

## LITIGATOR OF THE WEEK

# Stuart Gasner of Kecker & Van Nest

By Andrew Longstreth



The Securities and Exchange Commission rarely takes a case to trial. Forcing defendants into settlement is more its game. And, frankly, the Commission's courtroom inexperience showed last week during the trial of Michael Shanahan, Jr., a former Engineered Support Systems director who'd been hit with SEC options backdating charges.

On Friday, after eight days of trial—and before the case reached the jury—St. Louis federal district court judge Jean Hamilton decided she had seen enough and granted Shanahan's motion for judgment as a matter of law. Stuart Gasner of Kecker & Van Nest, who was Shanahan's lead trial lawyer, told us he'd never heard of such a result.

"They're usually cautious about what they bring," said Gasner of the SEC. "They only bring cases they are pretty sure they can win. So the idea that they got shut out here is unusual...I feel as though I pitched a perfect game, or at least a no hitter."

The dismissal of the SEC case puts an end to a long-running ordeal for Shanahan and his father, the former CEO of Engineered Support. Both were indicted on charges relating to an alleged backdating scheme. The senior Shanahan pled guilty to one criminal count, a books and records violation; prosecutors eventually dropped their case against Michael Shanahan, Jr.

Gasner, who represented Shanahan during the criminal investigation, told us that he also urged the SEC to drop its case against his client. Instead, the agency pushed ahead with charges that Shanahan helped to lead an options backdating scheme that enriched him, his father, and others.

From the bench on Friday, Judge Hamilton offered a sober explanation of her decision to toss the case (in contrast to the more dramatic style of Santa Ana federal district court judge Cormac Carney, who last December tossed civil and criminal options backdating charges against former Broadcom executives). Judge Hamilton found that the SEC had not presented any evidence or expert to show that Shanahan acted recklessly, according to a transcript of the court session. She also cited contradictions by the SEC's experts. During cross-examination of Indiana University business school professor Randall Heron, for instance, Heron was forced to acknowledge that he and his close colleague, options backdating maven Erik Lie of the University of Iowa, differed on what practices were permitted under the Engineered Support Systems options plan.

Despite the many differences between the Broadcom and Engineered Support cases, Gasner said they raise similar questions about the government's options backdating investigations. "These cases are complicated," said Gasner. "There is a difference between an innocent state of mind and an accounting mistake on one hand, and committing a crime worthy of prison on the other. It's a huge divide...There's an enormous question of fairness about the way in which the SEC and Department of Justice enforce white-collar cases. This is one in which my client got indicted—and the same evidence was later deemed not to be sufficient [in the civil case]."

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