

Another Fee Case Dismissed. Do Plaintiffs Have Any Hope?

By Greg Saitz, *BoardIQ*, March 27, 2018

A judge dismissed an excessive fee lawsuit against **Harbor Capital** earlier this month, marking the third recent loss for plaintiffs and prompting some to question whether shareholders' litigation strategies have hit a brick wall.

The March 13 order by District Court Judge Joan Lefkow in Chicago federal court to grant summary judgment in Harbor's favor was no doubt good news to the fund manager. But it was another defeat for plaintiffs, who have lost five cases by judicial ruling and walked away empty-handed from three others.

The emerging trend is a reversal from the success plaintiffs enjoyed in the early stages of many excessive fee lawsuits. With few exceptions in the past seven years, plaintiff after plaintiff survived defense motions to dismiss. Those rulings allowed them access to millions of pages of documents and the ability to take sworn statements from directors and others in their effort to prove advisers charged funds too much.

But now, as plaintiffs try to ferry many of these complaints past summary judgment motions, judges are starting to side with fund firms and dismiss the cases. A judge will grant summary judgment when there are no factual issues that need to be resolved.

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"There is a domino effect – judges are seeing what other judges are doing. They're seeing no plaintiffs are winning these cases," says Sean Murphy, a partner at **Milbank** who represents fund firms in fee litigation. "I think we're going to see more [dismissals] now there's more precedent to cite to."

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Yet suing shareholders have some accomplishments to point to.

There have been four settlements of excessive fee complaints since 2016, although details of them are confidential, making it difficult to judge how successful they were. Additionally, a judge denied **Metropolitan West's** summary judgment efforts last year on the limited question of whether it was appropriate to compare what the firm charges its Total Return Bond Fund with fees it charges to subadvise unaffiliated funds.

And Niels Holch, executive director of the Coalition for Mutual Fund Investors, points out plaintiffs have appealed the trial rulings in the Axa and Hartford cases.

“It’s too early [for the industry] to declare victory, because no appellate court has ruled on these cases yet,” Holch says.