

## Great-West Wins 36(b) Fee Case

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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*.