general."). *See also* Romajas, *supra* note 15, at S252-54.

19. 17 C.F.R. §§ 230.175(a), 240.3b-6(a) (2005) (both provisions are substantially identical).

Although the SEC's new rules placed the burden of proof on plaintiffs to demonstrate liability, these rules did nothing to shield defendants from the expense of discovery in securities lawsuits that ultimately proved to be baseless; defendants were often unable to obtain dismissal on the pleadings because plaintiffs were entitled to discovery to sustain their burden.[20] Recognizing that the inevitability of protracted and costly discovery undermined the goal of encouraging voluntary disclosures, the federal courts jumped into the fray and adopted a new defense theory to address the problem: the bespeaks caution doctrine.[21]

Judicial Protection: Courts Adopt the "Bespeaks Caution" Doctrine

Although the SEC's rule change in 1979 was a step in the right direction for corporate executives who wanted to share forward-looking projections and statements with interested investors, the protection afforded was limited. However, investors eager for meaningful forward-looking projections and corporations willing to share this information found a unexpected friend in federal judges and a newly minted theory called "bespeaks caution."

The Eighth Circuit first coined the phrase "bespeak caution" in a footnote in *Polin v. Conductron Corp.*[22] The *Polin* action involved a claim for breach of fiduciary duty in connection with a merger; there was no claim for violation of the federal securities laws.[23] However, plaintiff did charge that defendant's 1967 annual report "'anticipated' losses had not, as the report stated, been charged off, and, further, that the report stated that the results for 1968 were 'expected' to show improvement, and the Company saw a 'possibility' of a break-

20. *See* Safe Harbor Release, *supra* note 13, at *9; 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).

21. *In re* Worlds Of Wonder Secs. Litig., 35 F.3d 1407, 1415 (9th Cir. 1994) ("In our view, the bespeaks caution doctrine helps 'to minimize the chance that a plaintiff with a largely groundless claim will bring a suit and conduct extensive discovery in hopes of obtaining an increased settlement.'" (quoting Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878 (1st Cir. 1991))).

22. 552 F.2d 797, 807 n.28 (8th Cir. 1977)

23. *Id.* at 799-802.

even soon."[24] In a footnote, the *Polin* court rejected plaintiff's contention that the annual report was fraudulent, stating that "[t]he terms thus employed *bespeak caution* in outlook and fall far short of the assurances required for a finding of falsity and fraud."[25] The *Polin* court affirmed the dismissal of plaintiff's fiduciary duty claims on other grounds. Thus, the seed of the bespeaks caution doctrine was planted.

Nine years after *Polin*, the Second Circuit invoked the bespeaks caution doctrine for the first time to dismiss a federal securities action. In *Luce v. Edelstein*,[26] the Second Circuit examined a securities fraud claim in which defendants' offering memorandum, upon which plaintiffs' claims were based, cautioned investors that the projections contained therein were speculative.[27] As the *Luce* court explained, defendants offering materials "made it quite clear that its projections of potential cash and tax benefits were 'necessarily speculative in nature' and that '[n]o assurance [could] be given that these projections [would] be realized.'"[28] Because defendants' projections were contained in documents that warned investors that the projections were speculative, the *Luce* court concluded that it was "not inclined to impose liability on the basis of statements that clearly 'bespeak caution.'"[29] Accordingly, the Second Circuit affirmed the dismissal of plaintiff's claims under the federal securities laws.

Since *Luce*, almost every federal circuit court of appeals has followed the Second Circuit's lead and adopted some form of the bespeaks caution doctrine.[30] As the doctrine has developed, different jurisdictions have advanced various rationales

24. *Id* at 807 n.28.
25. *Id.* (emphasis added).
26. 802 F.2d 49 (2d Cir. 1986).
27. *Id.* at 56.
28. *Id.*
29. *Id.*
30. *See, e.g.*, *In re* Amdocs Ltd. Secs. Litig., 390 F.3d 542, 548 (8th Cir. 2004); Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co., 353 F.3d 1125, 1132-33 (9th Cir. 2004); *In re* Adams Golf, Inc. Secs. Litig., 381 F.3d 267, 279 (3d Cir. 2004); Helwig v. Vencor, Inc., 251 F.3d 540, 559 (6th Cir. 2001); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1278-79 (11th Cir. 1999); Grossman v. Novell, Inc., 120 F.3d 1112, 1120 (10th Cir. 1997); Gasner v. Bd. of Supervisors, 103 F.3d 351, 358 (4th Cir. 1996); U.S. v. Morris, 80 F.3d 1151, 1167 (7th Cir. 1996); Rubinstein v. Collins, 20 F.3d 160, 166-68 (5th Cir. 1994); *Romani*, 929 F.2d at 879.

to explain why the doctrine insulates defendants from liability under federal securities laws.[31] Some courts have held that defendants' forward-looking projections are protected because there exists sufficient cautionary language accompanying the forward-looking statements to negate the falsity of that statement as a matter of law.[32] Other courts explain the protection differently: "'bespeak caution' is essentially shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law."[33] Finally, some jurisdictions have found that in addition to negating the materiality prong of a federal securities law claim, the bespeaks caution doctrine also undercuts a plaintiff's allegation that it reasonably relied on the forward-looking statements at issue.[34] These variations are significant on a theoretical level, and because they dictate what type of arguments plaintiffs may employ to oppose the application of the doctrine.

Since 1986, a multitude of defendants have successfully invoked the bespeaks caution doctrine to dismiss federal securities actions on a motion to dismiss phase prior to discovery.[35] In 1995, Congress modeled the safe harbor provision of the PSLRA on this useful and resilient doctrine.

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31. *See generally* O'Hare, *supra* note 20 at 622.

32. *See, e.g.*, Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040 (6th Cir. 1991) ("[T]o determine whether the statement was false when made . . . the court must emphasize whether the 'prediction suggested reliability, bespoke caution, was made in good faith, or had a sound factual or historical basis.'" (quoting Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 204 (5th Cir. 1988))). *See also* O'Hare, *supra* note 20.

33. *In re* Donald J. Trump Casino Secs. Litig.—Taj Mahal Litig., 7 F.3d 357, 364 (3d Cir. 1993). *See also* O'Hare, *supra* note 20.

34. *Rubenstein*, 20 F.3d at 166-67 (5th Cir. 1994) ("the 'bespeaks caution' doctrine has developed to address situations in which optimistic projections are coupled with cautionary language—in particular, relevant specific facts or assumptions—affecting the reasonableness of reliance on and the materiality of those projections." (citations omitted)). *See also* O'Hare, *supra* note 20.

35. *See, e.g.*, *In re* Adams Golf, Inc. Secs. Litig., 381 F.3d at 279 (granting motion to dismiss based on bespeaks caution doctrine); Provenz v. Miller, 102 F.3d 1478, 1493 (9th Cir. 1996) (noting that the bespeaks caution defense is a "mechanism by which a court can rule as a matter of law . . . typically in a motion to dismiss" that defendants' are protected from liability); *Luce*, 802 F.2d at 56 (granting dismissal based on bespeaks caution doctrine).

II.
LEGISLATIVE PROTECTION FOR FORWARD-LOOKING STATEMENTS: THE PSLRA'S SAFE HARBOR PROVISION

Background

Congress enacted the PSLRA with the hope of reducing "abusive" and "meritless" securities litigation. It desired to deter so-called "strike suits" in which shareholders filed baseless class action lawsuits under the federal securities laws in order to pressure corporate defendants into settling claims rather than submit to costly and burdensome discovery.[36] As the House Conference Committee explained, the PSLRA targeted a variety of abusive litigation practices, including:

> (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.[37]

One of Congress's central concerns was to limit costly and protracted discovery, and to prevent "fishing expedition" lawsuits.[38] The Conference Committee noted that "discovery costs account for roughly 80% of total litigation costs in securities fraud cases."[39] In an effort to protect defendants from in-

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36. *See* Bruce C. Gibney, *The End of the Unbearable Lightness of Pleading: Scienter After* Silicon Graphics, 48 UCLA L. REV. 973, 975 (2001); Patrick Hall, *The Plight of the Private Securities Litigation Reform Act in the Post-*Enron *Era: The Ninth Circuit's Interpretation of Materiality in* Employer-Teamster v. American West, 2004 BYU L. REV. 863, 874 (2004); Rick M. Simmons, *Reconciling Pleading Standards Under* Pirraglia*: The Private Securities Litigation Reform Act V. Federal Rule of Civil Procedure 12(b)(6)*, 81 DENV. U. L. Rev. 665, 665 (2004).

37. H.R. Conf. Rep. 104-369, at 31-32 (1995).

38. *Id.* at 37.

39. *Id.*

curring exorbitant discovery costs in defending meritless lawsuits, Congress inserted several protections into the PSLRA, including an automatic stay provision, which suspends discovery until resolution of a defendant's motion to dismiss,[40] and the safe harbor provision. The PSLRA safe harbor provision, modeled after both the SEC rules implemented in 1979 and the bespeaks caution doctrine, protects defendants in a federal securities action from liability for written or oral forward-looking statements provided that certain conditions are met.[41]

The reforms of the PSLRA were met with either unmitigated joy or strident criticism, depending on whether you were speaking with securities defendants or plaintiffs. As one commentator explained, the PSLRA garnered support from "corporate officials, accountants, and [defense] lawyers, and was criticized by consumer groups, investors, and plaintiff lawyers."[42]

The Safe Harbor Provision

The PSLRA safe harbor provision addresses both written and oral forward looking projections and statements. With respect to written forward-looking statements, the safe harbor has two prongs. The first prong protects a written forward-looking statement that is "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 [that is] immaterial."[43] The second prong of the safe harbor for written forward-looking statements applies if the plaintiff fails to prove that the forward-looking statement "if made by a natural person, was made with actual knowledge by that person that the statement was false and misleading," and "if made by a business entity, was made by or with the approval of an executive officer of that entity, and [was] made

40. 15 U.S.C. § 78u-4(b)(3)(B) (2005).

41. H.R. Conf. Rep. 104-369, at 43 (1995) ("[t]he Conference Committee safe harbor, like the Senate safe harbor, is based upon aspects of [17 C.F.R. §§ 230.175, 240.3b-6 (2005)] and the judicially created 'bespeaks caution' doctrine.").

42. Hall, *supra* note 36, at 873. *See also* Carrie Johnson, *Fight Renewed Over Limits on Investor Suits,* WASH. POST, May 10, 2002, at E01.

43. 15 U.S.C. § 78u-5 (c)(1)(A) (2005).

or approved by such officer with actual knowledge by that officer that the statement was false or misleading."[44]

The safe harbor for an oral forward-looking statement applies if the statement is accompanied by a cautionary statement

> that the particular oral statement is a forward-looking statement; and that the actual results might differ materially from those projected in the forward-looking statement; and if the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to materially differ from those in the forward-looking statement is contained in a readily available written document, or portion thereof; the accompanying oral statement. . . identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and the information contained in that written document is a cautionary statement [identifying important factors that could cause actual results to differ materially from those in the forward-looking statement].[45]

As is the case with the safe harbor for a written forward-looking statement, the safe harbor for an oral forward-looking statement applies if the plaintiff ultimately fails to prove that the statement was made with actual knowledge that it was false or misleading.[46]

The statute imposes a number of exceptions and exclusions that narrow the scope of the safe harbor significantly. The safe harbor does not apply to a forward looking statement that is made with respect to the business or operations of an issuer, if the issuer,

> during the 3-year period preceding the date on which the statement was first made was convicted of any felony or misdemeanor described in [the antifraud provisions of the Securities Exchange Act of 1934]; or has been made the subject of a judicial or

44. 15 U.S.C. § 78u-5 (c)(1)(B) (2005).
45. 15 U.S.C. § 78u-5 (c)(2)(A)-(B) (2005).
46. 15 U.S.C. § 78u-5 (c)(2) (2005).

> administrative decree or order arising out of a governmental action that prohibits future violations of the antifraud provisions of the securities laws; requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or determines that the issuer violated the antifraud provisions of the securities laws.[47]

The safe harbor also does not apply if the issuer "makes the forward-looking statement in connection with an offering of securities by a blank check company; issues penny stocks; makes the forward-looking statement in connection with a roll-up transaction; or makes the forward-looking statement in connection with a going private transaction."[48] Moreover, there is no safe harbor protection for forward-looking statements that are

> included in a financial statement prepared in accordance with generally accepted accounting principles; contained in a registration statement of, or otherwise issued by, an investment company; made in connection with a tender offer; made in connection with an initial public offering; made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or made in a disclosure of beneficial ownership in a report required to be filed with the [SEC] pursuant to section 13(d) of the Securities Exchange Act of 1934.[49]

Thus, the scope of the PSLRA safe harbor is narrower than that of its judicially created counterpart, the bespeaks caution doctrine. It is noteworthy that the bespeaks caution doctrine remains a viable defense to a federal securities fraud claim, and defendants often employ both defenses in the same dispositive motion.[50]

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47. 15 U.S.C. § 78u-5 (b)(1)(A) (2005).

48. 15 U.S.C. § 78u-5 (b)(1)(B)-(E) (2005).

49. 15 U.S.C. § 78u-5 (b)(2) (2005).

50. *See supra* note 30. *See also* GSC Partners CDO Fund v. Washington, 368 F.3d 228, 243 n.3 (3d Cir. 2004) (discussing the bespeaks caution doctrine as a separate defense from safe harbor); EP Medsystems, Inc. v. Echocath, 235 F.3d 865, 872-74 (3d Cir. 2000) (according the bespeaks caution doctrine a distinct analysis from that of the safe harbor).

*Pre-*Asher *Safe Harbor Litigation: Nine Years Spent Developing the Contours of Safe Harbor Jurisprudence*

The safe harbor provision of the PSLRA is a powerful tool for corporate defendants in federal securities actions, especially at the motion to dismiss phase of the proceeding. Since the enactment of the PSLRA, dozens of actions have been dismissed pursuant to the PSLRA safe harbor. As a result, defendants routinely invoke the safe-harbor provision. The reflexive invocation of the safe harbor provision has created some criticism. As one commentator has explained, "[t]here is an enormous incentive to move to dismiss every complaint because filing such a motion triggers the automatic stay of discovery. Defendants, it appears, thus continue to feel compelled to raise the [safe harbor] issue at every turn."[51] Since 1995, plaintiffs and defendants have engaged in numerous battles over the contours of the PSLRA safe harbor and have created a developed body of safe harbor jurisprudence. There are several battlefields in this arena: (1) the argument that defendants knew that the forward-looking statements were false or misleading at the time that they made the statement; (2) the contention that the statement was not forward-looking; (3) the argument that defendants failed to identify the statement as forward-looking; (4) the contention that the forward-looking statement was not "accompanied by meaningful cautionary language; and (5) the argument that the cautionary language was not meaningful.

1. *The Argument that Defendants Knew that the Forward-Looking Statement Was False or Misleading at the Time of the Statement*

Where a defendant's written forward-looking statements are not accompanied by sufficient cautionary language, and are not deemed to be immaterial, defendant can secure safe harbor protection only under the "actual knowledge" prong of the safe harbor.[52] In such a case, the plaintiff often argues that the safe harbor should not apply because the defendant

51. Richard A. Rosen, *Safe Harbor for Forward-Looking Statement in the Courts: A Year 2001 Scorecard*, 34 SEC. REG. & LAW REP. (BNA) No. 3, at 94 (Jan. 21, 2002).

52. *See supra* note 44 and accompanying text.

knew that its statements were false or misleading when made.[53] For example, in *Ruskin v. TGI Holdings, Inc.*, the plaintiffs alleged facts from which, according to the Southern District of New York, a jury could conclude that the defendant, a reinsurance company, knew at the time it made certain statements that the statements were false or misleading.[54] Specifically, the defendant company misrepresented the adequacy of the company reserves, which were maintained for unpaid losses and loss adjustment expenses. The company omitted statements in its public filings about the significant uncertainty of its reserve estimates and, instead, referred to their reserves as "adequate."[55] In turn, the court determined that the blanket cautionary statements that accompanied the public filings could not insulate defendant from liability because "they give the reader no reason to suspect the actual reserve deficiency known to the [company officers]."[56]

With respect to the "cautionary language" prong of the safe harbor, a plain language reading of the statute indicates that the defendant's state of mind—*i.e.*, whether the defendant knew the forward-looking statement was true or false—is irrelevant to whether this prong of the safe harbor protects the defendant from liability. The legislative history supports this interpretation of the statute: "[t]he first prong of the safe harbor requires courts to examine only the cautionary statement accompanying the forward-looking statement. Courts should not examine the state of mind of the person making the statement."[57] Accordingly, courts have held that the "cautionary language" prong of the safe harbor provision may insulate a defendant from liability without regard to the defendant's state of mind, and, in some cases, even if the defendant knew its statement was false when made.[58] However, some courts

53. *See, e.g.*, *In re* Advanta Corp. Secs. Litig., 180 F.3d 525, 536 (3d Cir. 1999); Ruskin v. TGI Holdings, Inc., 2000 WL 1154278 at *4 (S.D.N.Y. Aug. 14, 2000); *In re* Cendant Corp. Litig., 60 F. Supp. 2d 354 (D.N.J. 1999). *See also* Ann Morales Olazábal, *Safe Harbor for Forward-Looking Statements Under the Private Securities Litigation Reform Act of 1995: What's Safe and What's Not?*, 105 DICK. L. REV. 1, 27-29 (2000).

54. *See Ruskin*, 2000 WL 1154278, at *6.

55. *See id.* at *2.

56. *See id.* at *7.

57. H.R. Conf. Rep. 104-369, at 44 (1995).

58. *See* Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox, 353 F.3d 1125, 1133 (9th Cir. 2004) (holding that safe harbor

have been reluctant to accept that proposition. For example, in *Schaffer v. Evolving Sys., Inc.*, the court ignored the statutory language and legislative history, and found that "the safe harbor provision provides no refuge for Defendants who make statements with 'actual knowledge' of their falsity."[59] This debate will continue as the case law develops.

2. *The Contention that the Statement is Not Forward-Looking*

Plaintiffs can also avoid application of the safe harbor by successfully arguing that the challenged statements are not forward-looking at all, but instead are statements of historical or present fact.[60] For instance, in *In re Complete Management Inc. Securities Litigation*, the plaintiffs alleged that the defendants made public statements expressing confidence in certain receivables as a legitimate basis for the company's growth and acquisition strategy, despite defendant's knowledge that those receivables were uncollectible.[61] The defendants argued that their various registration statements and prospectuses contained sufficient cautionary statements.[62] The court declined

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applied even though plaintiffs alleged statements were "knowingly false"); Southland Secs. Corp. v. Inspire Ins. Solutions Inc., 365 F.3d 353 (5th Cir. 2004) (specifying that first prong does not focus on defendant's state of mind); Miller v. Champion Enters., Inc., 346 F.3d 660 (6th Cir. 2003) (stating that "actual state of mind" is irrelevant to the applicability of the first prong).

59. Schaffer v. Evolving Sys., Inc., 29 F. Supp. 2d 1213, 1224 (D. Colo. 1998). Courts often have made this point with respect to the bespeaks caution doctrine. *See, e.g., In re* Prudential Sec. Inc. Ltd. P'ship Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996) ("cautionary language does not protect material misrepresentations or omissions when defendants knew they were false when made.").

60. *See* Marc. H. Fallordi, *Protecting Forward-Looking Statements: The Private Securities Litigation Reform Act of 1995 and Other Safeguards*, 1402 PLI/Corp. 451, 479-81 (Jan. 2004) (surveying major cases distinguishing forward-looking statements from statements of historical or present fact); Richard A. Rosen, *Safe Harbor for Forward-Looking Statements in the Courts: A Year 2001 Scorecard*, 34 SEC. REG. & LAW REP. (BNA) 91, 94 (Jan. 21, 2002) ("Fourteen of the cases decided in the last fifteen months reject application of the safe harbor provision on the ground that the challenged statement is not forward-looking at all, but rather a statement of present or historical fact."). *See also In re* Nortel Networks Corp. Sec. Litig., 238 F. Supp. 2d 628 (S.D.N.Y. 2003); *In re* Lason, Inc. Sec. Litig., 143 F. Supp.2d 855, 860 (E.D. Mich. 2001); *In re* Aetna Inc. Sec. Litig., 34 F. Supp.2d 935, 948 (E.D. Pa. 1999).

61. 153 F. Supp. 2d 314, 330 (S.D.N.Y. 2001).

62. *See id.* at 340.

to apply the safe harbor, stating, "[t]he complaint is replete with allegations of both [material omissions and misstatements of historical fact], and such allegations cannot be rebutted by either the bespeaks caution doctrine or the PSLRA safe harbor."[63]

The legal distinction between forward-looking statements and statements of historical or present fact is more ambiguous when a defendant's disclosures contain elements of both. Courts are not in agreement about how the safe harbor should be applied to such "mixed" statements.[64] In *Harris v. IVAX Corp.*, the Eleventh Circuit addressed a press release that contained a list of factors that the defendant expected to affect the its company's future success.[65] Some factors on the list were forward-looking and some were not. Plaintiffs argued that the list, as a whole, was misleading, and that because part of the list was not forward looking, the safe harbor should not apply.[66] The court agreed that the list should receive uniform treatment:

> If the allegation is that the whole list is misleading, then it makes no sense to slice the list into separate sentences. Rather, the list becomes a "statement" in the statutory sense, and a basis of liability, as a unit. It must therefore be either forward-looking or not forward-looking in its entirety.[67]

The court did not agree, however, that the list should be denied "forward-looking" treatment:

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63. *See id.* (citing *In re* Oxford Health Plans Sec. Litig., 187 F.R.D. 133, 141 (S.D.N.Y. 1999)). *See also* No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Co., 320 F.3d 920, 937 (2d Cir. 2004) (declining to apply the safe harbor to statements the court described as "disclosure[s] of the fine imposed by the settlement agreement for past violations of FAA regulations and description of the present effects on their imposition of the company"); Homes v. Baker, 166 F. Supp. 2d 1362, 1381 (S.D. Fla. 2001) (declining to apply safe harbor to statements in accounting that improperly recognized revenue).

64. *See* Fallordi, *supra* note 60, at 481-83. *See also* Ehlert v. Singer, 245 F.3d 1313 (11th Cir. 2001); *In re* Unicapital Corp. Sec. Litig., 149 F. Supp.2d 1353, 1374 (S.D. Fla. 2001); *In re* Champion Enters., Inc. Sec. Litig., 144 F. Supp. 2d 848 (E.D. Mich. 2001).

65. 182 F.3d 799 (11th Cir. 1999)

66. *See id.* at 805-06.

67. *See id.* at 806.

> To begin with, there is no question under the statute that a material and misleading omission can fall within the forward-looking safe harbor. And while the statute does not tell us exactly what to do with a mixed statement, extrinsic sources of congressional intent point strongly toward treating the entire list as forward-looking. Congress enacted the safe-harbor provision in order to loosen the "muzzling effect" of potential liability for forward-looking statements, which often kept investors in the dark about what management foresaw for the company. Forward-looking conclusions often rest both on historical observations and assumptions about future events. Thus, were we to banish from the safe harbor lists that contain both factual and forward-looking factors, we would inhibit corporate officers from fully explaining their outlooks. Indeed, liability-conscious officers would be relegated to citing only the factors that could individually be called forward-looking. That would hamper the communication that Congress sought to foster.[68]

Some courts disagree with the reasoning of the Eleventh Circuit. For example, in *In re Ashanti Goldfields Securities Litigation*, the Eastern District of New York reached the opposite conclusion, holding that "mixed" communications should *not* be accorded "forward-looking" treatment:

> To be sure, some of the alleged statements also contain what appear to be forward-looking statements. For example, the claim that "[i]t has been the strategic aim of Ashanti to maintain a high level of protection" or "Ashanti enters into derivative financial instrument contracts in order to protect itself" may well be seen as forward-looking statements of plans or intent. As a result, these statements may not be actionable in and of themselves, but the shareholders have been quite clear that they are seeking liability for mis-

68. *Id.* at 806-07 (citations omitted). *See also In re* Smith-Gardner Sec. Litig., 214 F. Supp. 2d 1291, 1306 (S.D. Fla. 2002) (finding that if a statement contains a mixture of prognostications and comments on past performance, it is a mixed statement and "thus should be considered as a forward looking statement eligible for the safe-harbor provision").

> leading statements concerning what the investment policy of the company was. Such statements about the then-existing state of affairs are not protected by the safe harbor provision.[69]

Needless to say, this area of law is still developing. Companies would therefore be well-advised to carefully segregate forward-looking statements from statements of present or historical fact so that the safe harbor provision may be invoked to insulate them from liability should their projections ultimately prove to fall short of the mark.

3. *The Argument that Defendants Failed to Identify the Statement as Forward-Looking*

It is not uncommon for courts to deny safe harbor protection when defendants fail to "identify" forward-looking statements as being forward-looking.[70] For example, in *Southland Securities Corp. v. Inspire Insurance Solutions*, the Fifth Circuit addressed five misleading statements made by defendants regarding predicted future earnings and revenues.[71] While the court did find that the statements met the PSLRA's definition of a forward-looking statements, it still denied safe-harbor protection.[72] The *Southland Securities* court explained that "the defendants have not shown that these statements were identified as forward-looking statements," and that the requirements of the PSLRA therefore had not been met.[73]

Similarly, in *In re Campbell Soup Company Securities Litigation*, defendants moved to dismiss, arguing that various statements they made were forward looking and therefore not actionable due to the PSLRA safe harbor.[74] The court acknowledged that "at first glance," defendants' projections "would

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69. 184 F. Supp. 2d 247, 267 (E.D.N.Y. 2002).

70. *See* Fallordi, *supra* note 60, at 472-74. *See also In re* Honeywell Int'l Inc. Sec. Litig., 182 F. Supp.2d 414 (D.N.J. 2002); *In re* Sun Healthcare Group Inc. Sec. Litig., 181 F. Supp.2d 1283 (D.N.M. 2002); Robertson v. Strassner, 32 F. Supp. 2d 443 (S.D. Tex. 1998).

71. 365 F. 3d 353, 372 (5th Cir. 2004).

72. *See id.*

73. *Id. See also* Robertson v. Strassner, 32 F. Supp. 2d 443, 450 (S.D. Tex. 1998) ("the April 1 press release is not identified as 'forward-looking' and, therefore, does not qualify for 'safe-harbor' protection under the PSLRA.").

74. 145 F. Supp. 2d 574, 589 (D.N.J. 2001).

seem to fit within the safe harbor."[75] However, because "in absence of the full text, the Court must rely on the Amended Complaint, the Court must accept Plaintiffs' allegation that Defendants' statements were [not] 'identified as forward-looking statements.'"[76] Thus, the Court determined that the safe harbor did not apply.[77]

Accordingly, the failure to identify a projection or statement as forward-looking has been a litigable issue in a variety of federal securities actions.

4. *The Contention that the Forward-Looking Statement was not "Accompanied By" Meaningful Cautionary Language*

The PSLRA requires that written forward-looking statements be "accompanied by" meaningful cautionary language in order for the safe harbor to apply.[78] Courts are not in agreement, however, about how to interpret that requirement. In *Stavros v. Exelon Corp.*, the Northern District of Illinois explained the rift in this area of safe-harbor jurisprudence:

> The PSLRA provides that cautionary language should accompany a forward-looking statement. 15 U.S.C. § 78u-5(c)(1)(A). Although the Seventh Circuit has not ruled that accompanying cautionary language must be contained in the same document as the forward-looking statement, at least one district court has held that it must. *See In re Apple Computer, Inc., Secs. Litig.*, 243 F.Supp.2d 1012, 1025 (N.D. Cal. 2002). The Tenth Circuit, however, in discussing the analogous bespeaks caution doctrine, held that cautionary language need not be contained in the same document as the projection, although remote language is likely less effective. *See Grossman v. Novell, Inc.*, 120 F.3d 1112, 1122-23 (10th Cir.1997). The *Grossman*

75. *Id.* at 590.

76. *Id.*

77. *Id.*

78. 15 U.S.C. § 78u-5 (c)(1)(A)(i) (2005). As described in more detail below, one issue addressed in the Seventh Circuit's *Asher* decision concerned the meaning of the "accompanied by" requirement. While the court's analysis of that issue is encouraging for public companies, that aspect of the decision has received far less attention than the court's holding that the "meaningfulness" of defendant's cautionary language cannot be evaluated without discovery. *See infra* notes 139-141 and accompanying text.

> court reasoned that it is the total mix of information available to investors at the time of the alleged fraudulent statements that is relevant, not whether the warnings were contained in the same document. *Id.* At least one district court following *Grossman*' s ruling in the context of the PSLRA's safe harbor has considered cautionary language outside the statement at issue. *See In re S1 Corp. Secs. Litig.*, 173 F.Supp.2d 1334, 1356-57 (N.D. Ga. 2001) (holding forward-looking statements in press releases and public statements protected by the PSLRA's safe harbor and the bespeaks caution doctrine where SEC registration statement contained detailed cautionary language).[79]

Unless and until the contours of the "accompanied by" requirement become more clear, companies would be wise to err on the side of safety by ensuring that their forward-looking statements are always accompanied by cautionary language in the same document.

5. *The Argument that the Cautionary Language was not Meaningful*

Another strategy employed by plaintiffs for defeating the successful application of the PSLRA safe harbor is to argue that the defendant's cautionary language is not sufficiently meaningful.[80] For example, in *Helwig v. Vencor*, plaintiff argued that the safe harbor should not apply because although the defendant company disclosed that business projections could be affected by pending legislation, as the legislation neared enactment, the company's cautionary language did not become more precise.[81] The Sixth Circuit found that, while the original cautionary statements were at one point sufficient, they became too "cursory and abstract" and ultimately "were

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79. Stavros v. Exelon Corp., 266 F. Supp. 2d 833, 844 (N.D. Ill. 2003). *See also* Fallordi, *supra* note 60; Asher v. Baxter, 2003 WL 21825498 (N.D. Ill. July 24, 2003); *In re* Champion Enters., Inc. Sec. Litig., 144 F. Supp. 2d 848 (E.D. Mich. 2001); Karacand v. Edwards, 53 F. Supp. 2d 1236, 1245 (D. Utah 1999); Wenger v. Lumisys, Inc., 2 F. Supp. 2d 1231 (N.D. Cal. 1998).

80. *See* Fallordi, *supra* note 60, at 493-501. *See also* Ehlert v. Singer, 245 F.3d 1313 (11th Cir. 2001); Harris v. IVAX Corp., 998 F. Supp. 1449 (S.D. Fla. 1998).

81. 251 F.3d 540 (6th Cir. 2001).

not meaningful and were hardly even cautionary."[82] As such, the court refused to apply the safe harbor, reasoning that the company offered only "blanket statements concerning pending legislation [that] offered investors no guidance about the consequences of health care reform upon the company's business."[83]

In *Rasheedi v. Cree Research, Inc.*, defendant moved to dismiss arguing, *inter alia*, that cautionary language in its SEC filings was sufficient to trigger the safe harbor.[84] Plaintiffs countered that the cautionary language failed to identify the risk that came to pass, and that it therefore fell short.[85] The court held that "the cautionary statements [must] identify important factors that could cause results to differ materially—but not all factors. Failure to include a particular 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."[86] Accordingly, the court deemed defendants' cautionary sufficient, and granted the motion to dismiss.[87]

The "meaningfulness" requirement is central to the Seventh Circuit's opinion *Asher*. As described below, the *Asher* court may have significantly raised the bar for what defendants need to do in order to ensure that their cautionary language is sufficiently "meaningful" to trigger safe-harbor protection.

82. *Id.*

83. *See id. See also In re* Boeing Secs. Litig., F. Supp. 2d 1160, 1167-69 (W.D. Wash. 1998) (holding that defendant's cautionary statement that it was "experiencing a near-term decline in productivity" was not entitled to the safe harbor's protection because the language was boilerplate and, more importantly, it did not warn investors "of factors that could cause a steeper decline in the Company's productivity or an extension of that period of inefficiency.").

84. 1997 U.S. Dist. LEXIS 16968 at *1-2 (M.D. N.C. Oct. 17, 1997).

85. *Id.* at *4.

86. *Id.* at *4-5.

87. *Id.* at *7-8.

III.
THE SQUALL THAT HAS ROCKED THE ONCE SAFE HARBOR: JUDGE EASTERBROOK'S DECISION IN *ASHER V. BAXTER INTERNATIONAL, INC.*

Important Federal Circuit Court Safe Harbor Decisions Preceding Asher v. Baxter

Several federal circuit courts have, unlike *Asher*, dismissed similar federal securities claims on a motion to dismiss prior to discovery. As to the critical safe harbor inquiry—whether the forward-looking projection or statement "was accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement"—these courts applied different reasoning than the *Asher* court. It is noteworthy that three of these circuit court decisions were decided at or around the time of the *Asher* decision.

In *Haris v. IVAX Corp.*, the Eleventh Circuit discussed this prong of the safe harbor provision in detail.[88] The *Harris* court explained that the PSLRA safe harbor provision requires the cautionary language "only to mention *important* factors that could cause actual results to differ materially from those in the forward looking statement. . . . It does not require a listing of *all* factors."[89] The *Harris* court expressly rejected the notion that a defendant needed to identify the precise factor that caused the projection to fall short. Instead, the *Harris* court, citing the statutory language ("important factors"), affirmed dismissal of the complaint and explained that safe harbor protection applies if the cautionary language warns of significant risks "*similar* to that actually realized."[90]

Some decisions have affirmed the dismissal of federal securities claims under the safe harbor prior to discovery without a detailed analysis of this prong of the safe harbor provision.[91] For example, in *Rombach v. Chang*, which was decided a few months before *Asher*, the Second Circuit examined the defen-

88. 182 F.3d 799 (11th Cir. 1999).

89. *Id.* at 807 (citations omitted).

90. *Id.*

91. *See, e.g.*, *In re* Midway Games, Inc. Secs. Litig., 332 F. Supp.2d 1152, 1167, 1172 (N.D. Ill. 2004); *In re* Transkaryotic Therapies, Inc. Secs. Litig., 319 F. Supp.2d 152, 162 (D. Mass. 2004); *In re* PEC Solutions, Inc. Secs. Litig., 2004 WL 1854202 at *3-4, *16 (E.D. Va. May 25, 2004).

dant's warnings and concluded that "[w]hile some of these cautionary statements were formulaic, we conclude that as a whole they provided a sobering picture of [the defendant's] financial condition and future plans."[92] The court therefore affirmed dismissal of the complaint on a motion to dismiss prior to discovery.[93]

The Ninth Circuit reached a similar result in *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co.*, which was also decided a few months before *Asher*.[94] The defendant company in *Employers Teamsters Local* had made various statements predicting an upcoming merger's "immediate" positive effects on the company earnings and revenue.[95] The defendant warned, however, that the accretions to earnings and revenue would depend on the defendant's ability to smoothly integrate the newly-acquired company.[96] In the end, the newly-acquired company's inefficient trade practices delayed the benefits that defendant expected to realize from the acquisition.[97] The court held that because defendant warned that integration of the newly-acquired company could pose problems, the defendant's prior optimistic projections were protected by the safe harbor.[98]

In a case decided shortly after *Asher*, the First Circuit also dismissed a 10b-5 action on a motion to dismiss prior to discovery. In *Baron v. Smith*, defendants, executives of a struggling company, made statements anticipating that the company would emerge from an upcoming Chapter 11 reorganization in a stronger position that would benefit shareholders.[99] The defendants warned, however, that strength of the company's post-Chapter 11 position would depend on "the overall viability of the Company's long-term operational reorganization and financial restructuring plan."[100] In the end, the company's post-Chapter 11 position was significantly worse than expected because negotiations with creditors did not go

92. 355 F.3d 164, 176 (2d Cir. 2004).
93. *Id.* at 178.
94. 353 F.3d 1125 (9th Cir. 2004).
95. *Id.* at 1128.
96. *Id.* at 1133.
97. *Id.* at 1128.
98. *Id.* at 1133.
99. 380 F.3d 49, 51 (1st Cir. 2004).
100. *Id.* at 53.

well.[101] Although the defendant's cautionary language did not specifically warn of the possibility that negotiations with creditors would not go well, the First Circuit held that the cautionary language was sufficient to trigger safe harbor protection.[102]

As the circuit court cases discussed above suggest, the *Asher* decision diverges from a series of circuit court cases—decided both before and after *Asher*—that dismiss federal securities claims on a motion to dismiss prior to discovery.[103]

Overview of the Asher *Action*

In *Asher*, plaintiffs filed a class action on behalf of shareholders who purchased securities between November 5, 2001 and July 17, 2002 (the "Class Period").[104] Baxter, the primary defendant, is a multinational healthcare company composed of three principal divisions. One division sells products used in intravenous drug delivery (the "Medication Delivery Division").[105] Another division sells pharmaceuticals, vaccines, and blood collection products and services (the "BioSciences Division").[106] A third division sells products used in the treatment of kidney diseases (the "Renal Division").[107]

Plaintiffs alleged that in the Fall of 2001, Baxter faced a number of business and financial problems, "including defective products and a decrease in demand for some of its major products."[108] During the Class Period, Baxter allegedly made numerous forward-looking statements that misstated or omitted material facts in order to artificially inflate the price of Baxter stock.[109] Plaintiffs alleged that Baxter had two reasons

101. *Id.* at 51-52.

102. *Id.* at 53.

103. *See* Miller v. Champion Enters., Inc., 346 F.3d 660 (6th Cir. 2003) (Sixth Circuit similarly affirmed a dismissal of securities claims prior to discovery because the defendant actually had "disclosed the exact risk that occurred."). Plaintiff argued, *inter alia*, that the defendant should have the explained the risk in more detail. The court rejected plaintiff's argument, stating that "[defendant] is not required to detail every facet or extent of [the] risk to have adequately disclosed the nature of the risk." *Id.*

104. Asher v. Baxter Int'l, Inc., 2003 WL 21825498 (N.D. Ill. July 24, 2003).

105. *Id.* at *1.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

to keep its stock price inflated: (1) investors could unload Baxter stock at prices higher than if the misstatements omissions were not made; and (2) Baxter could acquire a competing company, Fusion Medical Technologies ("Fusion"), in a stock swap at a lower cost.[110]

Defendant Baxter's Alleged Misstatements And Omissions

Baxter's alleged misstatements and omissions took the form of press releases, oral statements to the media, and SEC filings. On the first day of the class period, Baxter announced in a press release that it would discontinue a major dialysis product and take $100-150 million loss due to an investigation of the death of patients using the product.[111] Nonetheless, Baxter predicted that it would "meet its 2002 full-year commitments of sales growth in the low-teens, earnings per share in the mid-teens and operational cash flow of at least $500 million."[112] On January 24, 2002, Baxter issued another press release reaffirming the November 2001 forecast and predicting "solid growth" for all three of its business units.[113] The January 24 press release specifically stated that despite the fact that 50 deaths had been linked to its dialysis product, its Renal division expected an increase in sales "in the high single-digits" in 2002.[114] On April 18, 2002 Baxter released an additional press release that stated that Baxter was "on track to achieve" its "2002 financial commitments," and that the company was "confident that we will achieve our growth commitments this year."[115]

Further, on February 2, 2001, a Baxter executive stated in a television interview that he thought "the overall financial dynamic for Baxter is very strong" for 2002.[116] Similarly, on March 14, 2001, the same executive stated that notwithstanding the Renal Division's product defect difficulties, he believed that in 2002 "the sales growth would be in the high single digits."[117]

110. *Id.*
111. *Id.* at *2.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

Baxter also incorporated its expectations regarding its "2002 financial commitments" into numerous SEC filings.[118] Its Form 10-K for the year ending December 31, 2001 predicted 2002 sales growth in the low-teens, earnings per share in the mid-teens, earnings per share in the mid-teens and operational cash flow of at least $500 million.[119] Further, on March 18, 2002 and April 3, 2002, Baxter filed its Registration Statement and Amendment in connection with its proposed Fusion acquisition, both of which repeated the rosy 2002 projections.[120] Finally, Baxter's Form 10-Q for the quarter ending March 31, 2002 reaffirmed the "2002 financial commitments."[121]

Defendant Baxter's Cautionary Language

Baxter provided a number of cautionary statements throughout the Class Period. As the Seventh Circuit observed, the best illustration of Baxter's cautionary language is found in Baxter's Form 10-K for the year ending December 31, 2001:

> Statements throughout this report that are not historical facts are forward-looking statements. These statements are based on the company's current expectations and involve numerous risks and uncertainties. Some of these risks and uncertainties are factors that affect all international businesses, while some are specific to the company and the health care arenas in which it operates.
>
> Many factors could affect the company's actual results, causing results to differ materially, from those expressed in any such forward-looking statements. These factors include, but are not limited to, interest rates; technological advances in the medical field; economic conditions; demand and market acceptance risks for new and existing products, technologies and health care services; the impact of competitive products and pricing; manufacturing capacity; new plant start-ups; global regulatory, trade and tax policies; regulatory, legal or other developments relating to

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

> the company's Series A, AF, and AX dialyzers; continued price competition; product development risks, including technological difficulties; ability to enforce patents; actions of regulatory bodies and other government authorities reimbursement policies of government agencies; commercialization factors; results of product testing; and other factors described elsewhere in this report or in the company's other filings with the Securities Exchange Commission. Additionally, as discussed in Item 3—"Legal Proceedings," upon resolution of certain legal matters, the company may incur charges in excess of presently established reserves. Any such change could have a material adverse effect on the company's results of operations or cash flows in the period in which it is recorded.
>
> Currency fluctuations are also a significant variable for global companies, especially fluctuations in local currencies where hedging opportunities are unreasonably expensive or unavailable. If the United States dollar strengthens significantly against mist [sic] foreign currencies, the company's ability to realize projected growth rates in its sales and net earnings outside the United States could be negatively impacted.
>
> The Company believes that its expectations with respect to forward-looking statements are based upon reasonable assumptions within the bounds of its knowledge of its business operations, but there can be no assurance that the actual results or performance of the company will conform to any future results or performance expressed or implied by such forward-looking statements.[122]

Although the cautionary language attached to Baxter's press releases was not as robust, the press releases, unlike the oral statements made by Baxter executives, specifically referred to the SEC filings.[123]

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122. *Asher*, 377 F.3d at 729-30.

123. *Id.* at 729.

Plaintiff Asher's Allegations

The *Asher* plaintiffs alleged that Baxter's projections regarding its "2002 financial commitments" were false and misleading because Baxter omitted to disclose material information which it should reasonably have included in its forecasts.[124] This information included the following:

> (1) [I]ts Renal Division had not met its internal budgets in years; (2) economic instability in Latin America adversely affected Baxter's sales in that part of the world; (3) Baxter closed plants in Ronneby, Sweden, and Miami Lakes Florida, that had been its principal source of low-cost dialysis products; (4) the market for albumin (blood-plasma) products was "over-saturated," resulting in lower prices and revenue for the Biosciences Division; (5) sales of that division's IGIV immunoglobin products had fallen short of internal predictions; and (6) in March 2002 the Bioscience Division had experienced a sterility failure in the manufacture of a major product, resulting in the destruction of multiple lots and a loss exceeding $10 million.[125]

On the final day of the Class Period, Baxter released its financial results for the second quarter of 2002, which plaintiffs contended revealed Baxter's "true financial condition."[126] According to plaintiffs, those results "shocked the market" resulting in a more than 25% decrease of the stock price in a single day (the price dropped from roughly $43.00 to roughly $32.00).[127]

As a result of Baxter's alleged fraudulent behavior and the resultant drop in the price of Baxter's stock, plaintiffs filed a four-count complaint against Baxter and certain Baxter executives and division managers. They claimed that defendants violated the securities laws' anti-fraud and "control person" liability provisions.[128] The Baxter defendants moved to dismiss the complaint on the grounds that: (1) plaintiffs failed to allege any misstatement or omission of material fact; (2) the al-

124. *Asher*, 2003 WL 21825498, at *3.
125. *Asher*, 377 F.3d at 729-30.
126. *Asher*, 2003 WL 21825498, at *3.
127. *Id.*
128. *Id.*

leged misstatements fell under the PSLRA safe harbor; (3) the complaint did not allege sufficient facts to meet the PSLRA's "scienter" requirement for forward-looking statements; and (4) plaintiffs did not have standing.[129]

The District Court's Decision

Judge Blanche M. Manning began her analysis by addressing Baxter's argument that plaintiffs had not identified any actionable misstatements or omissions of material facts. After a careful review of the complaint, Judge Manning concluded that the complaint alleges sufficient facts to show that the Baxter defendants "omitted material facts which if disclosed would have significantly altered the accuracy of the 2002 financial commitments, and therefore, have sufficiently alleged that the above forward-looking statements were misleading and not made in good faith or with a reasonable basis."[130] The Court then addressed Baxter's argument that the action should be dismissed because the forward-looking statements upon which plaintiffs based their claims contained "meaningful cautionary statements" and therefore were protected by the PSLRA safe harbor.

Judge Manning noted that the Seventh Circuit had not yet specifically interpreted the safe harbor provision.[131] Citing other circuit courts and the legislative history of the PSLRA, Judge Manning reiterated the well-worn principle that "vague and boilerplate" cautionary statements are not "meaningful" under the PSLRA.[132] Instead, "the cautionary language 'must be substantive and tailored to the specific future projections, estimates or opinions' contained in the alleged misleading forward-looking statement."[133] Judge Manning further stated that "[i]n determining whether the defendant has put forth sufficient cautionary language with its forward-looking statements, courts examine 'the total mix of information available to investors at the time of the alleged fraudulent state-

129. *Id.* at *4.

130. *Id.* at *9.

131. *Id.* at *10.

132. *Id.*

133. *Id.* (quoting Lindelow v. Hill, 2001 WL 830956, at *4 (N.D. Ill. July 20, 2001)).

ments.'"[134] In examining the total mix of information, Judge Manning reasoned that, "the 'cautionary language need not be contained in the same document as the projection.' The court may examine documents, such as SEC filings, which are specifically referenced in the forward-looking statement."[135]

After examining the "total mix" of Baxter's cautionary language and the information which plaintiffs contended was omitted from the forward-looking statements, Judge Manning held that "the cautionary disclosures were substantive and sufficiently tailored to the projections contained in the [forward-looking statements]. Indeed many of the issues which are addressed in the cautionary statements are the same or closely related to the alleged omissions."[136] To illustrate, Judge Manning highlighted, *inter alia*, Baxter's statement that it would have to discontinue the dialyzers which were the suspected cause of patients' deaths and would consequently have to take a charge of $100-150 million and that "legal or other developments" could arise from this product defect.[137] Noting that in other cases interpreting the PSLRA safe harbor such cautionary language was deemed sufficient, Judge Manning held that the safe harbor applied. Accordingly, she granted Baxter's motion to dismiss.[138]

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134. *Id.* at *11 (quoting Stavros v. Exelon, 2003 WL 21372468, at *8 (N.D. Ill. June 13, 2003)).

135. *Id.* (quoting *Stavros*, 2003 WL 21372468, at *8) (citations omitted).

136. *Id.* at *13. With respect to the first of the two oral statements referenced in the complaint, Judge Manning held that the statement was mere puffery and therefore not actionable. *Id.* at *16. With respect to the second of the oral statements, Judge Manning again looked to the "total mix" of information, and held that although the statement was not accompanied by an explicit cautionary statement, because it was made on the same day that Baxter filed its 2001 Form 10-K—which contained extensive cautionary language—the PSLRA safe harbor applied. *Id.* at *17.

137. *Id.* at *14.

138. *Id.* (citing Harris v. Ivax Corp., 182 F.3d 799, 800-02 (11th Cir. 1999) and *In re* ATI Technologies, Inc., 216 F. Supp. 2d 418, 440-41 (E.D. Pa. 2002)). Because Judge Manning found that Baxter's forward-looking statements contained sufficient cautionary language to merit PSLRA safe-harbor protection, she did not address the other arguments raised in Baxter's motion (*i.e.*, Baxter's arguments that plaintiffs fail to adequately allege scienter and that plaintiffs lack standing). *Id.* at *13 n.9.

The Seventh Circuit's Opinion

On appeal, plaintiffs offered two arguments to reverse the district court's decision. First, plaintiffs' argued that because the press releases only referred to, and did not repeat, the cautionary language in SEC filings, and because the oral statements did not even do that much, the safe harbor cannot apply because the forward-looking statements are not "accompanied by" meaningful cautionary language as is required by the statute.[139] In other words, plaintiffs argued that Judge Manning had erred by considering the "total mix" of information available to the public, rather than limiting her review to the cautionary language "accompanying" each forward-looking statement. The Seventh Circuit disagreed.

Judge Easterbrook, writing for a unanimous court, observed that "[i]f this were a traditional securities suit—if, in other words, an investor claimed to have read or heard the statement and, not having had access to the truth, relied to his detriment on the falsehood—then plaintiffs' argument would be correct. But this not a traditional securities claim. It is a fraud-on-the-market claim." Judge Easterbrook continued:

> [In] an efficient capital market. . . all information known to the public affects the price and thus affects every investor. . . . When the markets are informationally efficient, it is impossible to segment information as plaintiffs propose. They ask us to say that they received (through the price) the false oral statements but not cautionary disclosures. That can't be; only if the market is inefficient is partial transmission likely, and if the market for Baxter's stock is inefficient then this suit collapses because a "fraud-on-the-market" claim won't fly. An investor who invokes the fraud-on-the market theory must acknowledge that *all* public information is reflected in the price. . . .[140]

139. *Asher*, 377 F.2d at 731.

140. *Id.* at 731-32 (citing Basic Inc. v. Levinson, 485 U.S. 224, 241-47 (1998)). In *Basic*, the United States Supreme Court held that in a fraud-on-the-market case, the relevant inquiry concerns the total mix of the information available to the market at the time of the allegedly fraudulent statements. *Basic*, 485 U.S. at 246 ("the market price of shares traded on well-developed markets reflects all publicly available information.").

Accordingly, Judge Easterbrook concluded, "taking the claim as the pleadings framed it: the market for Baxter's stock is efficient, which means that Baxter's cautionary language must be treated as if attached to every one of its oral and written statements."[141]

Plaintiffs' second argument on appeal asserted two reasons why the district court wrongly concluded that Baxter's cautionary language was "meaningful." First, plaintiffs contended that cautionary statements did not cover any of the six matters that (in plaintiffs' view) Baxter had withheld.[142] Judge Easterbrook gave that contention short shrift, flatly rejecting it:

> That can't be dispositive; otherwise the statute would demand prescience. As long as the firm reveals the principal risks, the fact that some other event caused problems cannot be dispositive. Indeed, an unexpected turn of events cannot demonstrate a securities problem at all, as there cannot be "fraud by hindsight."[143]

Next, plaintiffs contended that the "cautionary statement did not follow the firm's fortunes: plants closed but the cautionary statement remained the same; sterilization failures occurred but the cautionary statement remained the same; and bad news that (plaintiffs contended) Baxter well knew in November 2001 did not cast even a shadow in the cautionary statement."[144] Judge Easterbrook's analysis of this second contention has created significant controversy in the securities bar.

Judge Easterbrook observed that the parties agreed on two fundamental propositions: (1) boilerplate warnings are not sufficient, and (2) the cautions need not identify what actually goes wrong and causes the forecasts to be inaccurate; in other words, "prevision is not required."[145] Plaintiffs had asserted in their papers that Baxter's warnings were boilerplate, an assertion that the Judge rejected: "Statements along the lines of 'all businesses are risky' or 'the future lies ahead' come

141. *Id.* at 732.
142. *Id.* at 730.
143. *Id.* (citations omitted).
144. *Id.* at 730-31.
145. *Id.* at 732 (citations omitted).

to nothing other than *caveat emptor* (which isn't enough); these statements, by contrast, at least included Baxter-specific information and highlighted some parts of the business that might cause problems."[146] Judge Easterbrook did not, however, end the inquiry there "because then any issuer could list its lines of business, say 'we could have problems in any of these,' and avoid liability for statements implying that no such problems were on the horizon even if a precipice was in sight."[147]

Judge Easterbrook surmised that in a world ideally calibrated to the needs of the investor, companies would be required to fully disclose the assumptions and calculations *behind* the projections.[148] However, after considering ways in which "Baxter could have made the cautions more helpful by disclosing assumptions, methods or confidence intervals," Judge Easterbrook abandoned that line of reasoning because "[t]he PSLRA does not require the *most* helpful caution; it is enough to 'identify[ ] important factors that could cause actual results to differ materially from those in the forward-looking statement.' This means that it is enough to point to the principal contingencies that could cause actual results to depart from that projection."[149] Applying that analysis to Baxter's cautionary language, Judge Easterbrook concluded:

> Baxter's chosen language may fall short. There is no reason to think—at least, no reason that a court can accept at the pleading stage, before plaintiffs have access to discovery—that the items mentioned in Baxter's cautionary language were those that at the time were the (or any of the) "important" sources of variance.[150]

146. *Id.* at 733 (emphasis added).
147. *Id.*
148. *Id.*
149. *Id.* at 734.
150. *Id.* This objective standard of disclosure appeared for the first time in the amended *Asher* opinion. In the original opinion, Judge Easterbrook settled on a more subjective standard that placed emphasis on the defendant's state of mind at the time of the disclosure. *See* Asher v. Baxter Int'l Inc., No. 03-3189 (7th Cir. July 29, 2004). The original opinion read: "Baxter's chosen language may fall short. There is no reason to think—at least, no reason that a court can accept at the pleading stage, before plaintiffs have access to discovery—that the items mentioned in Baxter's cautionary language were those *thought at the time* to be the (or any of the) 'important' sources of variance." *Id.* at *13 (emphasis added).

Judge Easterbrook thus reasoned that discovery was necessary to determine whether Baxter disclosed the principal or important risks known at the time of the disclosure.[151] He explained that although issuers need not anticipate all sources of deviations from expectations,

> the problem is that there is no reason (on this record) to conclude that Baxter mentioned those sources of variance that (at the time of the projection) were the principal or important risks. For all we can tell, the major risks Baxter objectively faced when it made its forecasts were exactly those that, according to the complaint, came to pass, yet the cautionary statement mentioned none of them. . . . This raises the possibility—no greater confidence is possible before discovery—that Baxter omitted important variables from the cautionary language and so made projections more certain than its internal estimates at the time warranted.[152]

Accordingly, the Seventh Circuit reversed the district court's grant of Baxter's motion to dismiss and remanded the case for further proceedings.[153]

IV.
THE LEGACY OF *ASHER V. BAXTER*

Reaction Of The Securities Bar

As many commentators and practitioners have noted, the *Asher* decision appears to signify a bellwether of change in liti-

151. *Asher*, 377 F.3d at 734.

152. *Id.* Judge Easterbrook's original opinion explains this point differently, consistent with a more subjective standard of disclosure: "the problem is that there is no reason (on this record) to conclude that Baxter mentioned those sources of variance that (at the time of the projection) were the principal or important risks. For all we can tell, the major risks Baxter *knew* that it faced when it made its forecasts were exactly those that, according to the complaint, came to pass, yet the cautionary statement mentioned none of them . . . . This raises the possibility—no greater confidence is possible before discovery—*that Baxter knew of important variables that would affect its forecasts, but omitted them from the cautionary language in order to depict the projections as more certain than internal estimates at the time made them.*" *Asher*, No. 03-3189, at *14 (7th Cir. July 29, 2004) (emphasis added).

153. *Asher*, 377 F.3d at 734.

gation of the PSLRA safe harbor.[154] The overwhelming majority of the short articles and opinion pieces on the decision have been negative.[155] The *Asher* opinion has been the object of strident criticism, and many commentators have called for the Supreme Court to reverse the decision.[156] Clearly, the decision raises the bar as to what a defendant must show in order to secure safe harbor protection (at least in the Seventh Circuit). Judge Easterbrook held that where, as in *Asher*, the risk disclosed by the defendant is not *identical* to the negative contingency that came to pass, discovery is necessary to determine whether the defendant disclosed the "principal" risks extant at the time of the disclosure.[157] Judge Easterbrook's use of the word, "principal"—which, according to Black's Law Dictionary, means "chief," "primary," or "most important"—is noteworthy because it indicates a more rigorous standard for evaluating the sufficiency of cautionary language than what a plain reading of the statute, which refers merely to "important" factors, would suggest.[158]

At least one commentator has read the *Asher* decision to totally eviscerate the safe harbor:

> [*Asher*] appears to mean that any plaintiff's counsel with an artful pen and creative mind—with the benefit of hindsight—will be able to allege that some "im-

154. *See, e.g.*, 20 No. 5 Andrews Corp. Officers & Directors Liab. Litig. Rep. 4 (Sept. 7, 2004); 3C Sec. & Fed. Corp. Law § 15:22:10 (Nov. 2004); Joseph De Simone, et al., *Stormy Waters In PSLRA's Safe Harbor: Will the Supreme Court hear the appeal from the Seventh Circuit's recent 'Asher' decision?*, N.Y.L.J., Feb. 22, 2005, at S4; Sarah S. Gold, et al., *The Not-So-Safe Harbor*, N.Y.L.J., Oct. 13, 2004, at 3; De Simone, et al., *High Court Should Review Ruling On Securities Fraud "Safe Harbor"*, Dec. 3, 2004, *available at* http://www.wlf.org; Allan Horwich, *Is There A Breach In The Breakwater Of The Statutory Safe Harbor For Forward-Looking Statements?*, Sept. 2004, *available at* http://www.wallstreetlawyer.com; O'Melveny & Myers LLP, *Seventh Circuit Limits Applicability of PSLRA Safe Harbor For Forward-Looking Statements*, Aug. 6, 2004, *available at* www.omm.com; Lyle Roberts, *The Safe Harbor May Just Be Safe Puddle*, Aug. 2, 2004, *available at* http://www.the10b-5daily.com; Stanford Law School Securities Class Action Clearinghouse, *Headline News: Legal Opinion Letter, "High Court Should Review Ruling On Securities Fraud 'Safe Harbor'"*, Dec. 3, 2004, *available at* http://securities.stanford.edu.

155. *Id.*

156. *Id.*

157. *Asher*, 377 F.3d at 734. *See generally* De Simone, et al., *supra* note 154.

158. BLACK'S LAW DICTIONARY 1210 (7th ed. 1999). *See also* De Simone, et al., *supra* note 154.

> portant" or "principal" cautionary statements known to management were omitted, even if some "important" ones were included, thereby both avoiding dismissal at the pleading stage and achieving the opportunity to conduct the very extortionate discovery the PSLRA was intended to foreclose. At best, the safe harbor will become a defense first usable at the summary judgment stage, after plaintiffs have had a full opportunity to rummage though defendant's documents and take extensive depositions.[159]

Moreover, Judge Easterbrook's reasoning appears to contradict the express language of the PSLRA, which directs courts on a motion to dismiss to "consider any statement cited in the complaint and any cautionary statement accompanying the forward-looking statement."[160] Similarly, the *Asher* Court's analysis contravenes Congress' explicit intent when it enacted the statute, as expressed in the legislative history:

> As part of the analysis of what constitutes a meaningful cautionary statement, courts should consider the factors identified in the statements. "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.
>
> The Conference Committee expects that the cautionary statements identify important factors that could cause results to differ materially—but not all factors. Failure to include the particular 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. *The Conference Committee specifies that the cautionary statements identify "important" factors to provide guidance to issuers and not to provide an opportunity for plaintiff counsel to conduct discovery on what fac-*

159. Allan Horwich, *Is There a Breach in the Breakwater of the Statutory Safe Harbor for Forward-Looking Statements?*, 8 No. 4 Wallstreetlawyer.com SEC. ELEC. AGE 19 (2004).

160. 15 U.S.C. § 77z-2(e) (2005).

tors were known to the issuer at the time the forward-looking statement was made.[161]

Arguing that the Seventh Circuit's decision represents a sharp divergence from congressional intent, and from courts' traditional interpretation of the safe harbor, Baxter filed a petition for a writ of certiorari with the United States Supreme Court.[162] Baxter's petition was supported by four *amicus curiae* briefs. The Washington Legal Foundation, a non-profit public interest law and policy center, argued, *inter alia*, that certiorari should be granted because the *Asher* decision is likely to discourage dissemination of forward-looking information to the public and because its is likely to chill constitutionally protected speech.[163] The American Society of Corporate Secretaries, Inc., The National Investor Relations Institute, and The New England Legal Foundation argued, in addition to the arguments raised by Baxter, that the *Asher* decision effectively nullifies the PSLRA's automatic stay of discovery pending resolution of a defendant's motion to dismiss.[164] Finally, the Business Roundtable, an association of chief executive officers, reiterated many of the arguments raised by the other parties supporting the petition.[165] Despite the support of these groups, Baxter's petition was denied by the Supreme Court on March 21, 2005.[166]

Asher's *Progeny*

Judge Easterbrook is an influential jurist, and his opinion will likely have far-reaching effects not only on federal securities litigation, but also on the content of the information that

161. H.R. Conf. Rep. 104-369, at 43-44 (1995) (emphasis added).

162. *Petition For A Writ of Certiorari*, Baxter Int'l, Inc. v. Asher, 73 U.S.L.W. 3354 (Mar. 21, 2005).

163. *Brief of Washington Legal Foundation as Amicus Curiae In support of Petitioners*, Baxter Int'l, Inc. v. Asher, 73 U.S.L.W. 3354 (Mar. 21, 2005).

164. *Brief of Amici Curiae The American Society Of Corporate Secretaries, Inc., The National Investor Relations Institute, and The New England Legal Foundation In Support of Petitioner*, Baxter Int'l, Inc. v. Asher, 73 U.S.L.W. 3354 (Mar. 21, 2005).

165. *Brief For Business Roundtable As Amicus Curiae*, Baxter Int'l, Inc. v. Asher, 73 U.S.L.W. 3354 (Mar. 21, 2005).

166. *Baxter Int'l, Inc. v. Asher*, 2005 WL 637208 (Mar. 21, 2005). For practical advice on *Asher*'s effect on securities practice, *see generally* De Simone, et al., *supra* note 154, at 26.

corporations disclose to their investors. Indeed, two courts already have relied on *Asher* in rejecting the safe-harbor defense.

In *Ong v. Sears, Roebuck & Co.*, a group of investors filed a securities fraud class action against a large retailer alleging that the retailer made a series of false and misleading forward-looking statements regarding the profitability of its credit card operations.[167] In its motion to dismiss, the retailer argued, *inter alia*, that its forward-looking statements were "consistently accompanied by meaningful cautionary language" that the projections were subject to "changes in. . . delinquency and charge-off trends in the credit card receivables portfolio."[168] The court noted, however, that "[a] warning that trends could change" did not warn of the problem actually plaguing the retailer at the time of the disclosures; namely that "the current portfolio was experiencing rising delinquencies and charge-offs due to its high-risk customers."[169] Further, "given the allegations that [the retailer] knowingly omitted material information, general disclaimers," even if somewhat specific to the retailer's business, could not "save [the retailer] from potential liability at this stage of the proceeding" because there was no way to be sure that the disclaimers identified the "'important' sources of variance."[170] The court therefore denied the retailer's motion.

Similarly, in *State of New Jersey v. Sprint Corp.*, the court applied Judge Easterbrook's analysis to the "actual knowledge" prong of the safe harbor rather than to the "meaningful cautionary language" prong at issue in *Asher*.[171] In *Sprint*, a group of investors filed a securities fraud class action against a telecommunications company alleging that the company made a series of false and misleading forward-looking statements regarding significant tax liabilities faced by two company executives that could interfere with the executives' ability to continue to lead the company.[172] The company argued that plaintiffs' allegations regarding the company's actual knowledge of the tax liabilities were conclusory and therefore insufficient to

167. 2004 WL 2534615 at *1 (N.D. Ill. Sep. 27, 2004).
168. *Id.* at *32.
169. *Id.*
170. *Id.* (quoting *Asher*, 377 F.3d at 732).
171. 2004 WL 1960130, *1-4 (D. Kan. Sept. 3, 2004).
172. *Id.* at *1.

withstand a motion to dismiss.[173] The court disagreed, holding that the allegations "'raise the possibility—no greater confidence is possible before discovery'—that defendants knew that the circumstances existed that made the long-term employment of [the executives] questionable (even unlikely) but omitted [disclosure] those circumstances."[174] Thus, the court ruled that dismissal on the pleadings was inappropriate.[175]

As safe harbor jurisprudence develops in the post-*Asher* era, it will be interesting to analyze how courts grapple with the decision. It is likely that many, like *Ong* and *Sprint Corp.*, will invoke *Asher* and Judge Easterbrook's reasoning therein to deny defendants' motions to dismiss. However, it will be even more interesting to see how courts distinguish *Asher* in cases that grant dispositive motions prior to discovery.

Asher *As A Judicial Reflection of the Post-Enron and Post-Sarbanes World*

Although the *Asher* decision appears to be at odds with the existing circuit court cases and the historical trend established by the SEC, the courts and Congress, in the past few years there has been a much heralded change in the way the public, the regulators and Congress view corporate defendants and these related issues. The series of high profile corporate scandals at companies such as Enron, Worldcom and Tyco has undermined the desire to protect corporations and their senior officers from liability in securities actions. In fact, the state and federal regulators—led by state attorneys general and more recently the SEC—have aggressively investigated allegations of corporate fraud and have levied record fines against companies and individuals.[176]

In July 2002, Congress took action to protect investors and curb perceived corporate fraud by enacting the Sarbanes-Oxley Act, which increased the obligations and duties of corporate officers and directors as well as their potential civil and criminal liability.[177] In the post-Enron and post-Sarbanes world, commentators and the public seem less concerned with

173. *Id.*
174. *Id.* (quoting *Asher*, 377 F.3d at 734-35).
175. *Id.*
176. *See, e.g.*, Hall, *supra* note 36.
177. H.R. Rep. 107-798, at 42-44 (2003).

preventing "abusive" and "meritless" shareholder litigation and protecting companies from costly and protracted discovery. In contrast, they understandably seem more concerned with protecting investors, deterring corporate fraud, and safeguarding pension funds.

It should not be surprising that judicial opinions, like *Asher*, reflect this shift in the legal and social environment.[178] This phenomenon has affected decision making in all branches of the federal government, and likely will continue to do so.

V.
CONCLUSION

To paraphrase Mark Twain, the reports of the safe harbor provision's death have been greatly exaggerated. The PSLRA safe harbor, and its judicially-created counterpart, the bespeaks caution doctrine, are well-established legal theories with many years of developed case law supporting them. Although some commentators have suggested that *Asher* may signal the demise of corporate defendants' effective use of the safe harbor provision, *Asher* is best viewed as a significant development in the normal ebb and flow of a resilient and influential defense theory, which has flourished since its enactment as part of the PSLRA in 1995. With its 10th birthday approaching, the PSLRA safe harbor continues to be employed effectively by post-*Asher* corporate defendants to dismiss meritless federal securities claims prior to discovery.[179] However, the *Asher* decision is a landmark safe harbor opinion that will affect safe harbor and bespeaks caution jurisprudence for years to come.

178. *See* De Simone, et al., *supra* note 154.

179. *See, e.g.*, Baron v. Smith, 380 F.3d 49 (1st Cir. 2004); *In re* Alamosa Holdings, Inc., 2005 WL 712001 (N.D. Tex. Mar. 28, 2005).