J.P. Morgan Scores Rare Win in Excessive Fee Case

By Emile Hallez, *Ignites*, March 13, 2018 [subscription required]

http://www.ignites.com/c/1909804/223804/morgan_scores_rare_excessive_case?referrer_module=issueHeadline&module_order=0

J.P. Morgan won a summary judgment this month in an excessive-fee lawsuit involving the advisory fees of several funds.

It appears to be the first time since 2010 that such a lawsuit, brought under Section 36(b) of the Investment Company Act of 1940, has ended through summary judgment in the defendant's favor, based on the merits of the case.

The J.P. Morgan case involves two similar lawsuits that were combined in 2015. The plaintiffs had argued that the company overcharged retail investors in several funds, as the company received lower fees from institutional funds where it acted as a subadvisor running substantially the same strategy. Because of the discrepancy in fee levels, those the firm received from "captive" retail funds could not have been the result of arm's-length bargaining, the plaintiffs argued.

However, J.P. Morgan contended that its retail funds' fees were in line with those of competitors and that, even after fees were deducted, the funds had higher average returns than peers'.

*　　　*　　　*　　　*　　　*

In his **March 9 order**, Chief U.S. District Judge Edmund Sargus, Jr., wrote that the retail funds' fees did not appear to be disproportionately large compared with those of competitor funds identified by Lipper.

"Additionally, defendants have shown that the funds' performance is generally favorable, and certainly within a 'range of acceptable results,'" Sargus wrote.

*　　　*　　　*　　　*　　　*

The last time a defendant won a case based on the merits was the **U.S. Supreme Court's 2010 decision** in the Jones v. Harris lawsuit, which reaffirmed the Gartenberg standards. In 2009, a 36(b) lawsuit against American Funds was dismissed on its merits when the court also evaluated claims based on the Gartenberg case standards, according to data from the Coalition of Mutual Fund Investors. The plaintiffs later appealed, though the 9th Circuit affirmed the dismissal.

Plaintiffs in such cases have had difficulty successfully litigating their claims, says Niels Holch, executive director of the coalition.

“These cases, which compare fees between retail funds and institutional clients, are difficult for investors,” he says in an e-mail. “The services being provided are very similar, but not identical, and the defendants are persuading judges that these fee comparisons are not ‘apples-to-apples’ evaluations.”

The fees charged to “non-captive” institutional clients provide a better illustration of arm’s-length bargaining than what is charged to mutual fund investors, Holch says.

“It is unfortunate that the courts don’t understand the nuances of these cases, namely that advisory work is largely similar between retail and institutional accounts.”

Currently there are two 36(b) cases in the appeals process, both of which are in the 3rd Circuit Court of Appeals, Holch notes. Those cases, which went to trial and were decided in favor of the defendants, involve **claims** **against** Hartford and Axa.