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AXA Prevails at First Post-Jones v. Harris Excessive Fee Trial

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In its 2010 opinion in *Jones v. Harris, L.P.*, the United States Supreme Court embraced the so-called *Gartenberg* standard for assessing an investment adviser's fiduciary liability for excessive mutual fund fees under Section 36(b) of the Investment Company Act of 1940. Under the *Gartenberg* standard, a plaintiff shareholder must establish that the fund 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 arms-length bargaining." In making this assessment, the court must consider several factors, including: the nature and quality of the adviser's services; the profitability of the arrangement to the adviser; the economies of scale achieved by the fund and whether such savings are passed on to shareholders; comparative fee structures for other similar funds; "fall-out" benefits accruing to the adviser; and the independence and conscientiousness of the mutual fund's board of trustees in approving the adviser's fee. On August 25, Judge Peter Sheridan of the United States District Court for the District of New Jersey issued his eagerly anticipated opinion in *Sivolella v. AXA Equitable Ins. Co.*, the first Section 36(b) case to go to trial since the Supreme Court's decision in *Jones*. The plaintiffs' basic claim in *Sivolella* was that the adviser charged inordinately high fees for investment management and administrative duties while delegating those same duties to sub-advisers and sub-administrators for far lower fees than those passed along to investors. Following a 25-day bench trial, Judge Sheridan handed a total victory to the defendant variable annuity issuer and its affiliated fund manager, finding that the plaintiffs had failed to meet their burden either to demonstrate that the defendants had breached any duty under Section 36(b) or to establish any actual damages. Rather, the court found that the adviser had retained significant investment oversight responsibility, risk, and administrative duties and the fund board had engaged in a robust review of the adviser's compensation. The 146-page opinion goes through the trial evidence in significant detail, notably calling out the "little weight" accorded to the testimony of the plaintiffs' four experts, while observing that the defendants' three experts were "credible, in that they provided direct answers, and relied on comprehensive and reliable materials in reaching their conclusions." Litigants in other excessive fee cases would be well-advised to review the *Sivolella* decision carefully as they prepare for trial.

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