

Mutual Fund Advisers Win Again on Section 36(b) Claims

June 23, 2017

Following a four-day bench trial, New Jersey District Judge Renee Bumb granted judgment to defendant Hartford mutual fund advisers on "excessive fee" claims brought by fund shareholders under Section 36(b) of the Investment Company Act of 1940. The court's decision in *Kasilag v. Hartford Investment Financial Services, LLC*, is the second recent industry-favorable decision issued by the United States District Court for the District of New Jersey, the first being the August 2016 decision in *Sivolella v. AXA Equitable Ins. Co.* A number of similar Section 36(b) "excessive fee" cases remain pending in various courts. Section 36(b) imposes a fiduciary duty on investment advisers regarding the compensation they receive from mutual funds. The Supreme Court's 2009 *Jones v. Harris* decision adopted the *Gartenberg* standard to assess an investment adviser's Section 36(b) fiduciary liability. To succeed on a Section 36(b) claim, a plaintiff must establish that an investment adviser's fee is "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." Courts look to six factors under *Gartenberg*: (1) the nature and quality of the adviser's services; (2) adviser profitability; (3) "fall out" benefits to the adviser; (4) economies of scale realized by the adviser; (5) other funds' fee structures in comparison; and (6) the independence and conscientiousness of the fund's board in approving the adviser's fee. The court decided the issue of the board's conscientiousness in favor of Hartford on summary judgment, but held that triable issues remained on other *Gartenberg* factors. In a 70-page order, reflecting the heavy burden plaintiffs face, the court rejected plaintiffs' theory that an investment adviser and sub-adviser provide the same services. It also refused to accept plaintiffs' "retained fee" theory, which would have calculated defendants' profitability without accounting for sub-adviser fees.

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