

Some Fear Fallout After Director-Attorney Bubble Popped

By Greg Saitz, *BoardIQ*, December 13, 2016 [subscription required]

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A court order requiring **Pimco** independent directors to turn over confidential emails between them and board counsel is causing widespread concern about how it will impact the way fund board members communicate with their lawyers.

The federal judge's November ruling in an excessive fee case pending against Pimco was quickly cited in another Section 36(b) lawsuit against **Great-West Capital Management**, where plaintiff's attorneys want access to a single email between a former independent director and an attorney. Industry lawyers are bracing for shock waves from the Pimco decision and expect other excessive fee plaintiffs to make efforts to pierce the attorney-client privilege between boards and their counsel that until recently many considered nearly impregnable.

At the same time, some expect fund directors to ask fewer questions of board counsel via email and shift more toward phone calls and in-person meetings. Others, however, are not as anxious about the potential for the Pimco order to cause "industry-destabilizing fallout" as defense attorneys for the Pimco directors warned in court papers.

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So on a broader level, some '40 Act attorneys see the potential for the Pimco ruling to have wide implications. But board counsel and directors also see the order as Exhibit A of what many have been preaching for years – that boards should be careful about what they include in emails, even with their attorneys.

"It certainly would change communication between outside counsel and trustees, no question," says Niels Holch, a partner at **Holch & Erickson** and executive director of the Coalition of Mutual Fund Investors.