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COURT URGED TO LIMIT LIABILITY FOR FORWARD-LOOKING STATEMENTS

***(Baxter International Inc. v. Asher*, No. 04-763)**

The Washington Legal Foundation this week urged the U.S. Supreme Court to give teeth to a 1996 federal law that was intended to limit the liability of corporations that make projections ("forward-looking statements") regarding future sales and earnings. In a brief filed in *Baxter International Inc. v. Asher*, WLF urged the Court to review (and ultimately overturn) an appeals court decision that essentially deprives the 1996 law of all meaning.

The Private Securities Litigation Reform Act ("PSLRA") creates a "safe harbor" for forward-looking statements; provided that such statements are accompanied by "meaningful" cautionary statements, the safe harbor provides that the statements cannot be used to hold a publicly held corporation liable to its shareholders for making false statements, regardless how inaccurate the statements turn out to be. The U.S. Court of Appeals for the Seventh Circuit in Chicago held that the PSLRA safe harbor cannot be invoked to win dismissal of a securities law class action at the pleadings stage because the issue of whether the accompanying cautionary statements are sufficiently "meaningful" can never be determined until after all pre-trial discovery is complete and the facts of the case have been fully fleshed out.

"WLF believes that stock market efficiency is greatly enhanced by encouraging companies to make projections regarding their sales and earnings prospects," said WLF Chief Counsel Richard Samp after filing WLF's brief. "We are concerned that the appeals court decision, if allowed to stand, will interfere with market efficiency by discouraging disclosure of information by companies who fear incurring liability if their projections end up being too high," Samp said.

The case involves Baxter International Inc., a company whose stock price fell following its July 2002 announcement of second-quarter 2002 financial results. The plaintiffs filed suit against Baxter almost immediately afterwards, alleging that projections made by Baxter beginning in November 2001 had been materially misleading. The plaintiffs (several individual shareholders) seek to represent a class of all shareholders who purchased Baxter stock during that eight-month period and thereby suffered losses.

The district court dismissed the suit on the pleadings, finding that the PSLRA safe harbor protected Baxter against claims based on its forward-looking statements. The Seventh Circuit reversed the dismissal and remanded the case for discovery and possible trial. The Seventh

Circuit did not fault the cautionary statements issued by Baxter; rather, it held that the issue of whether those cautionary statements were "meaningful" could only be determined after the parties had had an opportunity for full pre-trial discovery. Only then can a court determine whether the cautionary statements disclosed all (or at least most all) the risks actually faced by the company at the time it made its projections, the court ruled. Baxter has asked the Supreme Court to review that decision.

WLF's brief argued that the PSLRA was intended to permit defendants to invoke the "safe harbor" provision to win dismissal of suits at the pleadings stage. WLF argued that by precluding all possibility of early dismissal, the Seventh Circuit essentially wrote the safe harbor out of the law, because the principal purpose of the provision was to allow corporations to win dismissal of "forward-looking statement" lawsuits without having to incur the huge drain on resources that the litigation discovery process generally entails. WLF noted that those costs generally drive most companies to settle *all* securities class action suits that survive a motion to dismiss, because those costs often exceed the costs of settlement; so the safe harbor does no good if it cannot be involved at the pleadings stage prior to discovery. WLF argued that Congress adopted the PSLRA safe harbor to encourage companies to make financial projections largely free of the fear of lawsuits, but that the Seventh Circuit decision subverts that intent.

WLF also argued that the PSLRA safe harbor does not require an accompanying cautionary statement to disclose *all* risks actually faced by the company, as the Seventh Circuit held. Rather, it is sufficient if the statement discloses risks of a significance similar to that actually realized, so that potential purchasers are on notice of the level of risk they are taking on. WLF argued that a court need not permit full discovery in order to decide whether cautionary statements are "meaningful" under that standard.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.