Misrepresenting Good Will and Loan Loss Reserves in Registration Statements

*Fait v. Regions Financing Trust*

Section 11 and Section 12 of the 1933 Act prohibit material misrepresentations in registration statements and prospectuses. *See* 15 U.S.C. §§ 77k(a), 77l(a)(2). To be actionable under Section 11 and Section 12, misrepresentations of fact must be only objectively false, but unlike misstatements of fact, misstatements of belief and opinion must be both objectively false and disbelieved by the defendant at the time the statement was expressed. *See Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1095-96 (1991).

In *Fait v. Regions Financing Trust*, No. 10-2311-cv (2d Cir. Aug. 23, 2011), the Second Circuit recently addressed whether financial estimates in a registration statement, like good will and loan loss reserves, are statements of fact or opinion. The court held that they were indeed statements of opinion. According to the Second Circuit, estimates of good will depend on management’s assessment of the fair value of the assets acquired and liabilities assumed, which are not matters of objective fact. And in *Fait*, the plaintiffs did not point to any objective standard to measure the value of the assets. Furthermore, the court held that the company’s assessment of the adequacy of loan loss reserves was likewise a statement of opinion, not fact. Under Generally Accepted Accounting Principles, the defendant was required to maintain adequate reserves for estimated losses that indicated probable losses. Thus, the court said that loan loss reserves reflect management’s opinion about what, if any, portion of the amount due on the loans ultimately might not be collected.

The Second Circuit’s decision is available [here](#).