

O'Connell v. Mass. Mutual Life Ins. Co., AAA Matter No. 11 116 Y 01362 05

In late 2006, a three-member arbitration panel ruled that the “for cause” termination of Robert J. O’Connell, the former Chief Executive Officer of Mass Mutual Financial Group (“MassMutual”), was unjustified and improper, and ordered the company to pay O’Connell his contractual termination benefits including three times his annual salary and benefits and other compensation estimated to total over \$ 50 million. O’Connell was represented at the arbitration hearing by Michael Keating and Dean Richlin of Foley Hoag LLP, with assistance from associates David Kluff, Andrew Orsmond and Carrie Wicker.

After an internal investigation conducted by a Special Committee of the Board of Directors, the Company accused O’Connell of a variety of acts of misconduct, including padding his retirement account by making unethical “shadow” stock trades, purchasing a company condominium at below-market prices, interfering with a company investigation of his son and son-in-law, and unauthorized personal use of the company aircraft for himself and his family. Before O’Connell even had a chance to understand the scope of the accusations against him, the Company reported them to the media and to state and federal regulators. The case generated national press that was almost all unfavorable to O’Connell.

Claiming that the allegations were grounds “for cause” to terminate under O’Connell’s employment contract, the Board terminated O’Connell and not only paid him none of his contractual benefits, but attempted to recoup from him all the salary and benefits it had ever paid him.

But the arbitration panel rejected the Board’s claims on two separate grounds. First, it held that no act committed by O’Connell gave the Board grounds to terminate for cause. Second, it held that the procedures used by the Board to investigate O’Connell and terminate his employment had been so biased and unfair that they invalidated the Board’s “for cause” determination, irrespective of whether O’Connell had committed the acts of which he was accused. The factual basis for this extraordinary ruling strikes a cautionary note on the duties of directors in the internal investigation context. The arbitration panel found the following facts about the Board’s actions:

- Every member of the Board had made up his or her mind to terminate O’Connell for cause before the internal investigation was complete. Two directors discussed the definition of “cause” before the investigation had begun, and at least one director lobbied the Special Committee for his preferred result before a single witness had been interviewed.
- In its rush to establish termination for cause, the Board ignored gaps in the investigative record and accused O’Connell of several acts of misconduct of which it had little or no evidence.
- The Board intentionally kept O’Connell “in the dark” by refusing to provide him with a detailed description of the allegations against him and or the reports containing the evidence supporting those allegations.
- The Board held a “hearing” at which O’Connell was forced to defend himself before he had been fully informed of the allegations against him.
- At the hearing, the Board refused to let O’Connell’s lawyer enter the room.
- The chair of the Special Committee hired his own law firm to conduct the investigation.
- Before the Special Committee had begun its investigation, a few disaffected directors and executives secretly hired outside counsel and began their own investigation without informing the full board or a committee thereof. The results of this biased investigation were incorporated into the Special Committee’s investigative findings.

In early 2007, a Massachusetts Superior Court judge upheld the arbitration ruling in favor of O’Connell. The Supreme Judicial Court of Massachusetts subsequently rejected MassMutual’s request to take its appeal on Direct Appellate Review. The matter is currently pending before the Appeals Court.