

DAILY BUSINESS REVIEW

CLASS ACTION Judge finds plaintiff attorneys misrepresented what witness would say

Firms representing shareholders in BankAtlantic suit sanctioned

by **John Pacenti**

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Attorneys for BankAtlantic Bancorp have long said the shareholder class action should never have made it to trial because the plaintiff attorneys misrepresented what confidential witnesses would say to bolster their case.

A federal judge partly agrees.

U.S. District Judge Ursula Ungaro in Miami, who overturned the verdict that favored shareholders in April, ordered sanctions Aug. 2 against New York's Labaton Sucharow and Kessler Topaz Meltzer & Check of Radnor, Pennsylvania.

It's not exactly new ground. A federal judge in Connecticut agreed in October to sanction the two firms in a failed securities class action against Star Gas. In that case, U.S. District Judge Janet Bond Arterton ordered the plaintiff firms to pay all of Star's attorney fees and costs.

But Ungaro's order was relatively limited for a defendant that thought the case was baseless. She granted the motion for sanctions based on the improper use of a confidential witness.

Ungaro ordered the two firms to pay BankAtlantic's attorney fees and other costs for deposing one witness and a tenth of the fees and costs of preparing and filing the motion for sanctions.

She gave the defense until Aug. 19 to name the attorneys who should be held liable for paying the sanctions and allowed the two firms to respond.

"We are pleased that the court soundly and completely rejected all but a very small part of the defendant's baseless arguments for sanctions," said attorney Mark Arisohn, a Labaton Sucharow partner and lead plaintiff counsel. "As for the one issue that survived, we are confident upon further

review the result will be the rejection of this claim as well given the facts that we presented."

Arisohn has filed an appeal with the 11th U.S. Circuit Court of Appeals in Atlanta to overturn Ungaro's reversal of the verdict.

Miami attorney Eugene Stearns, who led the defense for BankAtlantic Bancorp, said he believed the appellate court will reverse Ungaro on the other witnesses and the plaintiff firms will end up owing BankAtlantic Bancorp close to \$10 million.

"I think the case was frivolous from Day 1," he said. "Frankly, they should be embarrassed for what they did. This company did everything right. It told the market what it needed to know."

Labaton Sucharow and Kessler Topaz represented the class representative, State Boston Retirement System, claiming executives of the Fort Lauderdale-based bank

holding company made misleading statements to shareholders about deteriorating loans to developers as the housing crisis hit home.

A jury found BankAtlantic liable in November and ordered it to pay shareholders \$2.41 a share in damages. But Ungaro tossed the verdict, saying it was inconsistent because jurors made a determination that BankAtlantic Bancorp chairman and chief executive Alan Levan made disputed statements in good faith.

Stearns, co-founder of Stearns Weaver Miller Weissler Alhadeff & Sitterson, said depositions of the confidential witnesses contradicted details in the amended complaint. The depositions were taken after Ungaro ordered the plaintiffs to reveal their identities. Many were former BankAtlantic employees.

He had argued four of the six confidential witnesses disavowed assertions attributed to them, according to Ungaro's 47-page order. Labatow Sucharow provided sworn affidavits of its investigators to refute the claim.

Ungaro's order said it's typical for defense counsel to

complain about plaintiff lawyers relying on investigators to depose witnesses rather than doing it themselves. But she said discrepancies occur because of "changing memory or in a desire to remain in a former employer's good graces once the protection of confidentiality is removed."

One witness worried about retaliation by Levan.

Ungaro upheld only one of BankAtlantic Bancorp's requests for sanctions involving former bank employee Donna Loverin. The complaint said she worked as a loan analyst and underwriter, but she worked in the small business division during the period covered by the class action.

Lawrence A. Kellogg, a partner at Levine Kellogg Lehman Schneider + Grossman in Miami, said federal securities law now requires courts to conduct an after-the-fact flyspeck review of shareholder class action pleadings to look for possible violations.

"This order is an example of what courts are now required to do," said Kellogg, who is not involved in the BankAtlantic case. "The purpose of the law is to inhibit the filing of securities fraud

class action cases. Any lawyer considering filing a class action securities fraud case must now be prepared to engage in separate litigation after the case is over to justify every factual and legal allegation made. This will likely continue to reduce the number of cases filed because it will be too risky and expensive for lawyers to file them."

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