

[Securities Regulation Daily Wrap Up, INVESTMENT COMPANIES—D. Colo.: 401\(k\) investors fail to prove fiduciary breach by Great-West, \(Aug. 10, 2020\)](#)

Securities Regulation Daily Wrap Up

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By [John M. Jascob, J.D., LL.M.](#)

Retirement plan investors lose at trial on claims they suffered damages due to allegedly excessive advisory fees charged to the Great-West mutual funds.

The federal district court in Denver has entered judgment in favor of Great-West Capital Management, LLC on claims that the investment adviser and an affiliate breached their fiduciary duties to retirement plan investors by charging excessive fees in violation of the Investment Company Act. After an 11-day bench trial, Judge Christine Arguello ruled that the plaintiffs failed to prove any of the *Gartenberg* factors for showing that the fees charged to the Great-West mutual funds were so disproportionately large that they bore no reasonable relationship to the defendants' services and could not have been the product of arm's length bargaining. Moreover, the plaintiffs failed to establish that they suffered actual damages, with the court characterizing the theories underlying their expert witness's damages analysis as being "fundamentally flawed" ([Obeslo v. Great-West Capital Management, LLC](#), August 7, 2020, Arguello, C.).

The approximately 60 mutual funds in the Great-West mutual fund complex are advised by Great-West Capital Management and are principally distributed through retirement plans administered by Great-West Life & Annuity Insurance Co. under the "Empower Retirement" brand. In a consolidated shareholder derivative action, individuals who acquired shares of certain Great-West funds as participants in retirement plans offered by their employers alleged that both the advisory and administrative services fees charged to the funds at issue were excessive under Investment Company Act Section 36(b), which imposes on fund advisers a "fiduciary duty with respect to the receipt of compensation for services."

Among other things, the plaintiffs alleged that Great-West Capital Management does not actually provide day-to-day advisory services to the funds and instead relies on sub-advisers to make daily decisions and incur expenses. For example, the sub-adviser for each fund receives only a fraction of the advisory fees paid to Great-West Capital Management, with the adviser retaining a "grossly disproportionate share" of the fees in breach of its fiduciary duty, the [complaint alleged](#).

Gartenberg factors. The court disagreed, however, ruling that the plaintiffs failed to establish a fiduciary breach with respect to any of the factors set down by the Second Circuit in *Gartenberg v. Merrill Lynch Asset Management, Inc.* (2d Cir. 1982) and later affirmed by the Supreme Court in *Jones v. Harris Associates L.P.* (U.S. 2010). In adopting the defendants' proposed findings of fact and conclusions of law, the court agreed that the decision by the Great-West fund board to approve the fees was entitled to substantial deference because the board was independent and qualified and had engaged in a robust approval process.

The court found that the advisory and administrative fees were within the range of comparable funds and that the plaintiffs failed to quantify any alleged economies of scale or show that those economies were not adequately shared with shareholders. In addition, the defendants' profits were within the range of their competitors, and the defendants provided extensive, high-quality services in exchange for their fees. Accordingly, the plaintiffs failed to prove by a preponderance of the evidence that the defendants breached their fiduciary duties.

Damages. The court also held that the plaintiffs failed to introduce any evidence to suggest that they sustained actual damages as a result of the fees that the defendants charged. The only witness that the plaintiffs produced to calculate the damages was "thoroughly discredited" on cross examination, the court stated. The court found

the witness to be non-credible due to several weaknesses and inconsistencies in his testimony, including his unfamiliarity with relevant regulatory changes and changes in the mutual fund industry that have occurred since he was last employed in the securities industry in 2009.

Moreover, the court found the witness's specific theories regarding the alleged damages to be legally flawed. The theory that the plaintiffs were entitled to recover "overcharges" for fund fees that exceeded the average or median fees of their peers failed because charging a fee that is above the industry average does not violate Section 36(b), the court reasoned. As to the witness's contention that the Great-West funds charged some fees that should have been completely eliminated, there was no legal basis to support his opinion that the entirety of the advisory fee charged to the complex's asset allocation funds constituted "actual damages"; the plaintiffs' contention that Great-West Capital Management earned sufficient profit on the underlying funds amounts to rate regulation, the court opined. Finally, the plaintiffs were not entitled to recover "lost gains" from investment returns because the legislative history of Section 36(b) makes clear that "lost gains" are not "actual damages" recoverable under the statute.

Accordingly, the court entered judgment in favor of the defendants.

The case is [No. 16-cv-00230](#).

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Companies: Great-West Capital Management, LLC

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