

## District Court Rules that Great-West Did Not Breach Fiduciary Duties Under Section 36(b)

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On August 7, 2020, the U.S. District Court for the District of Colorado issued a judgment in favor of defendants Great-West Capital Management, LLC and Great-West Life & Annuity Insurance Co. (together, Great-West), holding that the plaintiffs, investors in Great-West funds through retirement plans, failed to prove that Great-West breached its fiduciary duties under Section 36(b) of the Investment Company Act of 1940 by charging excessive fees. Based on the evidence presented, the court found that the plaintiffs failed to meet their burden of proof with respect to the factors prescribed in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, and the plaintiffs failed to identify any legitimate damages stemming from Great-West's alleged breach.

The District Court noted that, as set forth in the U.S. Supreme Court's decision in *Jones v. Harris Associates. L.P.*, Section 36(b) prohibits fees that are "so disproportionately large that [they] bear[] no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." Citing *Jones*, the District Court noted that "the essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain."

To underscore the arm's-length nature of the relationship, the District Court noted that the services provided to and fees paid by the plaintiffs were approved by an independent financial adviser, and that the Great-West funds are overseen by independent directors. In reviewing the *Gartenberg* factors as applied to the fees in question, the District Court noted that (1) the board was independent and qualified, and that it engaged in a "robust process" in approving the fees, as a result of which the board's decision was afforded substantial deference by the court; (2) Great-West's advisory and administrative fees were comparable to those of similar funds; (3) the plaintiffs failed to quantify any alleged economies of scale or demonstrate that any such economies of scale were not properly shared with shareholders; (4) Great-West's profits were comparable to those of its competitors; (5) Great-West provided high-quality services in exchange for its fees; and (6) the plaintiffs failed to identify any material fall-out benefits accruing to Great-West. Importantly, the

District Court gave substantial deference to Great-West's presentation of credible evidence in support of its position.

In addition to failing to prove that Great-West breached its fiduciary duties under Section 36(b), the plaintiffs also failed in their obligation to establish the damages suffered. At trial, the plaintiffs offered expert testimony to establish the amount of damages they allegedly suffered. But when questioned on cross-examination, the plaintiffs' expert witness was "thoroughly discredited" and his testimony was found to be non-credible.

In conclusion, having failed to prove that Great-West breached any fiduciary duties under Section 36(b), coupled with the failure to establish any damages, a final judgement was entered against the plaintiffs and in favor of Great-West.

The opinion was issued by the U.S. District Court for the District of Colorado under the caption *Obeslo v. Great-West Capital Mgmt., LLC*, No. 16-cv-00230-CMA-SKC.

The plaintiffs filed a notice of appeal on September 1, 2020.

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National Law Review, Volume X, Number 253

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