SIMPSON THACHER

SECURITIES LAW ALERT

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This month's Alert addresses three decisions from circuit courts: a Second Circuit opinion holding that plaintiffs must allege a misrepresentation to state a market manipulation claim under Section 10(b); a Fifth Circuit decision holding that defendants may not rebut the fraud-on-the-market presumption of reliance with price impact evidence at the class certification stage; and a Sixth Circuit decision rejecting the Second Circuit's holding in *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011) and ruling that plaintiffs need not plead knowledge of falsity to state a Section 11 claim.

We also discuss two decisions from the Southern District of New York, one relying on the Second Circuit's holding in *Fait* to dismiss Securities Act claims against AIG, and another dismissing a LIBOR-related securities fraud action against Barclays.

Save the Date for Our Annual CLE Program

On Monday, June 24th at 4:00 p.m., we will host our annual CLE panel discussion on recent decisions, emerging trends and breaking developments in securities and corporate litigation. Cocktails to follow. Please RSVP for this event by contacting Emma Rotenberg at erotenberg@stblaw.com or 212-455-3529.

Second Circuit Holds Plaintiffs Must Allege a Misrepresentation to State a Market Manipulation Claim Under Section 10(b)

On May 7, 2013, the Second Circuit held that in order to state any claim for damages under Section 10(b), including a market manipulation claim, plaintiffs must allege that a defendant made a misrepresentation upon which plaintiffs relied. *Fezzani v. Bear, Stearns & Co. Inc.*, 2013 WL 1876534 (2d. Cir. May 7, 2013) (Winter, J.). Judge Lohier issued a lengthy dissent criticizing the majority for "superimpos[ing] the elements of a misrepresentation claim on a market manipulation claim."

Background

During a four-year period beginning in 1992, A.R. Baron—a now-defunct broker-dealer—allegedly engaged in a typical "pump and dump" scheme that ultimately defrauded customers out of millions of dollars. "The goal of the scheme was to induce … customers to purchase securities in initial public offerings of small, unknown companies with negligible profits." Baron's salespeople allegedly "would falsely

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represent that the stocks were the subject of an active, rising market" and that the prices of the securities "were set by trading in that arms-length market." In reality, however, "the market was principally a series of artificial trades orchestrated by Baron designed to create a false appearance of volume and increasing price."

Baron's investors brought a securities fraud action alleging Section 10(b) and Rule 10b-5 claims against various defendants, including Issac R. Dweck, allegedly one of Baron's principal investors. According to plaintiffs, Dweck "provided Baron with short-term cash infusions and financing for specific deals, and allowed Baron to park certain securities on particular occasions in his accounts at other broker-dealers." Dweck's assistance allegedly created an "illusion of trading activity" in the securities Baron sold.

Plaintiffs did not allege that Dweck himself made any representations concerning the market for Baron's securities; rather, plaintiffs asserted that Dweck's conduct constituted market manipulation in violation of Section 10(b) and Rule 10b-5. Plaintiffs further asserted that Dweck had "aided and abetted, and conspired to commit, fraud under New York law." Notably, plaintiffs sought recovery from Dweck for all losses they suffered as a result of Baron's scheme, not simply "discrete claims related to the prices paid for the particular securities parked by Dweck at times they were trading."

The Southern District of New York dismissed plaintiffs' complaint in its entirety; plaintiffs appealed. With respect to most defendants, the Second Circuit affirmed in part, vacated in part, and remanded the district court's decision by summary order. *Fezzani v. Bear, Stearns & Co. Inc.*, 2013 WL 1876531 (2d. Cir. May 7, 2013). In a published decision issued on the same date, the Second Circuit affirmed dismissal of plaintiffs' market manipulation claims against Dweck, but vacated dismissal of plaintiffs' state law claims against Dweck for civil conspiracy to defraud and aiding and abetting fraud. *Fezzani*, 2013 WL 1876534.

Second Circuit Relies on Supreme Court's Rulings in *Stoneridge* and *Janus* to Hold Plaintiffs Must Allege a Misrepresentation to State a Claim Under Section 10(b)

At the outset of its analysis, the Second Circuit found "no doubt" that plaintiffs had "alleged a valid Section 10(b) claim against Baron based on false representations that the price Baron charged customers for securities was established in a market independent of artificial trading by Baron itself." The Second Circuit further held that plaintiffs had "also adequately alleged their reliance upon Baron's misrepresentations."

The Second Circuit explained that its "difficulty with regard to Dweck's liability under Section 10(b)" stemmed from "the lack of an allegation that Dweck was involved in any communication with any of the appellants." Although Dweck had allegedly "engaged in phony trading activity that created an 'impression' of 'value and liquidity' in securities being pedaled by Baron," there was "no allegation that any appellant was told of Dweck's artificial trading, or purchased such securities in specific reliance on such trading."

The Second Circuit turned to Supreme Court precedent to determine whether the allegations "sufficiently support a Section 10(b) claim" against Dweck "for damages by all the appellants for all the fraudulent sales of securities to them by Baron." Citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Second Circuit explained that "Dweck may be liable in this matter only as a primary violator." The Second Circuit further found that under *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta*, 552 U.S. 148 (2008), "a plaintiff must allege that the specific defendant was identified as making the pertinent misrepresentation(s)" in order "to prove a primary violation of Section 10(b)." In other words, "an allegation of acts facilitating or even indispensable to a fraud is not sufficient to state a claim if those acts were not the particular misrepresentations that deceived the investor."

The Second Circuit observed that the Supreme Court had "further elaborated this test" in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). "In *Janus*, the Court held that a corporation serving as the investment advisor and administrator—the manager—of a mutual fund could not be liable under Section 10(b) for false statements made in the mutual fund's prospectuses" even though it had "surely prepared the prospectuses."

"Applying these principles to the present claims," the Second Circuit found that plaintiffs "were required to allege acts by Dweck that amounted to more than knowingly participating in, or facilitating, Baron's fraud to state a claim under Section 10(b)." The Second Circuit explained that under its prior decision in *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007), "manipulation violates Section 10(b) when an artificial or phony price of a security is communicated to persons who, in reliance upon a misrepresentation that the price was set by market forces, purchase the securities." In view of *Stoneridge* and *Janus*, the Second Circuit determined that "only the person who communicates the misrepresentation is liable in private actions under Section 10(b)."

Here, the complaint "alleges only that Baron and Bear Stearns communicated the artificial price information to the would-be buyers." The Second Circuit therefore held that the complaint "fail[ed] to state a Section 10(b) *private claim for damages* against Dweck." As to plaintiffs' state law claims for civil conspiracy to defraud and aiding and abetting fraud, the Second Circuit found that "the complaint alleges sufficient involvement by Dweck in the scheme to survive a motion to dismiss."

In an Opinion Dissenting in Part, Judge Lohier Emphasizes Market Manipulation Claims Are Distinct from Pure Misrepresentation Claims

Judge Lohier "dissent[ed] from the majority's disposition of the federal securities claim of market manipulation against Dweck." He determined that the majority had erroneously "conflate[d] market manipulation claims and pure misrepresentation claims." While both claims fall within the ambit of Section 10(b), Judge Lohier explained that "the pleading requirements for a claim of market manipulation differ from the pleading requirements for a misrepresentation claim."[1] He found that the "most relevant difference between the two claims relates to pleading reliance." "A market manipulation claim permits the plaintiff to plead that it relied on an *assumption* of an efficient market free of manipulation, whereas a misrepresentation claim requires the plaintiff to allege reliance upon a misrepresentation or omission."

Judge Lohier found this key difference "essential to understanding why the Supreme Court's analysis in *Stoneridge* and *Janus* regarding reliance does not control the outcome in this case." He explained that "the claims in both *Stoneridge* and *Janus* failed because the defendants in each case did not communicate any false statement or misrepresentation directly to the investing public, and the 'deceptive acts' of the defendants in *Stoneridge* were 'too remote to satisfy the requirement of reliance.'" Unlike the misrepresentation claims at issue in *Janus* and *Stoneridge*, stock manipulation "necessarily and directly communicates false information through the market and goes beyond a false statement." Judge Lohier determined that the majority had misread both *Janus* and *Stoneridge* "to require a direct communication of false information to the plaintiffs in the context of a claim of market manipulation."

In Judge Lohier's view, the plaintiffs had "adequately and plausibly alleged that Dweck [had] personally engaged in a stock manipulation scheme that affected the prices of the relevant manipulated securities." The plaintiffs had also adequately pleaded "reliance on an assumption of an efficient market free of manipulation when they purchased the securities at artificially inflated prices." Judge Lohier concluded that "[i]n the context of a claim for market manipulation, and at this stage in the proceedings, these allegations are enough."

1. Judge Lohier noted that in *ATSI*, 493 F.3d 87, the Second Circuit stated that "[m]arket manipulation requires a plaintiff to allege (1) manipulative acts; (2) damage; (3) caused by reliance on an assumption of an efficient market free of manipulation; (4) scienter; (5) in connection with the purchase or sale of securities; (6) furthered by the defendant's use of the mails or any facility of a national securities exchange." Citing *Stoneridge*, 552 U.S. 148, he explained that "[a] misrepresentation claim, on the other hand, requires the plaintiff to allege '(1) a material [mis]representation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'"

Fifth Circuit Holds Defendants May Not Rebut the Fraud-on-the-Market Presumption of Reliance with Price Impact Evidence at the Class Certification Stage

On April 30, 2013, the Fifth Circuit considered the question of "whether a defendant should be permitted to show the absence of price impact at the class certification stage … to establish that common issues among class members do not predominate" in a fraud-on-the-market case. *Erica P. John Fund, Inc. v. Halliburton Co.*, 2013 WL 1809760 (5th Cir. Apr. 30, 2013) (Davis, J.). The Fifth Circuit relied on the Supreme Court's ruling in *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184 (2013) (Ginsburg, J.) to hold that "price impact fraud-on-the-market rebuttal evidence should not be considered at class certification."

Background

Plaintiffs brought suit against the "Halliburton Company and its CEO, President, and Chairman of the Board, David Lesar (collectively, 'Halliburton')" alleging that Halliburton had "understated its projected liability for asbestos claims," overstated its revenues, and "exaggerated the cost savings and efficiencies" that would result from the company's 1998 merger with Dresser Industries. Plaintiffs claimed that these alleged misrepresentations had "artificially inflated the price of Halliburton stock," and that they had suffered losses when the truth ultimately came to light.

In November 2008, the Northern District of Texas denied plaintiffs' motion for class certification based on plaintiffs' failure to establish loss causation as required under Fifth Circuit precedent. *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 2008 WL 4791492 (N.D. Tex. Nov. 4, 2008) (Lynn, J.). The Fifth Circuit affirmed the district court's ruling in February 2010. *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010) (Reavley, J.). Plaintiffs petitioned the Supreme Court for certiorari of the Fifth Circuit's ruling; the Court granted certiorari in January 2011.

On June 6, 2011, the Supreme Court unanimously held that the Fifth Circuit had "erred by requiring proof of loss causation for class certification." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (Roberts, C.J.).[2] The Court explained that "[l]oss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." Notably, the Court declined to address questions of "how and when [the fraud-on-the-market presumption of reliance] may be rebutted." The Court specifically "express[ed] no views on the merits" of Halliburton's contention that once the fraud-on-the-market presumption "has been successfully rebutted by the defendant," "a plaintiff must prove price impact" to win class certification. The Supreme Court remanded the action to the Fifth Circuit for consideration of any further arguments that Halliburton had preserved in opposition to class certification.

The Fifth Circuit, in turn, remanded the case to the Northern District of Texas. Before the district court, Halliburton argued that class certification was unwarranted in light of evidence that the alleged misrepresentations did not affect the price of the

company's shares. The district court declined to consider this evidence, finding that defendants may not rebut the fraud-on-the-market presumption at the class certification stage by showing an absence of price impact. The court determined that price impact evidence was not relevant to the issue of whether common questions predominated under Rule 23(b)(3).[3] Halliburton appealed.

Fifth Circuit Applies *Amgen*'s Two-Pronged Analysis to Find Price Impact May Only Be Considered on the Merits After Class Certification

At the outset of its analysis, the Fifth Circuit observed that price impact "is neither an element of 10b-5 fraud nor an element of the fraud-on-the-market theory." Instead of fitting "neatly into any one fraud issue," price impact evidence "is probative of materiality, statement publicity, and market

2. Please click here to read our discussion of the Supreme Court's decision in *Erica P. John Fund* in the June 2011 edition of the Alert.

3. Under Rule 23(b)(3), "[a] class action may be maintained if Rule 23(a) is satisfied" and "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

efficiency, all of which are relevant in establishing the presumption of fraud-on-the-market reliance." Because "only some of these matters may be considered at class certification," the Fifth Circuit explained that it must "determine at what issue Halliburton's price impact evidence is directed." Halliburton contended that "its price impact evidence [was] intended only to generally rebut the fraud-on-the-market presumption of reliance without necessarily attacking [any] one of the presumption's individual elements."

To resolve the question of whether courts may consider price impact evidence at the class certification stage, the Fifth Circuit turned to the Supreme Court's decision in *Amgen*. The *Amgen* Court held that proof of materiality "is not a prerequisite to class certification."[4] While the *Amgen* Court "did not discuss whether [price impact evidence] … could be considered at class certification,"the Fifth Circuit found that the Court's opinion "did set forth the proper [two-part] analytical framework" for resolving the issue.

First, the *Amgen* Court "made clear" that "the 'pivotal inquiry' when determining whether to consider a matter at class certification is whether resolution of the matter" is necessary to "'ensure that the questions of law or fact common to the class will predominate over any *questions* affecting only individual class members ….'" The Fifth Circuit found that "the first question" here is "whether price impact evidence is common to the class." "Because price impact is simply a measure of the effect of a misrepresentation on a security's price," the Fifth Circuit determined that price impact is "undoubtedly an objective inquiry" that "inherently applies to everyone in the class." The Fifth Circuit concluded that "[t]he first *Amgen* consideration" indicates that "price impact fraud-on-the-market rebuttal evidence should not be addressed at class certification."

"The second inquiry suggested by *Amgen* is whether there is any risk that a later failure of proof on the common question of price impact will result in individual questions predominating." Put differently, "if Halliburton successfully rebuts the fraud-on-the-market presumption with evidence of no price impact, could individual plaintiffs still proceed with their fraud claims?" Halliburton argued that "a plaintiff class which fails to show price impact would only lose the class-wide presumption of reliance, leaving individual plaintiffs with viable fraud claims." The Fifth Circuit disagreed.

The Fifth Circuit explained that in order to "prove a lack of price impact," Halliburton would have "to demonstrate both that the stock price did not increase when the misrepresentation was announced, and that the price did not decrease when the truth was revealed." If Halliburton could "successfully show that the price did not drop when the truth was revealed, then no plaintiff could establish loss causation" "because a showing of negative price impact is required to establish loss causation." "[T]he claims of all individual plaintiffs would" therefore "fail because they could not establish an essential element of the fraud action." "Thus," the Fifth Circuit concluded that "the second *Amgen* consideration also leads to the conclusion that price impact fraud-on-the-market rebuttal evidence should not be addressed at class certification."

Finding that "Halliburton's price impact evidence does not bear on the question of common question

4. Please click here to read our discussion of the *Amgen* ruling in the March 2013 edition of the Alert.

predominance," the Fifth Circuit held that price impact is "appropriately considered only on the merits after the class has been certified." The Fifth Circuit therefore affirmed the district court's decision certifying the class.

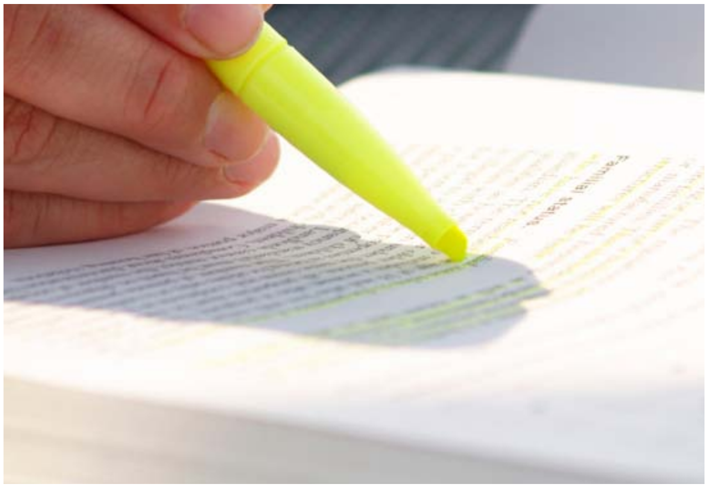
Sixth Circuit Rejects Second Circuit's Holding in *Fait* and Rules Plaintiffs Need Not Plead Knowledge of Falsity to State a Section 11 Claim

On May 23, 2013, the Sixth Circuit held that Section 11 of the Securities Act "does not require a plaintiff to plead a defendant's state of mind" even if the Section 11 claim is based on a statement of opinion or belief. *Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 2013 WL 2248970 (6th Cir. May 23, 2013) (Cole, J.). In so holding, the Sixth Circuit expressly declined to follow the Second Circuit's decision in *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011) and the Ninth Circuit's decision in *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009).

Background

Omnicare provides a wide range of pharmacy-related services to long-term care facilities throughout the United States and Canada. Investors who purchased Omnicare securities in a December 2005 public offering brought a putative class action alleging Section 11 claims against Omnicare and certain of its officers and directors.

Plaintiffs contended that the registration statement for the December 2005 offering contained two categories of material misstatements and omissions. First, plaintiffs claimed that Omnicare's statements concerning "legal compliance" were "material, untrue and misleading" because Omnicare was allegedly "engaged in a variety of illegal activities including kickback arrangements with pharmaceutical manufacturers and submission of false claims to Medicare and Medicaid." Plaintiffs asserted that Omnicare's claims of "legal compliance" "effectively concealed Omnicare's illegal activities from its investors." Second, plaintiffs alleged that "Omnicare failed to comply with Generally Accepted Accounting Principles ('GAAP'), such that the financial statements filed in connection with the December 2005 public offering substantially overstated the company's revenue." Defendants moved to dismiss plaintiffs' complaint.



On February 13, 2012, the Eastern District of Kentucky granted defendants' motion to dismiss. *Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 2012 WL 462551 (E.D. Ky. Feb. 13, 2012) (Bertelsman, J.). The court found that plaintiffs' Section 11 claims were subject to, but did not meet, Rule 9(b)'s heightened pleading standard. The court further determined that plaintiffs were required to, but failed to allege, particularized facts showing that defendants knew that their statements were false or misleading at the time they were made. Plaintiffs appealed.

Sixth Circuit Holds a Defendant's Knowledge of Falsity Has No Relevance to a Section 11 Claim

On appeal, plaintiffs contended that "§ 11 provides for strict liability" and claimed that "it was therefore inappropriate for the district court to require them to plead knowledge in connection with their § 11 claim." The Sixth Circuit agreed with plaintiffs' view.

The court explained that Section 11 "provides a remedy for investors who have acquired securities pursuant to a registration statement that was materially misleading or omitted material information." While "Section 10(b) and Rule 10b-5 require a plaintiff to prove scienter," the Sixth Circuit emphasized that "§ 11 is a strict liability statute" that "does not require a plaintiff to plead a defendant's state of mind." "[O]nce a false statement has been made" in a registration statement, the court found that "a defendant's knowledge is not relevant to a strict liability claim" under Section 11. A complaint asserting a Section 11 claim "may survive a motion to dismiss without pleading knowledge of falsity."

Sixth Circuit States the Second Circuit in *Fait* and the Ninth Circuit in *Rubke* Misapplied the Supreme Court's Holding in *Virginia Bankshares*

Notably, the Sixth Circuit declined to follow the Second Circuit's decision in *Fait* and the Ninth Circuit's decision in *Rubke*. In *Fait*, the Second Circuit held that "when a plaintiff asserts a claim under [S]ection 11 … based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed."[5] 655 F.3d 105. Similarly, in *Rubke*, the Ninth Circuit held that statements of opinion "can give rise to a claim under [S]ection 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false or misleading." 551 F.3d 1156. Both the Second and Ninth Circuits relied on the Supreme Court's ruling in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991) in reaching their decisions.

The Sixth Circuit found "nothing in *Virginia Bankshares* that alters the outcome in the instant case." The Sixth Circuit explained that the *Virginia Bankshares* Court addressed the requirements for bringing a claim under Section 14(a) of the Exchange Act, and held that "a plaintiff is required to plead objective falsity in order to state a claim; pleading belief of falsity alone is not enough." The Sixth Circuit emphasized that "[t]he *Virginia Bankshares* Court was not faced with and did not address whether a plaintiff must additionally plead knowledge of falsity in order to state a claim." "It therefore does not impact our decision today."

In the Sixth Circuit's view, "[t]he Second and Ninth Circuits ha[d] read more into *Virginia Bankshares* than the language of the opinion allows and ha[d] stretched to extend [a] § 14(a) case into a § 11 context." The Sixth Circuit explained that because "the Supreme Court assumed knowledge of falsity for the purposes of the

5. Please click here to read our discussion of the *Fait* ruling in the September 2011 edition of the Alert.

discussion in *Virginia Bankshares*, § 14(a) was effectively treated as a statute that required scienter." The court found that *Virginia Bankshares* "therefore, ha[d] very limited application to § 11; a provision which the Court ha[d] already held to create strict liability." Parting ways with the Second and Ninth Circuits, the Sixth Circuit "refuse[d] to extend *Virginia Bankshares* to impose a knowledge of falsity requirement upon § 11 claims."

Sixth Circuit Finds a One-Sentence Disclaimer Insufficient to Avoid Rule 9(b)'s Heightened Pleading Requirements

The Sixth Circuit noted that in an earlier decision in this case, it had held that Rule 9(b)'s heightened pleading standards apply to Section 11 claims sounding in fraud. *See Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935 (6th Cir. 2009). Plaintiffs claimed that they had since amended their complaint to "expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct" and therefore "Rule 9(b) no longer applies."

The Sixth Circuit held that plaintiffs' "one-sentence disclaimer … d[id] not achieve [p]laintiffs' desired result." Because the "basis of [p]laintiffs' allegations ha[d] not changed," the court held that "the heightened pleading standard of Rule 9(b) still applie[d] to the § 11 claims."

The Sixth Circuit found that plaintiffs' legal compliance-related allegations met Rule 9(b)'s particularity requirements. "Instead of relying on the mere existence of *qui tam* complaints or investigations," the court found that plaintiffs "comprehensively discuss[ed] how the details [were] relevant to their own complaint, and g[a]ve extensive rationale for that support." However, the court found that plaintiffs' GAAP-related allegations "appear[ed] to contain some factual holes."

The Sixth Circuit reversed dismissal of plaintiffs' legal compliance-related Section 11 claims and remanded for further proceedings, but affirmed dismissal of plaintiffs' GAAP-based Section 11 claims.

Southern District of New York Relies on Second Circuit's Holding in *Fait* to Dismiss Securities Act Claims against AIG Defendants

On April 26, 2013, the Southern District of New York granted judgment on the pleadings with respect to certain pending Securities Act claims in a subprime mortgage-related putative class action against American International Group, Inc. ("AIG") and various related defendants. *In re Am. Int'l Grp., Inc. 2008 Sec. Litig.*, 2013 WL 1787567 (S.D.N.Y. Apr. 26, 2013) (Swain, J.) (*AIG*). The court also granted judgment on the pleadings with respect to all Securities Act claims against PricewaterhouseCoopers LLP ("PwC").

The court found that the claims at issue involved statements of opinion, and were therefore subject to the pleading requirements set forth in *Fait v. Regions Fin. Corp*., 655 F.3d 105 (2d Cir. 2011). Because there was no allegation that the defendants did not believe their opinions at the time they were made, as required under *Fait*, the court found that dismissal was warranted.

Background

Plaintiffs brought suit alleging, among other things, that defendants had materially misrepresented the extent of AIG's exposure to the subprime mortgage market. Plaintiffs asserted claims under both the Exchange Act and the Securities Act.

Among various other Securities Act claims, plaintiffs contended that AIG had violated Financial Accounting Standard ("FAS") 107 and Financial Accounting Standards Board Interpretation ("FIN") 45. AIG and certain other defendants ("Moving Defendants") moved for judgment on the pleadings as to these claims. PwC moved for judgment on the pleadings as to all Securities Act claims asserted against it.

Court Finds the FAS 107 and FIN 45 Allegations Concern Matters of Opinion Subject to *Fait*'s Pleading Requirements

In *Fait*, the Second Circuit held that statements concerning "goodwill estimates and loan loss reserve calculations" constitute opinions, rather than facts, and will only "give rise to liability under sections 11 and 12" of the Securities Act if plaintiffs can plausibly "allege that defendant's opinions were both false and not honestly believed when they were made." *Fait*, 655 F.3d 105. In *AIG*, the Southern District of New York determined that "the key inquiry" was "whether the FAS 107 and the FIN 45 allegations" concerned "opinions subject to *Fait*'s subjective falsity pleading requirements."

FAS 107 requires that companies disclose "significant concentrations" of credit risk. Plaintiffs argued that "unlike goodwill, which is quantified based on judgments about the value of the company's business, and loan loss reserves, which are set based on judgments about possible future events," "there is an objective way to measure risk concentration" for purposes of FAS 107. The court disagreed, explaining that "FAS 107's disclosure obligation is only triggered where the concentration of credit risk is 'significant'—a determination that hinges on management's judgment." The decision not "to disclose credit risk pursuant to FAS 107 is therefore tantamount to an implicit representation that management was not of the opinion that the concentration of credit risk was significant."

The court "reache[d] the same conclusion with respect to FIN 45," which "requires disclosure of the 'maximum potential amount of future payments' for arrangements that qualify as 'guarantees.'" The court found persuasive Moving Defendants' argument that "whether a contract qualifies as a guarantee subject to the FIN 45 requirement necessarily requires a complex series of judgments as to whether it fits the criteria set forth in FIN 45."

Having determined that the FAS 107 and FIN 45 allegations involved opinions subject to *Fait*'s pleading standards, the court considered whether plaintiffs had alleged that defendants did not believe those opinions at the time they were made. The court found that "[b]y repeatedly disclaiming fraud and intentional or reckless misconduct in the Securities Act section of the Complaint," plaintiffs had "disavowed any allegation" that Moving Defendants had "knowingly misstated any opinions they may have implicitly or explicitly communicated in the offering documents and SEC filings." The court concluded that the Securities Act claims alleging violations of FAS 107 and FIN 45 "must be dismissed" for "failure to plead subjective falsity" under *Fait*.

Court Also Relies on *Fait* to Dismiss All Securities Act Claims Against PwC

With respect to PwC, the court found that "PwC's Audit Opinions [were] clearly expressed as statements of opinion and [were] therefore subject to *Fait*'s subjective falsity requirement." Plaintiffs did not contest that their Securities Act claims against PwC were based on statements of opinion. Rather, plaintiffs contended that PwC "had extensive access to AIG's financial records" and would have discovered the extent of AIG's subprime exposure had it conducted a proper audit. The court found "the theory that PwC [had] deliberately flouted its auditing duties or knowingly issued audit opinions based on incomplete audits" to be "foreclosed by the Complaint itself," which expressly disclaims any allegation that could be construed as pleading intentional or reckless misconduct. The court therefore dismissed the Securities Act claims against PwC in their entirety.

Southern District of New York Dismisses LIBOR-Related Securities Fraud Action Against Barclays

On May 13, 2013, the Southern District of New York dismissed a putative securities fraud class action against Barclays, PLC and various related defendants (collectively, "Barclays") based on Barclays' alleged participation in setting the London Interbank Offered Rate ("LIBOR"). *Gusinsky v. Barclays PLC*, 2013 WL 1955881 (S.D.N.Y. May 13, 2013) (Scheindlin, J.). To our knowledge, this is the first dismissal of a federal securities fraud suit filed in connection with the alleged LIBOR rate-setting scandal.

Background

LIBOR is a benchmark reference rate that underlies various derivative financial instruments and loan agreements around the world. LIBOR rates are set for ten different currencies. The rates are developed by a panel of banks, each of which submits an estimate of "the rate at which it could borrow funds" (the "Submission Rates"). Thomson Reuters, the designated LIBOR calculation agent, averages the middle 50% of the Submission Rates to arrive at a LIBOR rate for each currency and maturity.

Barclays has served on all ten LIBOR bank panels since at least 2005. On April 27, 2011, Barclays disclosed that it was under investigation by several government agencies in connection with its LIBOR submissions. On June 27, 2012, Barclays announced that it had agreed to settlements totaling over $450 million with the U.K. Financial Services Authority, the U.S. Commodity Futures Trading Commission and the U.S. Department of Justice. The price of Barclays' American Depositary Shares ("ADSs") dropped by twelve percent on the day of the announcement.

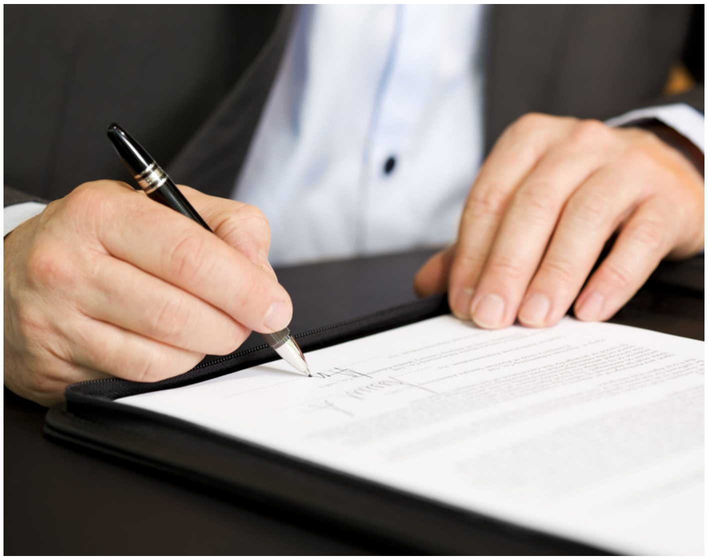
Investors in Barclays ADSs subsequently filed the instant securities fraud action alleging violations of Section 10(b) and Rule 10b-5, as well as claims under Section 20(a). Plaintiffs contended that "Barclays [had] participated in two schemes to manipulate its LIBOR Submission Rates." According to the complaint, "Barclays' traders [had] attempted to influence LIBOR for financial gain by directing LIBOR submitters to submit inaccurate Submission Rates for Barclays." Barclays had also allegedly "attempted to enhance market perception of its financial health by directing its LIBOR submitters to submit rates that were lower than the rates at which it legitimately believed it could borrow funds." Defendants moved to dismiss plaintiffs' complaint.

Court Finds Plaintiffs Failed to Allege Actionable Misstatements

Plaintiffs alleged that Barclays' representations about its business practices in its financial statements were materially false and misleading because they failed to disclose Barclays' alleged role in manipulating LIBOR rates. The court found that many of the statements at issue fell "squarely within the Second Circuit's definition of non-actionable puffery—for example, statements about being a responsible global citizen and doing business ethically."

With respect to the statements that "might not be *per se* non-actionable 'puffery,'" the court determined that plaintiffs had "fail[ed] to connect the statements about Barclays' Business Practices to Barclays' LIBOR practices." The court noted that "[n]one of Barclays' statements regarding its Business Practices reference[d] Barclays' LIBOR submissions or appear[ed] to contemplate LIBOR as a risk." Thus, "the connection between Barclays' statements regarding risk management and its LIBOR practices [was] too attenuated to find that the alleged LIBOR misconduct rendered the representations regarding risk management materially misleading."

Plaintiffs also contended that under International Accounting Standard ("IAS") 37, which requires



the disclosure of contingent liabilities, Barclays was obligated to disclose its alleged manipulation of LIBOR rates. The court found "[t]he notion that IAS 37 obligates companies to disclose any potentially illegal conduct the instant it is committed" both "unrealistic and contrary to precedent." "At most, the disclosure obligation would arise when an investigation into the conduct began." Noting that Barclays disclosed the existence of government investigations into LIBOR-related conduct on April 27, 2011, the court held that plaintiffs' "fraud claims based on failure to disclose under IAS 37 … must therefore be dismissed."

Court Finds Plaintiffs Failed to Plead Loss Causation

Plaintiffs claimed that Barclays' LIBOR Submission Rates constituted actionable misrepresentations insofar as Barclays had allegedly "under-reported its perception of its borrowing costs" in order to "deceive the market about the rate at which Barclays truly believed it could borrow funds." Assuming that the Submission Rates constituted actionable misstatements—which defendants contested—the court found that plaintiffs did "not adequately plead loss causation." The court explained that the "alleged fraudulent submissions occurred between 2007 and 2009," while the alleged corrective disclosure did not occur until June 27, 2012, when Barclays announced its settlement agreements. There was "no allegation that the LIBOR submissions between 2009 and 2012 were also false and misleading such that the ADS price would have remained artificially inflated."

The court found "implausible" the "notion that the market would fail to digest three years of non-fraudulent Submission Rates and other more detailed financial information, and would instead leave intact artificial inflation as a result of fraudulent Submission Rates during the financial crises." The court also determined that permitting plaintiffs to proceed with their claims would "run[ ] afoul of the Second Circuit's admonition against loss causation based on 'attenuated' connections."

For the same reason, the court concluded that plaintiffs had failed to state a claim with respect to statements during an October 31, 2008 conference call by Robert Diamond, then Barclays' President and Chief Executive of Corporate and Investment Banking and Wealth Management, regarding Barclays borrowing rates. "Even assuming that Diamond's statements were materially misleading," the court found that plaintiffs had "fail[ed] to connect these 2008 statements to any loss experienced in 2012."

Complaint Dismissed without Leave to Amend

The court held that the allegations in the complaint were "insufficient" not because of "lack of specificity" but rather because of "fundamental deficiencies under the securities laws." Finding that "amendment would be futile," the court dismissed the complaint in its entirety without leave to replead.

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