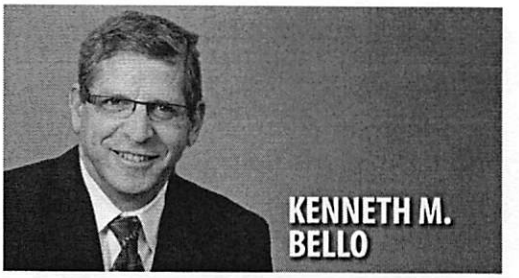
Exec not discharged in bad faith, says 1st Circuit

Biotech VP alleged firing to avoid incentive award

By: Eric T. Berkman December 12, 2019

A biotech company that terminated an executive before he reached certain equity incentives under his contract did not breach the implied covenant of good faith and fair dealing, the 1st U.S. Circuit Court of Appeals has ruled.



Lawyer for biotech co.

Abiomed hired plaintiff Keisuke Suzuki to help the company obtain Japanese regulatory approval of its "Impella" heart pump. Suzuki's employment agreement with Abiomed entitled him to 20,000 shares of the company's stock upon Japanese governmental approval.

The defendant terminated Suzuki a little more than a year before receiving such approval, and Suzuki asserted in a lawsuit that Abiomed did so to deprive him of earned compensation in violation of the implied covenant.

A U.S. District Court judge granted summary judgment to the defense, finding that Suzuki failed to show he was on the brink of achieving the relevant milestone at the time of discharge or that he had earned the shares in question by virtue of his past work.

The 1st Circuit affirmed, holding that Suzuki's termination did not violate the implied covenant under the "*Fortune/Gram* doctrine" laid out in the Supreme Judicial Court's 1977 *Fortune v. Nat'l Cash Register Co.* decision and its 1981 *Gram v. Liberty Mutual Insurance Co.* decision.

In *Fortune,* the SJC recognized bad faith when an employer fires an employee "on the brink" of successfully achieving a compensable milestone. *Gram* extended the doctrine to at-will employees who, having been discharged without good cause, lose compensation "clearly related" to "past service."

"[N]o reasonable factfinder could conclude that when Abiomed fired Suzuki, it deprived him of compensation that he had already earned by virtue of his past services," Judge Bruce M. Selya wrote for the court. "The undisputed facts establish that Suzuki understood he would be entitled to the 20,000 shares only upon final regulatory approval of the Impella devices — a milestone that was far from assured at the time of his ouster and that was not reached until fifteen months later (after … additional work)."

Petition for rehearing?

Abiomed's attorney, Kenneth M. Bello of Boston, said the ruling is particularly helpful given the lack of previous decisions spelling out in significant detail the parameters and scope of the implied covenant, even though the doctrine has been around for several decades.

Meanwhile, Bello said, "the court clearly affirmed the fundamental proposition that the covenant is not a vehicle to rewrite the agreements of the parties, which, at its core, is what the plaintiff sought for the court to do here."

Suzuki v. Abiomed, Inc., Lawyers Weekly No. 01-253-19 (29 pages)

THE ISSUE: Did a biotech company that terminated an executive before he reached certain equity incentives under his contract breach the implied covenant of good faith and fair dealing?

DECISION: No (1st U.S. Circuit Court of Appeals)

LAWYERS: William T. Harrington and Christine A. Maglione, of Harrington Law, Hingham

(plaintiff)

Kenneth M. Bello and Alexandra D. Thaler, of Bello Welsh, Boston (defense)

Hingham attorney William T. Harrington, who represented the plaintiff, said his client plans to petition for rehearing.

Harrington said his client secured a favorable meeting with Japanese authorities and then, right afterward, Abiomed demanded he agree to change his contract to drastically reduce the value of his equity incentive rights. He was fired when he refused, Harrington said.

"There was ample evidence that Abiomed's motive ... was to avoid having to pay the equity incentive shares," Harrington said. "This is the undue leveraging that the implied covenant is designed to combat. A jury should have been allowed to decide whether to award Suzuki the percentage of the 20,000 shares proportionate to the work already done at the time of termination."

Matthew J. Fogelman, an employment lawyer in Boston, said it is critical that the law prevent employers from terminating people as a means of depriving them of compensation legitimately due to them for services rendered. The *Fortune/Gram* doctrine is intended to achieve that, he said.

And while the decision shows that *Fortune/Gram* remains good law, Fogelman said, *Suzuki* did not appear to be the type of situation it was intended to address.

"It seems the court was saying that there was still work Suzuki had not completed," Fogelman said. "If indeed there was work he still needed to do in order to close the deal and he hadn't done that work, it would seem he didn't fall into the *Fortune/Gram* paradigm."

Boston employment attorney Brian J. MacDonough said the chief takeaway from *Suzuki* is that employees who rely on the goodwill of their employers or on the common law to protect them do so at their peril.

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>
> *— Brian J. MacDonough, Boston*

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Alleged bad faith

After working with Abiomed in a consulting capacity for about a year, Suzuki joined the company full time in April 2010 as its vice president of Asia.

His primary responsibility was shepherding the company's Impella line of heart pumps through the Japanese regulatory approval process, which entailed submission of an application (known as the "Shonin" application) to Japan's Pharmaceutical and Medical Device Agency, followed by testing audits and expert panel reviews.

At that point, the PMDA would make its recommendation to a review panel in Japan's health ministry, which would then conduct a final review and make a decision regarding approval.

Suzuki's employment agreement called for him to receive 10,000 shares of Abiomed stock upon submission of the Shonin application, 20,000 shares upon the health ministry's approval of Impella for final use, and another 15,000 shares once Abiomed gained approval for a targeted reimbursement level of Impella.

The agreement also required Suzuki to be actively employed at the time of each milestone to receive the relevant equity award.

Additionally, it gave Abiomed the right to modify certain terms and stated that it was not to be construed as an agreement to employ Suzuki for any stated term.

The contract further stated that Abiomed could terminate him without cause upon 28 days' written notice and entitled Suzuki to resign without cause under the same terms.

When Suzuki started, he apparently estimated that final approval would take about two years.

However, it took a year longer than anticipated for Abiomed to submit the Shonin application, and the subsequent progress became bogged down with delays and complications.

Meanwhile, according to Abiomed, issues arose over Suzuki's allegedly "caustic" demeanor and aggressive tactics, which the company claimed stalled the approval process.

Abiomed executives apparently began discussing the possibility of terminating Suzuki as early as April 2014.

By May 2015, the company sought to change his duties and compensation structure. Despite significant back and forth, the two sides could not come to terms.

A meeting in June 2015, known as the "Menkai" meeting, was held between Abiomed and the PMDA that Suzuki helped set up. The meeting resulted in developments that would save the company substantial work but apparently did not guarantee ultimate approval.

Suzuki, however, characterized the meeting as a success and later alleged that the Menkai meeting and other steps achieved toward approval of Impella gave him vested rights in the 20,000 shares.

Abiomed viewed the approval of Impella as being many months away and, with Suzuki rejecting the company's suggested terms of continued employment, terminated him.

Suzuki filed a diversity action in U.S. District Court in 2016 alleging breach of the implied covenant. Judge Denise J. Casper granted summary judgment for Abiomed, and Suzuki appealed.

Abiomed ultimately gained final approval for Impella in September 2016 after additional work that included new tests, submission of supplemental data, and answering recurring questions from regulators.

Insufficient showing

Applying the *Fortune/Gram* doctrine, the 1st Circuit rejected Suzuki's assertion that Abiomed committed bad faith by depriving him of compensation — namely the 20,000 shares — he earned through past services.

"We do not gainsay that Suzuki helped lay some of the groundwork for eventual approval of the Impella devices during his five-year tenure with Abiomed," Selya said. "But under the specific terms of the compensation arrangement entered into by the parties, Suzuki was not entitled to the second equity incentive until regulatory approval actually occurred."

In fact, Selya said, it was uncertain whether Impella would be approved at all when Suzuki was fired and was only achieved after 15 months of additional substantial work. "Consequently, there is no principled way in which we can say that Abiomed deprived Suzuki of 'compensation clearly connected to work already performed,'" Selya wrote.

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