CARLTON FIELDS

Great-West Wins 36(b) Fee Case

December 15, 2020

Great-West Life & Annuity Insurance Co. and Great-West Capital Management, LLC (together, "Great-West") have won a judgment that they did not violate their fiduciary duty by receiving excessive investment advisory and administrative fees from Great-West-sponsored funds.

The U.S. District Court in Colorado concluded, after a trial, that fund shareholder plaintiffs failed to prove, under Section 36(b) of the Investment Company Act, that:

- the fees were so disproportionately large that they bore no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining; and
- any actual damages resulted from the alleged breach of fiduciary duty.

The court discussed in detail and dismissed the plaintiffs' assertions of damages as follows:

- The plaintiffs asserted that the amount by which the investment advisory fees of some funds exceeded the average fee of the top 10 "large market" competitors. The court concluded that "a fee that is above the industry average does not violate Section 36(b)" for that reason alone.
- The plaintiffs asserted that certain entire fees were an "overcharge." The court concluded that "total disgorgement of a fee is inappropriate absent evidence the adviser performed no services."
- In challenging the fees paid by certain "funds of funds," the plaintiffs asserted that Great-West earned sufficient profit on the underlying funds. The court concluded that precedent "does not allow a court to assess the fairness or reasonableness of advisers' fees; the goal is to identify the outer bounds of arm's length bargaining and not engage in rate regulation."
- The plaintiffs asserted that they were entitled to recover "lost gains" from investment returns that funds would have earned on amounts they paid out as allegedly excessive fees. The court concluded that "recovery is limited to the 'payment of any excess fee to the company' and legislative history prevents recovery of 'special damages that the excess payments may have caused.'"

- The plaintiffs asserted disgorgement of entire fees on some funds, and then compounding those damages with supposed lost investment returns thereon, resulting in damages that would exceed the amount of the fee paid on those funds. The court concluded that "such an approach violates the prohibition that any recovery under § 36(b) 'shall in no event exceed the amount of compensation or payments received from such investment company.'"

The opinion, dated August 7, 2020, was in a consolidated shareholder derivative action titled *Obeslo v. Great-West Capital Management, LLC*.

Authored By

Gary O. Cohen

Related Practices

Financial Services Regulatory

Related Industries

Life, Annuity, and Retirement Solutions
Securities & Investment Companies

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.