

This Was Printed From South Florida Business Journal

BankAtlantic loses class action trial

South Florida Business Journal - by Brian Bandell

Date: Thursday, November 18, 2010, 12:34pm EST - Last Modified: Thursday, November 18, 2010, 5:15pm EST

A jury has ruled that BankAtlantic Bancorp and its officials violated federal securities laws.

After more than a week of deliberations, the jury came back with a verdict Thursday, finding that the price of the bank's stock was inflated during parts of 2007 because of misstatements by the company.

Also held liable were BankAtlantic Bancorp Chairman and CEO **Alan Levan** and CFO **Valerie Toalson**. The company said it will appeal.

Attorneys for BankAtlantic shareholders, led by **Mark Arisohn** of Labaton Sucharow in New York, accused the Fort Lauderdale-based company (NYSE: BBX) of making misleading statements about its loan portfolio from October 2006 through October 2007 that violated securities laws and inflated the value of its stock.

BankAtlantic attorney **Eugene Stearns** told jurors that the bank repeatedly warned investors that it had Florida land loans, and those would suffer if the market deteriorated. He said the bank had a culture of disclosure.

The bank's \$30 million loss in the third quarter of 2007 and the subsequent \$2.93 drop in its stock price was caused by the catastrophic meltdown of the Florida real estate market, Stearns argued.

The plaintiffs asked to collect the \$2.93-a-share drop as damages because they blamed the drop on the bank's concealing information about its deteriorating land loan portfolio. They also asked for 37 cents a share in damages in the first half of the class period.

The jury ruled that BankAtlantic made several false statements during the first half of the class period, but they caused no damages. However, during the period from April 26, 2007, through Oct. 26, 2007, BankAtlantic made eight false statements, which caused damages of \$2.41 a share, the jury ruled.

Leticia Bacallao, who served on the jury during the grueling five-week trial, said the biggest problem they found was that Levan downplayed his concerns with its land development portfolio, besides builder land bank loans, during the class period. That contradicted Levan's e-mails to bank officials, expressing his worries about those loans, as well as the bank's internal loan watch list, which showed growing problems with that portfolio.

"If you were a member of the public and just read that, and didn't work for the bank and read the bank's paperwork, you wouldn't know that anything was wrong," Bacallao said.

Bacallao said the bank should have told investors about the problems it was seeing on its watch list, even if it did not disclose the entire list.

In the first half of the class period, there were false statements by BankAtlantic officials, but there was no evidence that its stock was inflated, Bacallao said.

The jury determined that shareholders suffered damages in the second class period because of the sharp drop in share price after the earnings release, but the plaintiffs did not factor the economy into their \$2.93 request, Bacallao said. In order to consider the recession, the jury subtracted the 52 cents a share the bank lost from the amount the stock dropped, she said.

When Stearns heard how the jury determined damages, he laughed.

"The 52 cents a share in losses are what drove the stock decline," Stearns said. "It shows just how silly it is."

Arisohn called the verdict a great victory for shareholders.

"The banks and bank management better take a good look at this verdict because it means they can't get away with lying to their shareholders about the risks of their lending," Arisohn said.

Stearns said he would file motions with U.S. District Judge **Ursula Ungaro** to set aside the verdict and ask for a new trial. He also plans to

ask the 11th Circuit Court of Appeals in Atlanta to void both the verdict and Ungaro's instructions to the jury.

He called the outcome of the case "indefensible" and said he is close to 100 percent sure it won't stick.

"We are unhappy about the outcome, but the plaintiffs shouldn't be spending their money yet," Stearns said.

Noting that seven of the eight statements the jury determined to be false were made by Levan during an investor conference call, Stearns said those findings should be overturned because executives are supposed to have safe harbor under the law to speak openly on such calls.

Lewis Cohen, a partner at Miami-based Cohen & Bobotas who specializes in banking law, said the verdict should make public companies more cautious about conducting investor conference calls. And companies that stick with the practice better have lawyers and accountants on hand, he said. Executives should defer to them and not answer questions they are not sure of the answers to, he added.

The eighth false statement came from the bank's financial statement from the second quarter of 2007, when it listed \$8.3 million in "potential problem loans." Bacallao said she and fellow jurors spent a lot of time examining the bank's loan records and determined that they should have listed more than that.

[Click here](#) to read more about the statements that led to BankAtlantic's courtroom loss.

Plaintiffs' attorney **Andy Zivitz**, of Philadelphia-based Barroway Topaz, said he's confident the verdict will hold up and be ratified by Ungaro. While it is too early to calculate the total damages, he expects it to be in the tens of millions of dollars.

Zivitz noted that this is only the 12th class action securities lawsuit to go to trial since the securities laws were reformed – and the first stemming from the recent recession. A number of banks have been slapped with similar lawsuits.

"This sends a clear message to those other cases headed to trial," Zivitz said. "A lot of them will settle."

With the per-share amount of damages set, the next step before full damages are determined is appointing a claims officer to identify the

shareholders who would be eligible to collect. Shareholders who bought the stock during the class period and did not sell it during that time would be eligible. For investors who bought and sold stock within the class period, the issue would need to be worked out.

Normally, the claims process does not begin until after the appeals are exhausted. So it may not be clear for a while how much BankAtlantic could owe.

Unless BankAtlantic can get the verdict overturned, paying damages could deal a significant blow to the bank's hopes of raising more capital. The bank has lost money since the third quarter of 2007 and has used several public offerings, led by its controlling shareholders BFC Financial Corp. (Pink Sheets: BFCF) to retain "well capitalized" levels. The prospect of contributing money to pay damages may not sit well with some potential investors.

It also marks a troubling turn of events for Levan, who has led the bank since 1985. While he has built up many companies, the recession has picked apart some of his ventures. National homebuilder Levitt & Sons entered bankruptcy in 2007 and had its assets liquidated. Core Communities recently agreed to turn over its massive Tradition Florida project, a Port St. Lucie development Levan spearheaded, to its lender. Levan was not held personally liable for the debt in either of those cases, yet the value of his investments has suffered.

[Click here](#) to read BankAtlantic's response to the verdict.

The verdict has damaged the credibility of BankAtlantic's management with investors and regulators, said **Andy Hall**, a securities trial attorney with Hall Lamb & Hall in Miami. They ruled that Levan did not simply make mistakes, but that he intended to mislead investors, which raises a big red flag, he said.

As for the company that lost money for 13 straight quarters, things just got more difficult. Hall said it's going to be hard to convince investors to participate in another public offering until the extent of the damages is known.

"The hole that has to be plugged just got a lot deeper," Hall said. "When they quantify it, it will have depressing effect on the value of the bank."

BankAtlantic shares closed down 11 cents or 13.10 percent to 71 cents, a new 52-week low. Most of the drop occurred in the last 90 minutes of

trading. The 52-week high was \$3.28 on April 26. The previous 52-week low was 75 cents on Sept. 22.

Shares of BFC Financial, Levan's company with majority control of BankAtlantic, fell to a 52-week low of 27 cents on Thursday.