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BankAtlantic shareholder suit may spawn more

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A jury that found BankAtlantic Bancorp misled shareholders about the quality of its loans could encourage other banks facing similar claims to settle out of court and avoid trial.

"I think that's really the greatest significance of this litigation," said attorney Eugene Stearns, who defended Fort Lauderdale-based BankAtlantic in the federal class action trial and may lead an appeal. "For the plaintiffs' firms who are engaging in trying to frighten people into settling, it has that effect. ... Even if you think a claim is frivolous, you pay to make it go away."

The verdict against BankAtlantic is a reminder to other financial institutions defending similar suits that resisting an out-of-court settlement can be a risky tactic. The verdict also could encourage more investors to litigate over money lost on investments in banks and other types of financial institutions, especially if BankAtlantic loses its appeal.

BankAtlantic shows no sign of settling. The Fort Lauderdale-based publicly traded bank holding company responded to the Nov. 18 jury verdict with two motions — one for final judgment as a matter of law, another for a new trial. If both fail, Stearns said BankAtlantic will appeal to the 11th U.S. Circuit Court of Appeals in Atlanta.

"In this environment, I think a defense lawyer ought to think long and hard before advising his client to take a chance at trial," securities class action litigator Paul J. Geller, senior partner at Robbins Geller Rudman & Dowd in Boca Raton, said in an e-mail. "I've been on both sides of large class actions; I've represented defendants and plaintiffs. ... On the plaintiff's side, I don't know that there can be a better environment to try these cases than there is right now."

Geller, who was not involved in the BankAtlantic case, said the verdict was remarkable because a South Florida jury ruled against a South Florida-based bank: "If even a local bank can get smacked by a jury in its

own back yard, what does that say about the way juries will treat huge global financial services companies" in similar cases?

Banking law attorney Lewis Cohen, a partner of Cohen & Bobotas in Miami, said, "There are many aggrieved investors and many attorneys who would look at this case and see it as an opportunity to recover losses that they incurred in the distressed financial market."

Cohen, who has no involvement in the BankAtlantic case, said the verdict "is an application of longstanding law to a new set of facts" that arose from a historic collapse in the value of real estate and real estate loans. "Considering the unprecedented problems that banks are experiencing with their loan portfolios ... the need for disclosure, and the nature of the disclosure needed, is something that is being looked at in a fresh light."

The verdict against BankAtlantic "certainly should send a message to management of banks, indeed management of any company, that is considering putting out stuff that's not true," said Mark Arisohn, lead lawyer for the State-Boston Retirement System pension fund in the class action against BankAtlantic. "It's not a crime to have a risky business. ... But before they [investors] put their money in, they need to know what is the real risk, and that is what the jury found."

The nine-member jury found the company violated federal securities laws in 2007 by failing to fully disclose loan problems at its bank subsidiary, thus artificially inflating the price of the holding company's stock. The jury found BankAtlantic liable for covering up the full extent of commercial loan-loss risks and causing purchasers to overpay during a six-month period in 2007 by \$2.41 per share. That is about twice the current price of the publicly traded, Class A shares of BankAtlantic. Listed under ticker symbol BBX, the shares last year ranged in price from \$3.28 in late April to 60 cents on Nov. 22, four days after the verdict. The stock closed at a one-year low of \$1.04 a share Friday and 97 cents Monday.

Jurors determined BankAtlantic and two individual defendants, Alan B. Levan, chairman and controlling shareholder, and chief financial officer Valerie C. Toalson, kept the stock price artificially high through verbal and written statements that misled investors.

The affected class of investors includes those who bought Class A stock from April 26 to Oct. 26, 2007. These were the release dates for two quarterly reports summarizing BankAtlantic's financial performance. Both reports triggered a sharp decline in the share price and sizable paper losses for investors holding the shares.

The holding company could be required to pay damages totaling tens of millions of dollars. The final sum would depend on the number of eligible shareholders who file claims, among other conditions. Just before class period, there were 55 million Class A shares outstanding, including 8.3 million shares that Levan and vice chairman John E. Abdo controlled. The pair controls most of the shareholder votes through their indirect ownership of BankAtlantic's super-voting Class B stock.

Judicial Directive

The legal team representing BankAtlantic is prepared to fight the jury verdict on multiple fronts. In its motion for a new trial, the company contends "the magnitude of judicial error in the trial of this case, invited by plaintiffs, is simply overwhelming."

One target of the defense is jury instructions by U.S. District Judge Ursula Ungaro. Just before the Miami jury started deliberating, it learned the judge had determined Levan made four false statements about loan quality during BankAtlantic's July 2007 conference call with securities analysts.

"I don't blame the jury," Stearns said. "The judge instructed them that Alan Levan made four false statements. And that is, I believe, unprecedented for a judge to tell the jury that one of the defendants made false statements."

Stearns, co-founder of Stearns Weaver Miller Alhadeff & Sitterson in Miami, insisted afterward, as he did in trial, "Alan Levan did not make a single false statement, much less four of them."

Levan "correctly stated what the condition of the company was at that time," Stearns said. "The company over and over and over again said the (real estate) market was collapsing, and 'we're going to lose a lot of money.'"

Shareholders complained BankAtlantic failed to disclose the full extent of doubtful commercial loans secured by land as fast as the quality of the portfolio worsened. The bank holding company's net losses soared from \$22 million in 2007 to \$185 million in 2008 and \$202 million in 2009 as bad loans piled up. Net losses totaled \$74.6 million in the first nine months of 2010, down from \$100 million during the same period in 2009.

Valuation Expert

BankAtlantic could lose more money if it ultimately pays the damages assessed by the jury. But the company intends to discredit the amount. The jury's calculation is based on testimony by plaintiff expert Candace Preston of Princeton, New Jersey. She determined damages to investors based on declines in BankAtlantic's stock price following its release of quarterly financial results in April and October 2007.

Stearns said Preston's testimony about damages rested on several factual assumptions that the jury did not assess: "The judge refused to allow the jury to decide the factual questions upon which her testimony was predicated. Very puzzling."

For example, Stearns said Preston assumed the fall in BankAtlantic's stock price on Oct. 26, 2007, was due entirely to the company's revelation of previously undisclosed loan problems and other influences had a negligible impact on the stock price.

Stearns also said Preston's testimony failed to show clearly how specific statements kept the price of BankAtlantic shares artificially high.

"Damage has to be proximately caused by the fraud, and what that means is that there must be a connection between what was allegedly false and what occurred," he said.

But another plaintiff attorney said the defendants produced little evidence to counter Preston.

"Interestingly, the defendants did not put up a damages expert to rebut Preston. They had an expert, and 90 percent of his report was excluded by the judge prior to trial. The judge just found the guy to have no credibility essentially," said attorney Matthew Mustokoff, a partner with Barroway Topaz Kellser Metzler & Check of Radnor, Pennsylvania. The law firm represents the Erie County Employees Retirement System, a

public pension fund that bought BankAtlantic stock in 2007.

"I would suspect that as a result of this verdict, a lot of corporate defendants will think twice before they take a case like this all the way to a jury," he said. A large backlog of open cases could be affected. "In terms of litigation that has arisen out of the credit and the subprime crisis of the last two years, those cases were filed immediately after shareholder losses in '07 and '08, so there are still scores of similar cases that are making their way through courts' dockets right now."

The BankAtlantic case is widely watched because it is the first jury verdict in a federal securities fraud suit against a financial institution since the federal government enacted the Private Securities Litigation Reform Act in 1995 to discourage frivolous investor suits.

But Mustokoff also said aspects of the BankAtlantic case may limit its legal reverberations, including an ongoing Securities and Exchange Commission investigation.

"That was the really incredible thing about this bank," he said. "It's almost inconceivable that a bank under SEC investigation would take a parallel civil case to trial."

Walter J. Mathews, a former SEC prosecutor who worked in the agency's Miami office from 2002 to 2006, said a pivotal point in the BankAtlantic case was the defense's failure to introduce ample expert testimony about damages.

"That's huge. Experts play a huge role in these cases, and that was a substantial blow to BankAtlantic," said Mathews, a lawyer in Fort Lauderdale who wasn't involved in the BankAtlantic case.

He expects the verdict to inspire more institutional investors, particularly pension funds, to litigate over investment losses, especially if the defendant's public disclosures and private records contradict each other. "Juries are going to be very unsympathetic if you lay out the paper trail showing that internal communications were saying X and the chairman was saying Y," he said. "That's an easy analysis for a jury to make."