

# DAILY BUSINESS REVIEW

## JUSTICE WATCH

### SHAREHOLDER LAWSUITS GETTING TOUGHER TO WIN

**M**iami attorney **Lawrence A. Kellogg** remembers the good ol' days when plaintiffs in securities class action litigation had a "strike-first mentality."

Plaintiff attorneys would file shareholder class actions as soon as companies announced bad news that caused their share prices to drop.

"When I started practicing securities law, all you had to have was a share drop that you could tie to some statement in a prospectus or a failure to disclose," said Kellogg, a partner at Levine Kellogg Lehman Schneider + Grossman. "That would get you beyond a motion to dismiss."

Then, in the 1990s, the pendulum swung under the auspices of the **Newt Gingrich**-led Congress.

Kellogg said decisions by federal district and appellate courts now routinely derail shareholder class actions. Even if the class wins at trial, such as in the **BankAtlantic Bancorp** case, it often ends up as an empty victory. U.S. District Judge **Ursula Ungaro** in Miami overturned the verdict, citing inconsistent jury findings.

In another recent blow to plaintiffs who sued under the Private Securities Litigation Reform Act of 1995, U.S. District Judge **William Zloch** in Fort Lauderdale dismissed a lawsuit against Plantation attorney **David J. Stern's** foreclosure processing business, which

had been spun off into a publicly traded company. Shareholders claimed DJSP Enterprises painted a rosy picture when company officials knew their practices were highly suspect. Zloch rejected DJSP statements as simple "puffery," as if Stern were selling detergent promising a whiter white.

"If you are a plaintiff securities lawyer, you see the futility of bringing these types of cases," Kellogg said.

But it's not all doom and gloom for the plaintiff side. On the same day Zloch ruled, the 11th U.S. Circuit Court of Appeals breathed new life into a securities class action pending for six years in the Middle District of Florida.

Writing for a three-judge panel, Judge **Stanley Marcus** said some claims about alleged cor Writing for a three-judge panel, Judge **Stanley Marcus** said some claims about alleged corporate misstatements to prop up an already inflated share price could be tried. Marcus was joined by 11th Circuit Judge **Frank M. Hull** and U.S. District Judge **Marcia Cooke** of Miami, sitting by designation.

#### INSIDERS FIRST

"What the court has done here is say that when executives make confirmatory statements, although it doesn't create



J. ALBERT DIAZ

Miami attorney Lawrence A. Kellogg says decisions by federal district and appellate courts now routinely derail shareholder class actions.

inflation, it keeps the share price from falling and that is sufficient loss causation," said attorney **Joseph White**, a

#### SHAREHOLDER CLASS ACTIONS

**Cooper vs. DJSP Enterprises:** U.S. District Judge William Zloch dismisses class action, saying statements by the firm run by foreclosure lawyer David Stern amounted to "puffery" and not an intent to mislead investors.

**FindWhat Investor Group v. FindWhat.com:** The 11th U.S. Circuit Court of Appeals ruled corporate executives could be held liable for fraudulent statements made to prop up an inflated stock price.

**Hubbard v. BankAtlantic Bancorp:** U.S. District Judge Ursula Ungaro throws out a verdict after ruling the jury findings were inconsistent.

partner at Saxena White in Boca Raton. "In that sense, it is a significant case."

Fellow partner **Maya Saxena** argued the case in front of the 11th Circuit. She and White represent an investor group suing FindWhat.com, a subsidiary of Fort Myers-based MIVA, which drove Internet traffic for a fee to websites. An amended complaint sought to recover damages for shareholders from Sept. 3, 2003, to May 4, 2005. FindWhat's share price soared to more than \$26 during the class period.

An attorney listed for FindWhat.com, **Joseph Foster**, a partner with Porter Wright Morris & Arthur in Naples, did not return calls for comment by deadline. MIVA was later sold to Kansas City, Missouri-based Adknowledge.

During the high-tech bubble, such companies were ubiquitous, but the field narrowed over time.

The website provided "pay-per-click" or keyword-targeted advertising services. Shareholders claimed the company issued "public statements reporting seemingly unstoppable growth."

"Defendants knew that two of the company's primary revenue generating distribution partners were using illegal means to inflate revenues," the amended complaint read. "Indeed, these two distribution partners ... used illicit tactics described below, which included among other things, 'browser hijacking' and 'spyware' to boost and sustain company revenues."

Advertisers fled when they learned 36 percent of FindWhat.com's business was generated illegally, the complaint claimed. Insiders sold about \$7 million in shares at \$21.83 each in late 2004. Shortly thereafter, the share price fell to \$4.83 and never recovered.

Shareholders pointed to 11 false or misleading public statements by the company. The plaintiffs said the statements falsely inflated MIVA's share price until the truth came out, causing \$22 million in shareholder losses.

But U.S. District Judge **John E. Steele** in Fort Myers granted a motion for summary judgment in favor of FindWhat.com, dismissing nine of the 11 statements "for failure to state a claim." He granted summary judgment on the remaining two statements for failing to demonstrate issues of fact to support damages.

The 11th Circuit reinstated the latter two claims Sept. 30 and sent the case back to Steele.

Other shareholders can't move beyond summary judgment because they can't prove intent or knowledge of wrongdoing without access to internal documents.

#### **HIGH BAR**

"Is the bar too high? I think to some extent it really is," said attorney **Mark Arisohn**, a partner at Labaton Sucharow in New York, who represented BankAtlantic shareholders in trial.

White echoes that sentiment: "It's the highest bar in federal practice. It can be challenging without the benefit of discovery."

Because securities fraud plaintiffs don't have access to internal documents, they usually have to rely on insiders or freshly departed employees to prove an intent to defraud.

"There is a very high pleading burden," Arisohn said. "A lot of cases die on the vine before you can get to the next stage and prove your case. I think that is the troubling part of the PSLRA."

Arisohn is appealing Ungaro's April ruling that threw out the verdict against BankAtlantic Bancorp. She decided the

jury findings were inconsistent because it found BankAtlantic Bancorp chairman and CEO Alan Levan made false statements but not in bad faith. Arisohn said the verdict made sense given the jury instructions.

"The plaintiff really has to jump through or across a lot of hurdles to the finish line, and even then when you get to the finish line as you saw in BankAtlantic, there are still issues after you get a jury verdict," he said.

Attorney **Eugene Stearns**, who represented BankAtlantic, said the law under PSLRA is still involving, but he thinks it works.

"I think the bar needs to be set and is being set at a level that allows the punishment for real fraud but discourages" other shareholder suits, Stearns said. He is a partner at Stearns Weaver Miller Weissler Alhadeff & Sitterson in Miami.

He said the appellate claims are frivolous. Stearns maintained at trial that dropping share prices were tied to the collapse of the real estate market, not any fraudulent statements propping up the share.

"The issue isn't that you are reporting bad things. The issue is whether you concealed the bad things," Stearns said. "This case is the poster child of securities law abuse."

**John Pacenti can be reached at [jpacenti@alm.com](mailto:jpacenti@alm.com) or at (305) 347-6638.**

